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Bill of Complaint.

BILL OF COMPLAINT.

Filed September 15, 1919.

In Chancery of New Jersey

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

Complainants, Joseph Okin, of the City of Newark, County of Essex and State of New Jersey, and State Bank, a corporation of New York, with principal office in City, County and State of New York, respectfully show:

1. On or about May 29th, 1914, complainant Okin was owner of certain lands and premises in said City of Newark, more particularly described as follows:

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Beginning in southerly line of Springfield avenue at a point distant 213 feet westerly from the northwesterly corner of David B. Crockett's lot (or lately his) and thence running south 10 degrees east 86 feet 5 inches; thence south 22 degrees 45 minutes west 102 feet to the line of William street at a point 150 feet distant westerly from the northwesterly corner of a lot now or formerly belonging to William Lee; thence running along the line of William street north 67 degrees 15 minutes west 89 feet; thence north 21 degrees east 145 feet to the line of Springfield avenue aforesaid; thence along the same north 80 degrees eastly 60 feet to place of beginning. Said premises are commonly known as Nos. 99-101-103 Springfield avenue, and consist of a large theatre building arranged for the accommodation of 1,800 persons and the ground floor of which contains 2 stores occupied by tenants who are engaged in the business of selling merchandise at retail.

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2. Complainants further show, that on or about date last mentioned, complainant Okin sold and conveyed said premises to Joseph Meyer of Newark, N. J., and in partial payment of the consideration for said conveyance, the said Meyer executed a purchase money mortgage to said complainant for \$60,000.00 embracing the above described premises as a second lien. Said mortgage was dated May 29, 1914, and duly acknowledged pursuant to the laws of New Jersey, and recorded in the Register's

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Office of Essex County, in Book S. 32 of mortgages for said County, at page 465. By mutual adjustments made upon said conveyance and the delivery of said mortgage, one thousand dollars was credited on the principal of said mortgage, so that the actual principal due thereon from the date thereof has been
 10 fifty-nine thousand dollars. By the terms thereof, said Joseph Meyer, as mortgager, agreed for himself and his assigns, to fully and completely pay the principal of said mortgage in five years from the date thereof, to wit, May 29, 1919.

3. Complainants further show, that thereafter said Okin made various assignments of various interests in said mortgage to divers persons, and by an assignment dated June 10, 1914, recorded in said Register's office in Book 118 of Assignments of Mortgages, page 141, assigned a first and paramount interest
 20 to Nathan Shiman, *et al.* of \$21,500.00 in the said mortgage of \$59,000.00, and by virtue of the said assignment, to which reference is hereby made, and which is made a part hereof, said complainant agreed, upon his failure to pay said sum of \$21,500.00, that the said Nathan Shiman, *et al.* were empowered to make public sale of all his right, title and interest in said mortgage. On or above November 4, 1916, said Nathan Shiman, *et al.* the holders of said first interest in said mortgage, for an indebtedness of \$19,810.67 then due and owing to them, became,
 30 by virtue of the exercise of the power of sale contained in the aforesaid assignment, the owners of the said mortgage and thereby acquired all the right, title and interest of said Okin therein.

4. Complainant Okin shows that on or about June 18, 1914, he assigned to the Broad & Market National Bank of Newark, N. J., an interest of \$15,000.00 in the mortgage made by Joseph Meyer aforesaid, which assignment was recorded in said Register's office in Book 119 of Assignments of Mortgages page 143. Said assignment was made expressly subject to the prior assignment made by complainant to the said Nathan Shiman and others, and was given to secure the repayment of an antecedent loan
 40 in that amount made by said bank to complainant and your complainant shows that the purchase by the Broad & Market National Bank of a first interest in the said mortgage from the said Nathan Shiman and his associates was made for the avowed purpose of protecting their second interest in the said mortgage of \$59,000.00 aforesaid.

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5. Immediately upon acquiring said mortgage, said Nathan Shiman, *et al.* assigned their interest in the said mortgage to the Broad & Market National Bank, a New Jersey corporation, by assignment dated November 4, 1916, and recorded in said Register's Office in Book 130 of Assignments of Mortgages on page 539, and complainants show that upon said conveyance to them of aforesaid first and paramount interest in said mortgage, the said Broad & Market National Bank became vested with the complete title and ownership of the said mortgage, and that said mortgage thereupon became collateral security for the repayment by complainant Okin to said bank of the principal sum of \$19,000.00 due from your complainant to said Nathan Shiman, *et al.*, which moneys were advanced by said bank for complainant and for the \$15,000.00 theretofore due from complainant to the said bank. 10

6. Complainants further show, that simultaneously with the conveyance by said Nathan Shiman and others to said bank of the paramount interest aforesaid, and as a part of said transaction, complainant Okin, together with Harry Bernstein entered into a certain agreement with aforesaid bank, a copy of which is hereto attached and made a part hereof, wherein it was agreed that the financial interest of the said bank in said mortgage was \$34,000.00 with interest from the date of said agreement, and that the balance of \$25,000.00 of principal in said mortgage became vested in said complainant and Bernstein. Under and by virtue of said agreement, to which reference is hereby made, the interest paid by the owners of the mortgaged premises was agreed to be distributed first to said bank and then to complainant Okin in the manner and form set forth therein, and it was agreed that upon the redemption of said mortgage, and the full liquidation and payment to said bank of said \$34,000.00 and interest, said bank would pay over to your complainant the balance of \$25,000.00 of principal in the said mortgage, less such sums as said bank might have advanced for the protection of its security, in the manner designated by said agreement. 20 30

7. Complainants further show, that at the time of making said agreement with said Broad & Market National Bank, he was actually indebted to said bank in the sum of \$34,000.00 for principal, which sum constituted the advancement of \$19,000.00 of principal made by said bank to Nathan Shiman, *et al.* in con- 40

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sideration of the conveyance to it of said first interest in said mortgage, and also the sum of \$15,000.00 which complainant had as aforesaid secured by an assignment of a second interest in said mortgage, and that when said bank advanced said \$19,000.00 it required complainant Okin to pay the sum of \$3,000.00 as a consideration for the extension of time for the payment of his indebtedness of \$34,000.00 and complainant Okin avers that the said payment was usurious, and that his actual indebtedness to the said bank is only \$31,000.00 and not \$34,000.00 as the said agreement alleges.

8. Complainants further show, that on or about November 20, 1916, the interest of said Harry Bernstein and complainant Okin in the said mortgage was assigned to William Okin, by an instrument dated November 20, 1917, and recorded in said Register's office in Book 130 of Assignments of Mortgages at page 164; that the said complainant Okin assigned to the State Bank, a New York corporation, by instrument dated November 26, 1917, and recorded in said Register's Office in Book 137 of Assignments of Mortgages at page 222, an interest of \$10,000.00 out of the right, title and interest of \$25,000.00 aforesaid in the said mortgage; that by an assignment dated September 4, 1919, and recorded on September 8, 1919, in the office of said Register, said William Okin assigned to your complainant Okin all his right, title and interest in the said mortgage, subject to the prior assignment made by said William Okin to the said State Bank. Complainant Okin therefore, shows that he is the holder of an interest of \$15,000.00 in the aforesaid mortgage. Complainant State Bank shows that complainant Okin has made demand upon it to elect whether it shall be a party complainant determined to join in this action as a complainant.

9. Your complainant further shows that after various mesne assignments made by the said Joseph Meyer and Edna O. Meyer, his wife, to divers persons, the aforesaid lands were conveyed by Joseph Meyer and Edna O. Meyer, his wife, Ellen E. Mendel, Moses Mendel, her husband, Charles F. Kraemer and Freda Kraemer, his wife, to Federal Trust Company, a New Jersey corporation, by deed dated August 27, 1917, and recorded in the Register's Office of Essex County, in Book Z. 58 of deeds for Essex County, at page 533. Any interest which the said Federal Trust Company or the said Joseph Meyer, Moses Mendel,

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Charles F. Kraemer may have in said premises is subject to complainant's interest in said mortgage.

10. Complainants further show, that the Newark Heights Theatre Corporation, a body corporate of New York, holds a lease for a portion of the above described premises, consisting of the part of the building used for theatre purposes, which lease is duly recorded in the office of said Register in Book H. 57 of deeds for said County, on page 359, and that M. L. Silberman is in possession of the store on the part of the premises known as 99 Springfield avenue, and one Abraham Harrison is in possession of the store on part of the premises known as 103 Springfield avenue, and that the rights of the said tenants and occupants of the said premises is subject to the lien of complainant's interest in said mortgage and inferior to their rights in the premises. 10

11. Your complainants further show, that on May 29, 1919, the said mortgage became due and payable, and that said bank, although often requested by complainant so to do, has failed to make demand for the payment of the principal sum due on the said mortgage from the Federal Trust Company, and instead of so doing, your complainant has been informed and verily believes that the said bank entered into an agreement with the said Federal Trust Company, and Joseph Meyer, Moses Mendel, Charles F. Kraemer and others, who notwithstanding the conveyance made by them to Federal Trust Company claim to be interested in the said lands and premises, wherein and whereby the time for the payment of said mortgage has been extended and said bank has been given consideration for such extension and has received further and other securities for the payment of said indebtedness. Said agreements were made without the knowledge or presence or assent of complainants. 20 30

12. Said complainant Okin further shows that, as the period of redemption allowed by said agreement between him and said bank expires on May 29, 1920, the acts and deeds of said bank in making said private agreements with the Federal Trust Company and said Joseph Meyer and others, deprives him of his rights in the premises and precludes from the benefits he would otherwise have in the said mortgage. 40

13. Complainants further show that, at the present time the theatrical business has reached the highest plane of success enjoyed by it in the past 25 years; that the theatre building in

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question is designed for the production of plays which attract great masses of people by reason of the fact that the admission fees are very small, and that for this reason, there is an excellent opportunity to market the property at this time, and that if the said Broad & Market National Bank will cause an immediate sale thereof to be had at foreclosure, the full amount due on the said mortgage with interest and costs would be realized. Complainant shows that the said Joseph Meyer paid a consideration of \$225,000.00 for the said lands and premises, and that the same are encumbered by a first mortgage of \$65,000.00 in addition to the aforesaid mortgage of \$59,000.00; that complainant Okin has in the past six months made efforts to market the property and has received advantageous offers therefor; that the property is worth more than \$225,000.00 at this time, because the original cost of the land was \$95,000.00 and complainant Okin (who has constructed and erected many buildings in the City of Newark during the past fifteen years, including the building in question) verily believes that it would cost from \$150,000.00 to \$175,000.00 to construct the said building at this time, although the original cost of construction was \$110,000.00. Complainant therefore believes, that if said mortgage money is demanded and if, upon non-payment, a prompt judicial sale thereof is made, ample moneys will be realized to fully and completely pay the said bank for its entire indebtedness and to pay also the interest of complainants in the said mortgage.

14. Complainants further show that although said bank has been requested to inform them of the arrangements for extension made with said Federal Trust Company and such other persons as may be interested in said premises, said bank has refused to give any information and has also refused to extend to them the right to redeem said mortgage for a period similar to the period of extension granted by the said bank to said Federal Trust Company.

15. Complainants further show, that the conduct of said bank in extending the time for the payment of said mortgage, and in thus postponing the time of foreclosure will operate injuriously to complainants because said building is designed for a special purpose and no profitable disposition of same can be made except in an economic period of prosperity of the great masses of people, and that, by delaying the time for the sale of said pre-

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mises, an uncertainty of market will be created which will cause your complainants irreparable injury.

16. Complainant Okin further shows that he has made demand upon said Federal Trust Company for payment of said mortgage moneys and interest thereon to date, and that said Federal Trust Company have refused to make such payment by reason of the private agreement between them and said Broad & Market National Bank above set forth. 10

17. Complainants aver that said agreement operates to fraudulently prevent a collection of said mortgage moneys and was made for the purpose of preventing complainant Okin from redeeming the moneys due to the Broad & Market National Bank, and for the purpose of placing the Federal Trust Company in a position on May 1, 1920, which will enable it to redeem the said mortgage for \$34,000.00 instead of \$59, 000.00. 20

18. Said Joseph Meyer, Moses Mendel and Charles F. Kraemer are married and their respective wives' name are Edna O. Meyer, Ellen E. Mendel and Freda Kraemer. Any claim which any of the said wives may have by reason of inchoate right of dower or otherwise, is subject to complainant's interest in said mortgage.

19. Said Federal Trust Company, Joseph Meyer, Moses Mendel, Charles F. Kraemer, Newark Heights Theatre Corporation, M. L. Silberman and Abraham Harrison, or one of them, have always been in possession of the mortgaged premises.

20. The whole amount of principal, with interest thereon from May 29, 1919, is due upon the said mortgage and complainants have elected and do hereby elect that the principal sum of the said mortgage in which they are interested, with all unpaid interest, shall now be due. 30

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

1. That the Broad & Market National Bank, a corporation of New Jersey, Joseph Meyer, Edna O. Meyer, his wife, Moses Mendel, Ellen E. Mendel, his wife, Charles F. Kraemer and Freda Kraemer, his wife, M. L. Silberman, Abraham Harrison and the Federal Trust Company, a corporation of New Jersey, who are defendants in this suit, may answer this bill of complaint without oath and each statement therein made. 40

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2. That the Federal Trust Company, a corporation as aforesaid, Broad & Market National Bank, a corporation as aforesaid, Joseph Meyer, Moses Mendel and Charles F. Kraemer, being now specially thereunto interrogated, may answer particularly as to what agreement exist between the Federal Trust Company and the said Broad & Market National Bank with relation to the extension of time for payment of said mortgage; as to what agreements exist between the said banks and the said Meyer, Mendel and Kraemer with relation to said extension; whether the said agreements are written or oral, and if written, that copies thereof may be annexed to the answer of the said defendants last hereinabove named; as to what consideration was actually given by the said Federal Trust Company or the said Charles F. Kraemer, Joseph Meyer and Moses Mendel to the said bank; or as to what consideration was exchanged, delivered or promised between any of the said parties, for the purpose of procuring the said extension or for the purpose of making any agreement now existing in relation thereto; as to what interest in the lands and premises the said Joseph Meyer, Moses Mendel and Charles F. Kraemer may have notwithstanding the making of the aforesaid absolute deed of conveyance in fee simple by them to the said Federal Trust Company.

3. That an account may be taken of the amount due on complainant's interest in the said mortgage, that the amount due Broad & Market National Bank may be decreed to be \$31,000.00 for principal.

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

5. That a decree may be made for the sale of the said mortgage premises to raise and to pay to complainant and to the said Broad & Market National Bank, if the court shall so decree, the amount so found due on this mortgage, with interest and costs.

6. That said defendants, Broad & Market National Bank, Federal Trust Company, Joseph Meyer, Moses Mendel and Charles F. Kraemer, their servants, agents and attorneys may be restrained from taking any further step or proceeding in

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connection with the said extension agreement and that the same may be declared null and void so far as same affects rights of complainants.

7. That the said Broad & Market National Bank may be enjoined from taking any proceeding at law or in equity, until the further order of this court, for the purpose of foreclosing, or legally or equitably ending and determining the interest of complainants in said mortgage. 10

8. That the Broad & Market National Bank may be decreed to extend to the complainants a further time for the redemption of the moneys due to the said Broad & Market National Bank, which said period of time shall be equal to any period of extension of time granted and agreed to be given by the said bank to the said Federal Trust Company or any of the defendants herein.

9. That the Broad & Market National Bank may be enjoined from selling, assigning, encumbering, or disposing of the said mortgage or making any further agreements in relation thereto, so far as the interest of your complainants therein are concerned, or which may in any manner or form affect their said interest in the said mortgage. 20

10. That the Broad & Market National Bank may be decreed to become a party complainant in this bill of complaint or to institute appropriate separate proceedings at law or in equity for the foreclosure of the said mortgage and for the prompt and efficient collection of the said mortgage moneys, or that a receiver may be appointed for said mortgaged premises, clothed with the power to collect the rents, issues and profits of said premises, preserve the equities of complainants therein, institute foreclosure proceedings for the collection of said mortgage, &c. 30

11. That a writ of subpoena may issue, commanding said defendants to answer this bill of complaint without oath and to abide by such decree as this Court may make in the premises.

12. That a writ of injunction may issue out of this Court to be directed to the said Broad & Market National Bank, Federal Trust Company, Joseph Meyer, Moses Mendel and Charles F. Kraemer, commanding them and each and every of them that they absolutely desist and refrain from in any manner contracting in relation to the said mortgage or from in any manner attempting to execute the terms of any outstanding agreement 40

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now between them, which will in any way affect the interest of complainants in the said mortgage, and further commanding the said Broad & Market National Bank to absolutely desist and refrain from taking any steps or proceedings at law or in equity to cut off the right of redemption of the said complainant, notwithstanding the accrual of the period of redemption fixed by the present outstanding agreement between the said Broad & Market National Bank and your complainant, Joseph Okin, and until further order of this court. That complainants may have such other and further relief in the premises as may be consistent with equity.

JACOB L. NEWMAN,
Sol'r. for and Counsel with Complainant.

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**ANSWER OF DEFENDANT BROAD AND MARKET
NATIONAL BANK.**

Filed November 11, 1919.

This defendant, answering the bill of complainant, says:

1. On information and belief it admits the first paragraph of the complaint.
2. It admits paragraph 2.
- 30 3. As to paragraph 3 of the bill of complaint, It admits that the said Okin made various assignments of various interests in said mortgage to divers persons as hereinafter mentioned, and that by an assignment dated June 10, 1914, recorded in Book 118 of assignments of mortgages on page 141, the said Okin assigned a first and paramount interest to Nathan Shiman and David Shiman and Aetna Realty Company, a corporation, of \$21,500, in said mortgage of \$60,000, and by virtue of said assignment said Okin agreed upon his failure to pay the sum of \$21,500 that the said Nathan Shiman, *et als*, assignees were empowered to make sale of all the right, title and interest of said Okin in said mortgage at either public or private sale.
- 40 4. It denies that on or about November 4, 1916, the said Nathan Shiman, *et als*, the holder of said first interest in said mortgage

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for an indebtedness of \$19,810.67, then due and owing to them became by virtue of the exercise of the power of sale contained in the aforesaid assignment, the owners of said mortgage and therefore acquired all the right, title and interest of said Okin therein.

5. This defendant says, that on the 30th of October, 1916, the said Nathan Shiman and others publicly offered said bond and mortgage for sale at public auction at the office of Saul Cohn, attorney, suite 725 in the building at 790 Broad street, Newark, N. J., and that at such sale this defendant paid the sum of \$19,810.67, and notwithstanding other persons including complainant Okin were present no one bid so much or more for the same, and that the said bond and mortgage were then struck off to this defendant for said sum; that Saul Cohn, a counsellor at law of this State, and the attorney for the said Nathan Shiman, *et als*, did conduct said auction, and that by the sale at said auction, as aforesaid, this defendant became the owner of all the right, title and interest of the complainant Okin in and to said bond and mortgage, and that the same was thereafter duly assigned to said bank by formal instrument of assignment, duly recorded in Book 130 of Assignments of Mortgages for Essex County, page 539.

That said assignment contained a covenant that there was due upon said mortgage the sum of \$59,000 with interest from the 29th day of May, 1916; that there was due and owing upon the note for which said mortgage had been assigned to Nathan Shiman and others as collateral the sum of \$19,000, principal and interest thereon from the 2nd of March, 1916, that said sale and assignment were made by virtue of the power of sale contained in the assignment of mortgage given by Joseph Okin to Nathan Shiman and others, and that they, the said Nathan Shiman and others had complied in every manner with the conditions precedent to the conduct of said sale as in said assignment to them was mentioned. The said Shiman and others further covenanted that said Okin had made default in the payment of the principal and interest due on said note on March 2, 1916, for which said mortgage was assigned as collateral.

6. This defendant says that the assignment from Joseph Okin to Nathan Shiman and others recorded in Book 118 of Assignments of Mortgages, page 141 as aforesaid, among other provi-

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10 sions contained the following, that upon default by Joseph Okin, his executors, administrators and assigns, in the payment of principal of the note for which it was given as collateral security, or in the payment of any semi-annual installment of interest thereon, the said assignees should have full and complete authority to sell the said bond and mortgage at public or private sale upon giving sixty days notice in writing delivered either personally to said Joseph Okin or left at his usual place of abode with some member of his family, or mailed to his last known address, if not a resident within this State; that said notice should designate the time and place at which the proposed sale would be conducted, and the amount due on said mortgage to the said Nathan Shiman, *et als*, and that the said assignees at said sale might sell, assign and deliver said bond and mortgage

20 and expenses for the collection, sale and delivery of said bond and mortgage to apply the residue of the purchase of such sale to the payment of the amount due said Nathan Shiman, *et als*, and to return the overplus, if any, to Joseph Okin, and that upon such sale, the purchaser of said bond and mortgage might purchase the same, discharged of any right or redemption of said Joseph Okin, his executors, administrators, and assigns, that said assignment further recited that it was expressly understood and agreed that the interest of the assignees therein, their executors, administrators and assigns, in and to the said bond

30 and mortgage should be paramount and prior to the interest which the said Joseph Okin, his executors, administrators and assigns might from time to time have therein; that the said Joseph Okin, his executors, administrators and assigns should have the right to pay the debt secured by said assignment of the bond and mortgage, at any time before maturity, with interest up to the day of the payment, and that upon such payment, the said assignees, their executors, administrators and assigns would re-assign said bond and mortgage without any qualification or condition whatsoever.

40 That on the 15th day of April, 1916, the Broad and Market National Bank of Newark was served with a notice that pursuant to the terms of the assignment aforesaid, that Nathan Shiman, *et als*, would on Monday, June 6th, at the hour of ten o'clock in the forenoon at the office of Saul Cohn, their attorney, at

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suite 725 at No. 790 Broad street, Newark, N. J., sell said bond and mortgage, and all the interest of the said Joseph Okin in and to the same for the payment and satisfaction of the principal sum then due and owing from the said Okin to the said Nathan Shiman and others, viz.: \$19,000 and the interest thereon from the 2nd of September, 1915, to the date of sale, and that said sale was conditioned only on the said Okin or his assigns making an earlier payment and liquidation of the said principal sum and interest thereon, that the notice further recited that pursuant to the terms of said assignment to said Nathan Shiman, *et als*; that the said Nathan Shiman, *et als*, upon said sale would assign and deliver the aforesaid bond and mortgage to the purchaser at said sale, and after deducting reasonable costs and expenses for the sale and delivery of said mortgage would apply the residue of such sale to the payment of the amount due as aforesaid; that a similar notice was served on Joseph Okin on April 17, 1916, on Cook & Genung Co., April 25, 1916, on Joseph Meyer, April 25, 1916, by acknowledgment of service by Jacob Fischel, attorney; on Emanuel Beitman on April 15, 1916, and on Philip Spies on April 17, 1916, and on A. D. Marx, April 25, 1916.

That in addition to the assignment of said bond and mortgage to Nathan Shiman and others as above set forth and of the \$15,000 interest in said mortgage to this defendant as above mentioned, the said Joseph Okin on the 14th day of September, 1914, by deed of assignment recorded September 25, 1914, in Book 120 of Assignments of Mortgages, page 46, assigned to Cook & Genung Co., an interest in said mortgage of \$11,200 which interest was subject and subsequent to that of said Nathan Shiman and others and to that of this defendant.

That by deed of assignment dated November 11, 1914, recorded November 17, 1914, in Book 121 of Assignments of Mortgages for Essex County on page 336, etc., the said Joseph Okin assigned a further interest of \$11,350 in said mortgage to Saul Cohn, trustee for A. D. Marx and Philip Spies, Incorporated and Emanuel Beitman, which said assignment was subject to the prior assignment hereinabove recited.

That on the 6th day of October, 1915, by deed of assignment recorded October 8, 1915, in Book 126 of Assignments of Mortgages for Essex County on page 39, the said Joseph Okin as-

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signed an interest of \$2,500 in said mortgage to Emanuel Beitman, which said assignment was subject to the assignments theretofore made and hereinabove mentioned.

10 That on the 26th day of June, 1916, this defendant was, through its president, present at the office of Saul Cohn, at the time stated in said notice at which said sale would take place, and that said Joseph Okin was also present at said time and place, and that said sale was publicly postponed by Saul Cohn, acting as attorney for said Nathan Shiman and others, and after sundry adjournments the sale of said bond and mortgage took place on the 30th day of October, 1916.

7. It admits the 4th paragraph of the bill of complaint.

20 7½. It denies that Nathan Shiman and others acquired any interest in said mortgage by reason of said sale, and it denies that they assigned as owners of said mortgage any interest therein to this defendant as is implied in the statement in paragraph 5 of the bill of complaint.

It admits that the said Nathan Shiman and others assigned said bond and mortgage to this defendant, by assignment dated and recorded as in said paragraph mentioned.

It admits that by the assignment said bond and mortgage the said The Broad and Market National Bank of Newark, became vested with the complete title and ownership of said mortgage.

30 It denies that the said mortgage thereupon became collateral security for the re-payment by the complainant Okin to the bank of the principal sum of \$19,000 due from said Okin to said Shiman and others, or for the \$15,000 which had been theretofore loaned by this defendant to the said Okin.

It charges and alleges the fact to be, that the assignment from Shiman, *et als*, to this defendant was made solely to effectuate the purchase of said bond and mortgage by this defendant under the power of sale given to the said Shiman and others in the assignment of the paramount interest in said mortgage herein-after referred to.

40 It denies that the said \$19,000 was advanced by this defendant for the complainant.

8. As to paragraph 6 of the bill of complaint it admits that the said complainant Okin and one Harry Bernstein entered into the agreement referred to in the sixth paragraph of the bill of complaint, but it denies that the said agreement formed any part

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of the transaction by which this defendant purchased the bond and mortgage referred to in said paragraph, or that the purchaser of said mortgage and bond was in any way conditioned on the making of the said agreement by Okin and Bernstein.

It alleges that the only reason that this defendant purchased said bond and mortgage was to protect its interest of \$15,000 in said bond and mortgage, which was subject to the prior interest of said Nathan Shiman and others, and that had any one paid a sum sufficient to cover the amount due to the said Shiman and others with the costs and expenses of said sale, plus amount due to this defendant, that this defendant would not have purchased said bond and mortgage. 10

It denies that in said agreement it is agreed that the financial interest of said bank in said mortgage is \$34,000, and that the balance of the principal of \$25,000 in said mortgage became vested in the complainant and said Bernstein. 20

As to the balance of said paragraph 6, it alleges that the agreement clearly and fully sets forth the rights of the parties complainant and this defendant in and to said bond and mortgage.

9. As to paragraph 7 of the bill of complaint, it denies that at the time of the making of the said agreement between the said complainant Okin and this defendant, that said Okin was actually indebted to said bank in the sum of \$34,000.

It denies that at the time when said agreement was entered into it required the said complainant Okin to pay the sum of \$3,000 as a consideration for the extension of the time for the payment of \$34,000 as in the 7th paragraph of the bill of complaint set forth. 30

It alleges the fact to be that when it became apparent that the said Okin would be unable to purchase the said bond and mortgage at the sale to be held by the said Nathan Shiman and others of the bond and mortgage assigned to them as collateral for their loan as in the bill of complaint set forth, that it was arranged between this defendant and the said Okin, that if this defendant was compelled to purchase said bond and mortgage at the said sale in order to protect its interest of \$15,000 therein, that it, the bank would enter into an agreement with the said Okin and Harry Bernstein, whereby the said Okin and Bernstein might have an option to purchase said mortgage at 40

Answer of Broad & Market National Bank.

any time on or before the 29th day of May, 1920, provided the said Okin and Bernstein were willing to pay as part consideration for said agreement the sum of \$3,000.

10 It further alleges the fact to be that at the time the agreement was entered into Mr. Bernstein gave his note to this defendant for \$19,810.67, being the amount which this defendant paid for the purchase of the bond and mortgage, and the note of \$15,000 which the said Okin then owed the bank was not disturbed, but was permitted to run to its maturity. The arrangement between the parties being that the note of Okin for \$15,000 and the note of Bernstein for \$19,810.67 should be held by the bank as collateral security for the due performance of this agreement entered into contemporaneously with the giving of the Bernstein note, being the agreement, a copy of which is annexed to the bill of complaint.

20 It denies that the taking of the sum of \$3,000 as part of the consideration to be paid by the said Okin and Bernstein for the purchase of said bond and mortgage constituted a usurious payment and shows that this defendant, by said agreement entered into various covenants, which it was not in law or equity bound to enter into in favor of the said Okin and Bernstein.

30 It denies that it required the said Okin and Bernstein, or either of them to purchase said bond and mortgage from it, but that it did require that if they desired to purchase said bond and mortgage and pay the consideration at any time other than immediately following the purchase of the same, by this defendant that then as a part consideration for any agreement of purchase they would be required to pay the said sum of \$3,000.

10. This defendant has no knowledge or information sufficient to form a belief as to the assignments mentioned and described in the 8th paragraph of the bill of complaint.

40 This defendant denies that the said complainant Okin is the holder of an interest of \$15,000 in said mortgage, and further denies that the said complainant, or the said Bernstein or any of their assignee or any one claiming under them by virtue of said assignments or otherwise has any interest in said mortgage other than the right to purchase said mortgage according to the terms of the agreement between the said Bernstein and Okin and this defendant, a copy of which is annexed to the bill of complaint.

Answer of Broad & Market National Bank.

11. This defendant has no knowledge or information sufficient to form a belief as to the various assignments referred to in paragraph 9 of the bill of complaint.

It denies that any interest which the Federal Trust Company or Joseph Meyer, Moses Mendel and Charles F. Kraemer have in the premises is subject to the complainant's interest in said mortgage, and says that the interest of said parties in said premises is subject to this defendant's mortgage for \$59,000, which mortgage is the subject of this litigation, and that the interest of the complainant in said mortgage is only that which they acquired under the agreement between this defendant and Okin and Bernstein as before mentioned. 10

12. This defendant has no knowledge or information sufficient to form a belief as to the matters set forth in paragraph 10 of this bill of complaint.

It alleges and charges that whatever rights the tenants and occupants of said premises may have therein are subject to the lien of this defendant's mortgage. 20

13. As to the 11th paragraph of the bill of complaint this defendant denies that the said mortgage became due and payable on the 29th day of May, 1919, and says that the said mortgage became due on the 1st day of June, 1919.

It admits that William Okin called on the president of this defendant, and stated that he represented his father, Joseph Okin, one of the complainants in this suit and that the purpose of his call was to get this defendant to foreclose the mortgage in question. 30

This defendant denies that it has entered into an agreement with the Federal Trust Company, Joseph Meyer, Moses Mendel, Charles F. Kraemer and others, wherein and whereby the time for the payment of said mortgage has been extended, and denies that it has entered into any agreement whatsoever with any person or corporation whereby the rights of the complainant, William Okin and Harry Bernstein, or any parties claiming by, through or under them are in any way altered, changed or defeated in any manner whatsoever, with reference to the purchase of said mortgage under the agreement, a copy of which is annexed to the bill of complaint or their rights to immediately foreclose said mortgage upon the carrying out by them of said agreement. 40

Answer of Broad & Market National Bank.

14. This defendant denies paragraph 12 of the bill of complaint and denies the making of the agreements in said paragraph mentioned.

10 15. This defendant has no knowledge or information sufficient to form a belief as to the allegations in paragraph 13 of the bill of complaint.

16. As to paragraph 14 of the bill of complaint. This defendant admits that William Okin, who claimed to represent his father, Joseph Okin, the complainant made inquiries of the president of this defendant as to the form of any arrangement that had been made with the Federal Trust Company to extend the time within which said mortgage might be paid.

20 This defendant alleges the fact to be that its president informed said William Okin that no arrangement had been made with the Federal Trust Company, and that no arrangement had been made with any other person which interfered with the rights of said Joseph Okin and Harry Bernstein, or persons claiming under them to carry out the terms of the agreement between them and this defendant, or their rights to foreclose the mortgage mentioned in said agreement and the subject of this controversy.

This defendant admits that it has refused to extend the time within which the said agreement might be carried out.

It denies that the said agreement amounts to an agreement for the redemption of the mortgage in question.

30 17. As to the allegations in the 15th paragraph of the bill of complaint, this defendant denies that the rights of the said complainant, Joseph Okin and Harry Bernstein, or any person or persons claiming under, or through them have been in any way injuriously affected because of any act or thing done by this defendant in reference to said mortgage.

18. This defendant has no knowledge or information sufficient to form a belief as to the allegations of the 16th paragraph of the bill of complaint.

40 19. It denies the allegations set forth in the 17th paragraph of the bill of complaint.

20. As to the allegations contained in the 18th paragraph of the bill of complaint, it has no knowledge or information sufficient to form a belief, except that it says that any claim which any of said parties mentioned in said paragraph may have in

Answer of Broad & Market National Bank.

said premises is subject to the lien of this defendant's mortgage.

21. It admits the allegations contained in the 19th paragraph of the bill of complaint.

22. It admits that under the terms of the mortgage and the bond which accompanied it, that the whole amount of the principal and interest thereon became due and payable on the 1st day of June, 1919, and that at any time upon the said Joseph Okin and Harry Bernstein and those claiming by, under or through them, carrying out the terms of the contract, a copy of which is annexed to the bill of complaint, that said Joseph Okin or Harry Bernstein, or those claiming by, through or under them may demand the payment of the entire principal and interest due on said mortgage, but that until said agreement is carried out, this defendant alleges and charges that the said complainants have no right in law or in equity to elect that the principal sum of said mortgage shall become due and payable, or that the mortgage shall be foreclosed. 10 20

23. The complainants are hereby notified that on the hearing of the above cause this defendant will move to dismiss the bill of complaint on the ground that it discloses no cause of action, and that the said bill does not show any equity, that the sole right of the complainants is to perform and carry out the provisions and terms of the contract, a copy of which is annexed to the bill of complaint, and this defendant hereby tenders itself as ready and willing to make an assignment of said mortgage to such person or persons as may at that time be entitled to receive the same. 30

That said complainants and those claiming by, through or under them have at no time offered to carry out the terms of the said agreement with respect to the purchase of the same.

And this defendant prays to be hence dismissed with its reasonable costs in this behalf most wrongfully sustained.

LAMBERT & STEWART,

Solicitors of the Defendant, The Broad and Market National Bank of Newark. 40

Answer of Federal Trust Company.

ANSWER OF DEFENDANT FEDERAL TRUST COMPANY.

Filed November 10, 1919.

This defendant answering the bill of complaint says that,

10 1. On information and belief it admits the first paragraph of the complaint.

2. On information and belief it admits the second paragraph of the complaint.

20 3. On information and belief it admits that the assignments mentioned in the third paragraph of the complaint were made and that the assignment to Nathan Shiman *et. al.* contained a power to sell said mortgage at public sale, but denies that Nathan Shiman *et al*, to whom the said assignment was made, became by virtue of the exercise of the power of sale in said assignment, the owner of said mortgage; and states and alleges the fact to be that the said Nathan Shiman, *et al*, exercised the power of sale given in said assignment by exposing said mortgage to sale at public sale, after public advertisement, pursuant to the terms of said assignment, and according to law, and that the defendant, Broad & Market National Bank, became the purchaser at said sale and the owner of said mortgage, and that by virtue of said sale, all right, title and interest of the complainant Okin, was also transferred and set over to said bank.

30 4. On information and belief this defendant admits the assignment set up in the fourth paragraph of the complaint.

40 5. This defendant denies that the said Nathan Shiman *et. al.* became the owner of said mortgage, or that they assigned any interest as owner therein to the Broad & Market National Bank, and denies that by the assignment of said mortgage to the Broad & Market National Bank, said bank held the same as collateral security for the payment of moneys as alleged in the fifth paragraph of the complaint; and charges and alleges the fact to be, that the assignment referred to in said paragraph was to effectuate the purchase of said mortgage by the Broad & Market National Bank sold under the power of sale given in the assignment to Nathan Shiman *et. al.* referred to, and that by virtue of such purchase, the Broad & Market National Bank became the absolute owner of said mortgage, and not by way of collateral security, for moneys owing by the complainant Okin.

Answer of Federal Trust Company.

6. This defendant on information and belief admits the making of the agreement referred to in the sixth paragraph of the bill of complaint, copy of which is attached to the complaint, and begs leave to refer to the same for the terms and conditions thereof, but denies the balance of said paragraph.

7. This defendant has no knowledge or information sufficient to form a belief as to the allegations of the seventh paragraph of the complaint and neither admits nor denies the same, but calls upon the complainant for proof thereof. 10

8. This defendant has no knowledge or information sufficient to form a belief as to the assignment mentioned and described in the eighth paragraph of said complaint, but denies that the said complainant, nor anyone claiming an interest under, or through him, has any interest in said mortgage beyond the right to purchase said mortgage, according to the terms of the agreement with the Broad & Market National Bank dated October 30, 1916, a copy of which is annexed to the complaint. 20

9. This defendant admits the conveyance to it as alleged in the ninth paragraph of the complaint, and that said premises are subject to the mortgage for \$59,000.00, in which the complainant claims an interest, but denies that complainants have any interest in said mortgage other than the right to purchase the same under said agreement.

10. This defendant admits the occupation of said premises by tenants, as alleged in the tenth paragraph of the complaint, and that the rights of said tenants are subject to the lien of said mortgage for \$59,000.00. 30

11. This defendant admits that the said mortgage became due and payable on May 29, 1919, but has no knowledge or information sufficient to form a belief that the said complainant requested the Broad & Market National Bank to demand payment thereof, but denies that any agreement has been entered into between the Federal Trust Company and said Broad & Market National Bank, extending the time for the payment of said mortgage, nor has it any knowledge or information sufficient to form a belief that any such agreement has been entered into by any other person or persons, as alleged in said paragraph, or otherwise. 40

12. The defendant denies paragraph twelve of the complaint and denies that any such agreement referred to therein was made.

Answer of Federal Trust Company.

13. This defendant has no knowledge or information sufficient to form a belief as to the allegations of the thirteenth paragraph of the bill of complaint, except that it is informed and believes and therefore says, that the mortgaged premises furnish adequate security for the mortgage indebtedness thereon, and calls upon the complainant for proof.

14. This defendant has no knowledge or information sufficient to form a belief as to the allegations in the fourteenth paragraph contained, and neither admits nor denies the same, and calls upon the complainant for proof.

15. Defendant denies that any extension of time for the payment of said mortgage has been given to it, and therefore denies the allegations of the fifteenth paragraph of the complaint.

16. This defendant admits the demand alleged in the sixteenth paragraph of the complaint and the refusal, but denies that such refusal was due to any agreement or understanding with the Broad & Market National Bank.

17. This defendant denies the seventeenth paragraph of the complaint and further answering says, that it holds title to said premises as trustee, has no funds with which to redeem said mortgage in whole or in part, and has no intention of doing so on May 1, 1920.

18. This defendant admits the eighteenth paragraph of the complaint, except that it says that the complainant has no interest in said mortgage, except the right to purchase under the agreement, copy of which is attached to the complaint.

19. This defendant admits the nineteenth paragraph of the complaint.

20. This defendant further answering says, that it holds said premises as trustee, pursuant to the terms of a declaration of trust, a copy of which is annexed hereto, and made a part of this answer, and begs leave to refer to the same as it may find necessary so to do.

21. The complainants are hereby notified that on the hearing of the above cause the defendant, Federal Trust Company, will move to dismiss the bill of complaint herein, on the ground that it discloses no cause of action, in that the complainants' rights rest upon an agreement in writing, according to the terms of which, the complainants have only the right to purchase the

Agreement.

mortgage in question upon the payment of the consideration therein mentioned, which agreement the complainants have failed to carry out and perform for their part.

And this defendant prays to be hence dismissed with its reasonable costs in this behalf most wrongfully sustained.

H. P. LINDABURY,

Sol. of Defendant, Federal Trust Company.

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THIS INDENTURE made this twenty-seventh day of August, 1917, between JOSEPH MEYER and EDNA O. MEYER, his wife, CHARLES F. KRAEMER and FRED A. KRAEMER, his wife, ELLEN E. MENDEL AND MOSES MENDEL, her husband, all of the City of Newark, County of Essex and State of New Jersey, hereinafter called the settlers of the first part, and the FEDERAL TRUST COMPANY, a corporation, organized and existing under the laws of the State of New Jersey, having its principal office and place of business in the City of Newark, County of Essex and State of New Jersey, trustee, hereinafter called the trustee, of the second part.

20

WHEREAS, the settlers are the owners in fee of certain premises located in the City of Newark, County and State aforesaid.

BEGINNING in the southerly line of Springfield avenue at a point distant two hundred and thirteen feet westerly from the northwesterly corner of David B. Crockett's Homestead lot, or lately his, and from thence running south ten degrees east eighty-six feet five inches; thence south twenty-two degrees and forty-five minutes west one hundred and two feet to the line of William street, at a point one hundred and fifty feet distant westerly from the northwesterly corner of a lot now or formerly belonging to William Lee; thence running along the line of William street north sixty-seven degrees fifteen minutes west eighty-nine feet; thence north twenty-one degrees east one hundred and forty-five feet to the line of Springfield avenue and thence along the line of same north eighty degrees east sixty feet to the place of BEGINNING.

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AND WHEREAS, said property has been conveyed by the settlers to the trustee by deed of even date herewith and not yet recorded, which conveyance is made subject to two certain mortgages, one made by Thos. F. Bowers and wife to Ellis P. Pow-

Agreement.

ers and Mary B. Powers, dated July 22, 1912, for \$65,000.00, upon which there is now due \$65,000.00 principal and interest from January 22, 1917, and one made by Joseph Meyer to Joseph Okin, dated May 29, 1914, for \$60,000.00, upon which there is now due \$59,000.00, principal and interest from May 29, 1917.

10 WHEREAS, the said settlers have transferred to the said trustee the said property to the intent that it may stand seized and possessed thereof, and the income thereof, upon the trust, and with and subject to the powers hereinafter declared and conferred.

Now, THEREFORE, in consideration of the premises and of the sum of one dollar to them paid by the said trustee, the receipt of which is hereby acknowledged, the said settlers and trustee do hereby declare and agree that the terms of the said trust hereby created are as follows:

20 1. That the trustee is to collect all rents and income whatsoever from the aforesaid property during the term of this agreement.

2. That it is to pay the interest on the mortgages aforesaid, taxes, fire insurance and other charges against the property during the period of this trust as hereinafter provided. It is understood, however, that no payments are to be made by the trustee on account of the principal of the mortgages aforesaid.

30 3. That it is to use the income from the said property toward the payment of the said charges and in the event of there not being sufficient income to pay the charges aforesaid that it is authorized at its discretion to advance sufficient sums from time to time as may be necessary to meet such payments and in which case it shall have a lien against the property aforesaid for such sums and compensation as hereinafter provided together with lawful interest. The property being conveyed as aforesaid to the trustee as security to the trustee in order to protect it in making such advances and in carrying out the terms of this trust. The said security to be collateral to promissory notes to be given by Joseph Meyer, Charles F. Kraemer and Ellen E. Mendel, aforesaid, from time to time to cover any and all moneys advanced by the trustee as aforesaid, which notes are to be signed by the said parties in such proportionate amounts as will represent the interests in ownership of the property of the parties thereto. It being understood and agreed,

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Agreement.

however, that the said trustee, at its discretion, may require additional security to the aforesaid lien on the property and notes for advances made as aforesaid.

4. The trustee to have sole management and control of the said property during the continuance of this trust.

5. This trust may be terminated upon thirty days' notice by the settlers or any of same or trustee which notice shall be in writing and the property re-conveyed by the trustee to the settlers upon the payment to the trustee of all sums which it may have advanced or which may be owing to it whatsoever by reason of this trust.

10

6. The trustee shall render to the settlers at the expiration of every three months from the date hereof an itemized statement of its receipts and disbursements under this agreement and to distribute the net income at such times to the settlers in the following proportion, representing their interest in the trust property. Fifty per cent. thereof to Joseph Meyer, twenty-five per cent. thereof to Charles F. Kraemer, and twenty-five per cent. thereof to Ellen E. Mendel.

20

7. And it is agreed and declared that it shall be lawful for the said trustee to compromise or compound any action, suit, proceeding, difference or demand relating to the said trust property, or any of it, upon any terms it shall think proper and to refer any such difference or demand to arbitration and to execute all instruments and do all things expedient for such purpose, or any of them; and in all cases in which any question of law or equity shall arise relating to said trust property to settle and arrange the same in such manner as shall be advised by its counsel and to abandon, relinquish or release any claim relating to the trust property, or any of it, as its counsel shall advise, and to adjust, settle and approve all accounts relating to the said trust property, or any of it, and to do all things required or convenient in the administration of the said trust property as fully and absolutely as the said trustee could do if it was the absolute owner of the said trust property and without being answerable for any loss which may be occasioned thereby.

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8. The trustee shall be notified to reimbursement out of the trust estate for all expenses, inclusive of counsel fee incurred in the administration or care of the trust property, and to com-

Agreement.

pensation at the rate of 2% on the gross income of the property, to be retained as accruing.

10 IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals and the said party of the second part has caused these presents to be signed by its president and its corporate seal to be affixed hereto an attested by its secretary.

JOSEPH MEYER,
EDNA O. MEYER,
CHAS. F. KRAEMER,
FREDA KRAEMER,
ELLEN E. MENDEL,
MOSES MENDEL.

20 FEDERAL TRUST COMPANY,

By.....

As to

JOSEPH MEYER,
EDNA O. MEYER,
CHAS. F. KRAEMER,
ELLEN E. MENDEL,
MOSES MENDEL,
JACOB FISCHER,

As to

30 FREDA KRAEMER.
CHAS. M. LUM,

Attest:.....

Answer of Charles F. Kraemer, et als.

**ANSWER OF DEFENDANTS CHARLES F. KRAEMER AND
FREDA KRAEMER, AND ELLEN E. MENDEL AND
MOSES MENDEL, HER HUSBAND.**

Filed Nov. 2, 1919.

These defendants answering the bill of complaint say that: 10

1. These defendants admit the first paragraph of the complaint.

2. These defendants admit the second paragraph of the complaint.

3. On information and belief, these defendants admit that the assignments mentioned in the third paragraph of the complaint were made and that the assignment to Nathan Shiman *et al.* contained a power to sell said mortgage at public sale, but they deny that Nathan Shiman *et al.* to whom said assignment was made, became by virtue of the exercise of the power of sale in said assignment, the owner of said mortgage; and state and allege the fact to be, that the said Nathan Shiman *et al.* exercised the power of sale given in said assignment, by exposing said mortgage to sale at public sale after public advertisement pursuant to the terms of said assignment, and according to law, and that the defendant Broad & Market National Bank became the purchaser at said sale and the owner of said mortgage, and that by virtue of said sale all right, title and interest of the complainant Okin was also transferred and set over to said bank. 20 30

4. On information and belief, these defendants admit the assignment set up in the 4th paragraph of the complaint.

5. These defendants deny that the said Nathan Shiman *et al.* became the owners of said mortgage or that they assigned any interest as owners therein to the Broad & Market National Bank and deny that by the assignment of said mortgage to the Broad & Market National Bank, said bank held the same as collateral security for the payment of moneys as arranged in the 5th paragraph of the complaint; and charge and allege the fact to be that the assignment referred to in said paragraph, was to effectuate the purchase of said mortgage by the Broad & Market National Bank, sold under the power of sale given in the assignment to Nathan Shiman *et al.* referred to and that by virtue of said purchase the Broad & Market National 40

Answer of Charles F. Kraemer, et als.

Bank became the absolute owner of said mortgage, and not by the way of collateral security for moneys owing by the complainant Okin.

10 6. These defendants on information and belief, admit the making of the agreement referred to in the 6th paragraph of the complaint, a copy of which is attached to the complaint, and beg leave to refer to the same for the terms and conditions thereof, but deny the balance of said paragraph.

7. These defendants have no knowledge and information sufficient to form a belief as to the allegations of the 7th paragraph of the complaint, and neither admit or deny the same, but will call upon the complainant Okin, for proof thereof.

20 8. These defendants have no knowledge or information sufficient to form a belief as to the assignment mentioned and described in the 8th paragraph of said complaint, but deny that the said complainant Okin or any one claiming an interest under or through him have any interest in said mortgage beyond the right to purchase said mortgage according to the terms of the agreement with the Broad & Market National Bank, dated October 30th, 1916, a copy of which is annexed to the bill of complaint.

30 9. These defendants admit the conveyance to the Federal Trust Company, but charge the fact to be that said conveyance was made to the Federal Trust Company aforesaid in trust pursuant to the terms of a declaration of trust, a copy of which is annexed hereto and made a part of this answer, and they beg leave to refer to the same as they may find necessary so to do; and the defendants admit that said premises are subject to a mortgage for \$59,000.00 in which the complainants' claim any interest, but deny that the complainants have any interest in said mortgage other than the right to purchase the same under the agreement of October 30th, 1916.

40 10. These defendants admit the occupation of said premises by tenants, as alleged in the 10th paragraph of the complaint, and that the rights of said tenants are subject to the lien of said mortgage for \$59,000.00.

11. These defendants admit that the said mortgage became due and payable on May 29th, 1919, but have no knowledge or information sufficient to form a belief that the said complainants requested the Broad & Market National Bank to demand

Answer of Charles F. Kraemer, et als.

payment thereof, but they deny that any agreement has been entered into between these defendants and said Broad & Market National Bank extending the time for the payment of said mortgage nor have they any knowledge or information sufficient to form a belief that any such agreement has been entered into by any other person or persons as alleged in said paragraph. 10

12. These defendants deny paragraph 12 of the complaint and deny that any such agreement referred to therein was made.

13. These defendants have no knowledge or information sufficient to form a belief as to the allegations of the 13th paragraph of the bill of complaint, except that they are informed and believe and therefor say, that the mortgaged premises furnish adequate security for the mortgage indebtedness thereon and call upon the complainant for proof thereof. 20

14. These defendants have no knowledge or information sufficient to form a belief as to the allegations in the 14th paragraph of the complaint, and neither admit or deny the same and call upon the complainant for proof.

15. These defendants deny that any extension of time for the payment of said mortgage has been given to them and therefor deny the allegation of the 15th paragraph of the complaint.

16. These defendants have no knowledge or information sufficient to form a belief as to the allegations of the 16th paragraph of the complaint, and neither admit nor deny the same and call upon the complainant for proof. 30

17. These defendants deny the 17th paragraph of the complaint.

18. These defendants admit the 18th paragraph of the complaint, except that they say that the complainant has no interest in said mortgage except the right to purchase under the agreement a copy of which is attached to the bill of complaint, and except that the defendant Ellen E. Mendel's claim in said property is as set forth in the declaration of trust, a copy of which is annexed hereto and made part of this answer and is not a claim by reason of inchoate right of dower, and except that said Moses Mendel's claim is only by reason of the fact of his marriage to said Ellen E. Mendel. 40

Answer of Charles F. Kraemer, et als.

19. These defendants admit the 19th paragraph of the complaint.

10 20. These defendants admit that the whole amount of principal with interest thereon from May 29th, 1919, is due upon said mortgage but these defendants deny that the complainants have any interest in said mortgage except the right to purchase the same under the agreement a copy of which is attached to the complaint.

20 21. The complainants are hereby notified that on the hearing of the above cause, these defendants will move to dismiss the bill of complaint herein on the ground that it discloses no cause of action, in that the complainants' rights rest upon an agreement in writing according to the terms of which the complainants have only the rights to purchase the mortgage in question upon the payment of the consideration therein mentioned which agreement the complainants have failed to perform and carry out on their part.

And these defendants pray to be hence dismissed with their reasonable costs in their behalf most wrongfully sustained.

JACOB FISCHER,
Solicitor for Defendants,
 Charles F. Kraemer,
 Freda Kraemer,
 Ellen E. Mendel,
 Moses Mendel.

Joseph Okin, direct.

IN CHANCERY OF NEW JERSEY.

Between

JOSEPH OKIN, *et als.*,

Complainants,

and

BROAD & MARKET NATIONAL BANK, *et als.*,

Defendants.

On Bill, etc.

*Minutes of
Final Hearing.*

10

Chancery Chambers, Newark, N. J.
March 12, 1920.

Appearances:

Jacob L. Newman, Esq., for complainants.

20

Lambert & Stewart, Esqs., for defendant, Broad & Market National Bank.

Harrison P. Lindabury, Esq., for defendant, Federal Trust Company.

Jacob Fischel, Esq., for defendants, Moses and Ellen E. Mendel and Charles F. Kraemer and Freda Kraemer.

Before HON. JAMES F. FIELDER, *Vice-Chancellor.*

(Opening by Counsel.)

30

JOSEPH OKIN, sworn.

Direct examination by Mr. Newman.

Q What is your full name? A Joseph Okin.

Q You are the complainant in this cause? A Yes, sir.

Q You were formerly the owner of a piece of property on Springfield avenue, Newark, known as the Majestic Theatre? A Yes, sir.

Q How large a piece of property is it? A Why, I don't remember exactly to describe it. 40

Q Well, about? A I think there are 60 feet on Springfield avenue and running throughout to William street; I think it must be about 200 feet on Springfield avenue and on William street about 100 feet.

Joseph Okin, direct.

Q And on it is erected a brick building used for theatrical purposes, except the ground floor, is that right? A Yes, sir.

Q And on the ground floor there are various stores? A Two little stores.

Q You erected the building yourself? A Yes.

10 Q And you are familiar with the erection and also the construction of the building? A Yes, sir.

Q What did the building cost to erect at that time? A Well, about \$110,000.

Q And what did the land cost? A \$95,000, I think.

By the Vice-Chancellor.

Q When did you buy the land? A I bought the land in 1913.

Q When did you erect the building? A In 1913 it was begun and ended in 1914.

20 *By Mr. Newman.*

Q Now, subsequent to that you sold the building? A Yes, sir.

Q Whom did you sell it to? A Joseph Meyer.

Q And as part consideration did you take back a mortgage from Mr. Meyer? A Yes, sir.

Q What was the face value of the mortgage? A \$60,000.

Q But in fact there was actually due on the mortgage how much? A \$59,000.

30 Q Was this mortgage a second lien on the premises? A Yes.

By the Vice-Chancellor.

Q How much was the first mortgage? A \$65,000.

By Mr. Newman.

Q And the first mortgage which you have spoken of was the mortgage originally given as part of the purchase price of the land? A Yes, sir.

40 Q So that there was no additional mortgage put on for the construction? A No, sir.

Q Now, Mr. Okin, you assigned an interest in this mortgage to Nathan Shiman after you got it? A Yes, sir.

Q For how much? A Why, I think about \$25,000 on this mortgage and in addition on another property, and after that

Joseph Okin, direct.

I paid off \$35,000 and he released me the other property, and it has been left on this mortgage only \$21,500.

Q And this assignment in that mortgage was \$21,500? A Yes, and after I paid off \$35,000.

Q And the mortgage that you spoke of (the mortgage in this case) is the mortgage made by Joseph Meyer to Joseph Okin? A Yes, sir. 10

Mr. Newman. I offer the mortgage dated May 29, 1910, Book 532 of Mortgages of Essex County, page 965, etc., and the bond accompanying the mortgage in the penal sum of \$120,000 in evidence.

(Admitted without objection; Bond marked C. 1 and Mortgage C. 2.)

Q Now, Mr. Okin, the assignment which you made for \$21,500 to Nathan Shiman is the assignment which I now show you and bears date the 10th day of June, 1914; is that right? A Yes, sir. 20

Mr. Newman. I offer the assignment from Joseph Okin to Nathan Shiman and David Shiman and the Aetna Realty Company, which assignment is dated June 10, 1914, recorded in the Register's office of Essex County, in Book 118 of Assignments of Mortgages for said County, on pages 140 to 142, in evidence.

(Admitted without objection and marked C. 3.)

Q Subsequent to that assignment to Shiman, did you make an assignment to the Broad and Market National Bank? A Yes, sir. 30

Q To the extent of \$15,000? A Yes, sir.

Q I now show you a paper dated June 18, 1914, and your signature on it and ask you if that is the assignment that you have just referred to? A Yes, sir.

Mr. Newman. I offer the assignment in evidence; it is dated June 18, 1914, and recorded in Book 119 of Assignments of Mortgages, Essex County, pages 143-144. 40

(Admitted without objection and marked C. 4.)

Q Now, subsequent to this, Mr. Okin, was there a sale of this mortgage for \$60,000, under the power of sale mentioned in the Shiman assignment? A I don't understand that.

Joseph Okin, direct.

Q Was there a sale held? A Yes, sir.

Q Where was it conducted? A In Mr. Saul Cohn's office.

Q And who arranged about the sale? A Mr. Cohn.

Q With whom? A With Mr. Williams and Mr. Stewart—

10 *Mr. Stewart.* I object to that because he does not know anything about it.

Q As a matter of fact, Mr. Okin, didn't Mr. Stewart, Mr. Cohn and Mr. Williams talk about this matter? A Yes.

Q Well, there was a sale held? A There was, yes, sir.

Q And Mr. Cohn arranged the details for you, didn't he? A Yes, sir.

Q And after the sale was made under the assignment or under the power of sale the Shiman assignment the Broad & Market National Bank bought in the mortgage, didn't it? A
20 Yes, sir.

Q What, if anything, did you do? A Why, I have made arrangements with the Board and Market National Bank previous to that—

Mr. Stewart. I object.

The Vice-Chancellor. Strike out the answer and ask the question again.

Q Before the sale was held did you arrange with reference to the purchase of the mortgage?

30 *Mr. Stewart.* I object to the question.

The Vice-Chancellor. The objection is sustained.

Q Before the sale was held did you see Mr. Williams of the bank? A Yes, sir.

Q And did you talk with him about what was to be done at the sale?

Mr. Stewart. I object.

40 *The Vice-Chancellor.* The objection is sustained. Ask the witness first who Mr. Williams is, Mr. Newman.

Mr. Newman. Yes, your Honor.

Q Do you know Mr. Williams? A Yes, sir.

Q What is his position with the Broad & Market Bank? A President.

Joseph Okin, direct.

Q Now, tell me if you saw Mr. Williams before this sale was held and what was said with reference to this mortgage?

Mr. Stewart. I object—we finally come down to what this agreement is—what these people agreed to. There is no charge of fraud; there is no possibility of modifying this agreement. It was finally put in writing and that is what we have got to try here. 10

Mr. Lindabury. I object on behalf of Federal Trust Co.

The Vice-Chancellor. What have you got to say to that, Mr. Newman.

(Argument by counsel.)

The Vice-Chancellor. I am going to overrule the objection and allow the testimony to be given and I will consider it later on. 20

Q (Last question repeated.) A When I received the notice from Mr. Cohn that Shiman wants his \$19,000 otherwise he is going to sell the mortgage, I went into Mr. Williams and I told him that I have received notice that the mortgage will be sold and have his bank hold the second interest it will be possible for him to loan me \$19,000.

Q Go on. A Well, after considering this matter Mr. Williams tells me he would loan me \$19,000 under this condition, if I give them another man to sign a note for \$19,000 as the Banking and Insurance Department would not allow for him to give to one man more than \$15,000. 30

Q Then what did you do? A Then I told Mr. Williams I will let him know within the next couple of days.

Q Go ahead; what did you do in the next couple of days? A I talk over this matter with my son, William; we talk over the whole thing and I came to the conclusion—

Q Did you see Mr. Williams again? A Yes, and I told him I decided to give him the \$3,000. He says when the mortgage became due he will foreclose and the property will have to be bought in by the Broad & Market National Bank; he said the Broad & Market National Bank; he said the Broad & Market National Bank would give me one year to return it and I should make a second mortgage to the Broad & Market National Bank for what is due them with interest for one year. 40

Joseph Okin, direct.

Q That is in case of foreclosure? A Yes, and we agreed in the matter; I suppose the Broad & Market Bank had Mr. Stewart to take care for them; I took Mr. Bernstein to have him give a note for \$19,000 as an accommodation to me and Mr. Bernstein did that and signed the note; on the day of the sale nobody had been over there because I have made the arrangement with Mr. Williams prior to this, and, of course, Mr. Williams had bought the mortgage from Mr. Cohn at this time.

By the Vice-Chancellor.

Q You mean at the sale at Mr. Cohn's office, Mr. Williams was there and bought the mortgage in? A Yes, sir.

By Mr. Newman.

Q And was it at the same time when you gave him the Bernstein note? A The note has been given a day or two days before because I could not see Mr. Bernstein because he is working all the time.

Q How long was the note for? A I don't remember exactly the first note, but all the other notes are running six months.

Q Well, you mean the notes of \$19,000 and \$15,000 was made one note? A No, two notes.

Q And when they came due they were renewed? A Yes.

Q And did Mr. Bernstein still continue to sign them? A Yes.

Q And who paid for the same? A I.

Q And how was the interest collected? A The interest was collected whenever Mr. Williams was to get over \$59,000 he was to divide that for the Broad & Market Bank and give me his personal check for my own interest and then draw a check for the City Bank of New York and send them the check.

Mr. Newman. I offer in evidence the assignment from Nathan Shiman and David Shiman and the Aetna Realty Company to the Broad & Market National Bank dated November 4, 1916, and recorded in the Register's Office of Essex County, in Book 130 of Assignments, pages 539 to 541.

(Admitted without objection and marked C. 5.)

Joseph Okin, direct.

The Vice-Chancellor. Before you offer that agreement in evidence get some testimony from the witness about the agreement when it was prepared, etc.

Q Now, Mr. Okin, this agreement signed by you and Bernstein and the Broad & Market National Bank, where was that executed? A In Mr. Cohn's office. 10

Q And was it signed? A I don't remember the date.

Q Well, with reference to the sale? A Oh, that was signed a couple of days after the sale was made.

By the Vice-Chancellor.

Q How long after the conversation that you have testified to which you had with Mr. Williams? A Oh, that was two months prior to the sale, between six weeks and two months prior to the sale.

Q Now, Mr. Okin, I show you a number of notes—9 notes—being dated June 1, 1917, made for four months, in the sum of \$19,380 and made by Harry Bernstein, and then another note dated June 1, 1917, for \$15,300, the first note is made by Harry Bernstein and the next note is made by Joseph Okin—why was that \$380 added, do you remember that? A That was the interest that has been credited here—I have a memorandum made at that time—the note was \$19,810. 20

The Vice-Chancellor. Suppose you withdraw your question on the note and ask the witness when the first note was given, Mr. Newman. 30

Mr. Newman. Well, I think that that is in the possession of the Broad & Market Bank.

The Vice-Chancellor. Strike that all out.

Q Mr. Okin, I show you the note dated November 13, 1916, for \$19,810, payable to the Broad & Market National Bank and signed by Harry Bernstein and ask you whether that was the note that was given just prior to the sale of the mortgage? A I got it \$19,810.67. 40

Mr. Newman. I offer that note in evidence.

(Admitted without objection and marked Exhibit C. 6.)

Q Now, I show you note of November 27, 1916, for \$15,307.57 and ask you if you gave that note to the Broad & Market Bank; is that your signature? A Yes, sir.

Joseph Okin, direct.

Mr. Newman. I offer that note in evidence.

(Admitted without objection and also marked Exhibit C. 6.)

Q Your note for \$15,307.57 was renewed from time to time?

A Yes, sir.

10 Q And Mr. Bernstein's note for \$19,810.67 was renewed from time to time? A Yes, sir.

Q At what intervals? A Every three months.

Q Every six months? A Yes, sir.

Q Was that just before or just after the interest on the mortgage became due? A The first note was not six months; it was four months, and after that when we came to pay the interest on the mortgage I made arrangements with Mr. Williams to pay every six months.

20 Q And which interest payable on the mortgage you were credited with the interest on the notes? A Yes, sir.

Q And the balance? A He was to give me a check for it.

Q And every six months thereafter you renewed these notes? A Yes.

Q And these nine notes which I have in my hands (and I will offer them as one exhibit) were renewed notes of this obligation of Bernstein's and yours? A Yes, sir.

Q You did not keep all the notes that were returned to you, did you? A No, sir.

30 *Mr. Newman.* I offer the 9 notes in evidence as one exhibit.

(Admitted without objection and marked Exhibit C. 7.)

Q Now, Mr. Okin, I show you this agreement and ask you if that is your signature thereon? A Yes, sir.

40 Q This agreement is between the Broad & Market Bank and Joseph Okin and Harry Bernstein, and bearing date the 30th October, 1916, and is acknowledged by Okin and Bernstein on the 30th of October, 1916, before Saul Cohn, Master in Chancery of New Jersey, and recorded November 22, 1916 in Book G 36 of Mortgages for Essex County, pages 411-420? A Yes, sir.

Q Now, during this time that you had renewed these notes and received your interest what, if anything, did you do with reference to the property? A From time to time Mr. Williams

Joseph Okin, direct.

used to send to me to find out if the taxes have been paid on that property; once we discovered that taxes were not paid, and he ordered me to come and see him again and he wrote a letter to the Federal Trust Company if the taxes have not been paid otherwise the mortgage would be foreclosed.

Q Now, in May, 1919, did you see Mr. Williams with reference to the mortgage? A Prior to May, 1919, about two months after I told Mr. Williams that the mortgage became due in May, 1919, I told Mr. Williams to notify the owners of the property that we want the mortgage should be paid off and he promised he will do that. 10

Q Well, did you go to see him again? A Then I saw Mr. Williams a couple of weeks later, and he said he have not heard anything and I went to see Mr. Milton Meyer, who represented Mrs. Meyer; I went to see him about the mortgage to be paid off, and Mr. Meyer told me that they were supposed to give a deed from the Federal Trust Company to Mrs. Meyer; then they will make arrangements to pay off that mortgage; I repeated that to Mr. Williams that they wanted a little time and we have not heard nothing; then I went over to see Mr. Lindabury, who represents the Federal Trust Company, and I asked Mr. Lindabury why the deed has not been delivered, and Mr. Lindabury has explained it to me, there is some trouble about Joseph Meyer, some hitch in the title and it has to take a little while, and he says only one man can fix it up and that man is Mr. Joseph Fischel. 20 30

Q What did you do after you tried to pay off and straighten out the mortgage? Did you speak to Mr. Williams again about it? A Yes, then I went in—I don't remember the date—and I told Mr. Williams I am running around and can't get anything done; I said I think the best thing to do—I told Mr. Williams to foreclose the mortgage and Mr. Williams told me that he has received additional security and he gives these people one year's extension.

Q Did he say from whom? A No, he didn't say that, and he gives them one year's extension; I say, "Mr. Williams, what right have you got to give these people an extension without asking my son about it; you know the mortgage belongs to me and not to you." and he said, "The notes belong to the bank and not to me," and I said, "That is the first time I knew the mort- 40

Joseph Okin, direct.

gage belonged to the bank," and my son went to see Mr. Williams.

10 Q And then what else happened? A Well, then I started legal proceedings against the Broad & Market Bank; then when the note became due on the 10th of November last, I went in to renew the two notes and Mr. Williams, he called me "squealer" and all kind of names, and I told him if he didn't want to rob me I would not be a "squealer."

Q You mean that you went to Mr. Williams on November 10, 1919? A Yes, sir.

Q And renewed the notes? A Yes.

Q And bought the stamps? A Yes, sir.

Q Did he turn over any interest to you at that time? A Yes, he turned over a part of the interest at that time.

20 Q I show you a notice dated August 14, 1919, and ask you whether you served a copy of that notice on the Broad & Market National Bank? A Yes, I did.

Mr. Newman. I offer the notice in evidence; and will read it with the record. It reads as follows:

Newark, N. J., August 14th, 1919.

To the Broad & Market National Bank of Newark, N. J.

30 Take Notice, that as you have the physical possession of a certain bond and mortgage given by Joseph Meyer to Joseph Okin, the undersigned, which mortgage bears date the 29th day of May, 1914, to secure the sum of \$60,000 and recorded in Book S 32 of mortgages for Essex County of New Jersey, on page 465, upon which there is due \$59,000 for principal and accrued interest, which mortgage is my property, and as

The principal sum together with accrued interest, became due and payable on the 29th day of May, 1919, and as

40 I deem it advisable to demand the principal sum and accrued interest by reason of the present ability of the owners of the said property to pay the principal sum and interest and for the further reason of the favorable real estate market at the present time and as

Any delay in the collection of such principal and interest either by requesting the payment of the same or enforcing said payment through legal proceedings, may result in jeopardizing the interest of the undersigned.

Joseph Okin, cross.

I do hereby require that you immediately serve notice upon the owners of the premises embraced in the said mortgage, and demand payment of the whole amount of the principal sum and accrued interest and that upon failure of the owner of said premises to make payment in accordance with your demand within ten days from the date hereof, that you cause foreclosure proceedings to be instituted through the proper legal channels to compel the payment of said principal and interest. 10

Upon your failure to comply with my request, as stated in this notice and to proceed with the foreclosure of the said mortgage for the purpose of enforcing the collection of the principal sum together with accrued interest, it is my intention to institute a suit in the Court of Chancery of New Jersey and make you a defendant therein, for the purpose of effecting the collection of the principal and interest and to obtain such further equitable relief as I may be entitled to by reason of the agreement existing between you and me, dated October 30th, 1916, and the circumstances surrounding and connected with said transaction. 20

Yours truly,
JOSEPH OKIN.

(Notice admitted without objection and is marked Exhibit C. 9.) 30

Cross examination by Mr. Stewart.

Q Mr. Okin, the sale of this mortgage under the provision of the assignment of Nathan Shiman and others took place in October, 1916? A I don't remember the date.

Q It was in the fall? A I think it is.

Q And how long prior to the date of sale did you have notice that they were going to sell? A Why, I think about two months six weeks or two months.

Q That was the first notice you had that they were going to sell? A I don't remember, but I think prior to the sale I had between six weeks or two months, something like that. 40

Q I show you a paper dated April 14, 1916, signed Nathan Shiman and David Shiman and the Aetna Realty Company by Saul Cohn, and on the back of it it has the endorsement among

Joseph Okin, cross.

others, "Service acknowledged of a copy of the within notice 17th April, 1916"; is that your signature? A Yes, sir.

Q And you signed that on the 17th day of April, 1916, did you? A Yes, sir.

Q And now you can look at that paper; is that the notice of the sale? A That was the first notice; I received notice twice, one I received in April and one I received some time in the fall.

Mr. Stewart. I offer the notice for identification.

(Marked Exhibit D. 1 for identification.)

Q And prior to getting this formal notice of the intended sale of the mortgage in question you had received letters, had you not, from Mr. Cohn or others that they would expect you to pay the note for which that mortgage was assigned when it fell due in June? A I don't remember; it may be, but I don't remember.

Q Do you know, Mr. Okin, when the note fell due for which you gave the assignment of \$21,500 interest in the mortgage in question? A I don't remember that.

Q Now, Mr. Okin, Mr. Saul Cohn was acting as counsel for you at that time? A Yes, sir.

Q And that note fell due in March, 1916? A I don't remember.

The Vice-Chancellor. Wait a minute, he says he does not remember.

Q Mr. Okin, about the time that that note fell due—in any event, didn't you go to see Mr. Williams about arranging some method of taking care of that note? A Not at that time.

Q Not at that time? A No, sir.

Q Did you around April, 1916, see Mr. Williams with reference to trying to raise money to take care of that note of Shiman's? A I maybe did; I don't remember.

Q You don't remember? A No.

Q Do you remember trying to arrange it through the Metropolitan Lumber Company—Jake Jacobson's company? A No.

Q You don't remember that? A No, sir.

Q You never talked to Mr. Williams about arranging for the Metropolitan Lumber Company to buy this mortgage in? A Oh, I may have tried; I don't remember.

Joseph Okin, cross.

Q You do not remember any conversation that you had with Mr. Williams about that? A No, I might have tried; I had a right to try everybody to get money.

Q Now, isn't it a fact, Mr. Okin, that before this agreement, which has been offered in evidence here, between you and Mr. Bernstein of the one part and the Broad & Market National Bank of the other, that conversations were had between you and Mr. Williams, and as a result of those conversations this agreement was drawn up? A Yes, sir. 10

Q And Mr. Saul Cohn was acting as your counsel at that time? A Yes.

Q And wasn't it understood by everybody at that time that this agreement fully set forth all the arrangements entered into? A Yes, sir.

Q You understood at that time that the agreement that you were signing did not fully cover all your rights in the premises? A I understood that the agreement was made for the purpose 20

to cover up the \$3,000 bonus which I gave to the Broad & Market Bank.

Q At the time this agreement was made you were in rather straightened financial circumstances, were you not?

Mr. Newman. I object to that question.

The Vice-Chancellor. I suppose it is very evident he did not have \$19,000 at that time or he would not have gone to the bank. 30

Q Did you try to make an arrangement with Waldo Genung, of Cook & Genung, to buy their mortgage for you? 30

Mr. Newman. I object to the question.

The Vice-Chancellor. I overrule the objection.

Q Did you? A I think I did.

Q Did you tell him the only way to save his interest in the mortgage was to pay off the Broad & Market Bank and Nathan Shiman? A Yes, I think I did.

Q Did you tell him at that time that Mr. Williams had refused to buy the mortgage in to protect himself? A Not that I remember of. 40

Q Did you tell him that Mr. Williams had told you that he did not want to buy that mortgage at all if anybody else would buy it? A I don't remember that.

Joseph Okin, cross.

Q Did you tell him that Mr. Williams had told you that he would not buy that mortgage except to protect his own interest and that all he would pay for it was the amount due Shiman and the \$15,000 that was due the bank? A I don't remember.

10 Q Did Mr. Williams tell you that the only way that he would buy that mortgage in at all was that if nobody would pay the amount due Shiman Brothers and the amount due the bank, but if there was anybody else that wanted to pay more than that he could have it? A Before we make the arrangement to give me \$3,000 he did tell me that.

Q He told you that? A Yes.

Q Now, Mr. Okin, at the time that this sale took place Shiman Brothers had a \$19,500 interest in it plus about \$300 or \$400 interest additional, didn't they? A Shiman had an interest of \$19,810.67 in it.

20 Q And the Broad & Market National Bank had \$15,000 interest in it plus some interest, didn't it? A Yes, sir.

Q And at the time the notice was served on you in April, 1916, Cook & Genung had an interest in there of \$12,500, or thereabouts, didn't they? A I think they had a \$10,000—about \$10,000.

Q And that Saul Cohn, as trustee, nominally and others had an interest in these of about \$12,000? A Yes, sir.

30 Q And after that came the assignment to somebody else, I think, of \$2,500? A Yes, sir.

Q Now, at the time that this notice was served on you in April, 1916, what interest did you have in that mortgage? A I had made that arrangement with Cook & Genung; I gave them another mortgage so that they cancelled their interest in this mortgage.

Q That was done in the summer long after this notice was given? A I don't remember, but I have made arrangements with Cook & Genung and I have them—

40 Q Was not that arrangement with Cook & Genung made long after this notice was served? A I don't remember that.

Q Why, it was made after the notice was served anyway, wasn't it? A I don't remember.

Q Well, why would you have gone to Cook & Genung to try to get them to take an interest in some other mortgage prior to the service of this notice if this mortgage was going to be sold

Joseph Okin, cross.

out then? A They were not satisfied with that and therefore I made an arrangement with Mr. Cohn to give them another.

By the Vice-Chancellor.

Q You said in the summer of 1916? A I think it was made between the summer and the fall.

Q This notice was served on you in April? A This was the first notice; I had one notice served in April, and I think I have made arrangements and then when I could not arrange—

10

By Mr. Stewart.

Q After this notice in April was served it called for the sale of this mortgage on Monday, the 26th day of April, 1916, at ten o'clock in the forenoon at the office of Saul Cohn, you went to Nathan Shiman or through your counsel, got in touch with them and asked them to postpone the date of this sale to see if you could raise money, to see if you could pay it off? A I think I did.

20

Q And these other notices that you got were notices of adjournments of this sale from time to time? A I don't know, but I think I have received notices—

Q Of adjournments? A I don't remember if they were notices of adjournments.

By the Vice-Chancellor.

Q Where are those notices; have you got them? A No, I think my counsel have them.

30

By Mr. Stewart.

Q Now, Mr. Cohn and you were unable to make arrangements down to the summer of 1916 whereby you could pay Shiman Brothers off; isn't that right? A Yes, sir.

Q And as a result of your inability to make arrangements Shiman Brothers, through Saul Cohn, informed you that this mortgage would be sold on the 31st day of October, I think it is 1916; isn't that right? A Yes, sir.

Q Now, about two weeks before this mortgage was actually sold by public sale in Mr. Saul Cohn's office there was an occasion when the thing was put up for sale, and you were there and Mr. Williams was there and I was there; isn't that right? A I remember I was there and Mr. Williams was there, but I don't remember that you were there.

40

Joseph Okin, cross.

Q You were there at Mr. Cohn's office when this mortgage was put up for sale, were you not? On the first occasion it was not sold, but an adjournment of two weeks was taken or thereabouts? A I was there twice to see if the agreement was drawn.

10 Q No, no; this agreement which has been offered in evidence and marked C. 8, which is the agreement between you and Bernstein and the Broad & Market Bank, is dated 30th October, 1916, and it recites, "Whereas the Broad & Market Bank this day purchased the bond and mortgage," and goes on and describes— Now, do you remember that about two weeks prior to October 30, 1916, you were at Mr. Saul Cohn's office when the sale was to take place of this same mortgage? A I don't remember that.

Q Do you remember being there with Mr. Bernstein? A Yes, sir.

20 Q When the sale was to take place? A I don't think it was when the sale was to take place.

Q Do you remember being present when Mr. Williams was present at any time when the sale was to take place when it was postponed? A Yes, sir.

Q Now, why was it adjourned that time? A In order to have the agreement drawn, to give a chance to draw the agreement between the Broad & Market Bank and ourselves; two weeks they have adjourned at that time.

30 Q Didn't you tell the Court that this agreement whereby the Broad & Market Bank was to take title to this mortgage nominally for your benefit was arrived at; the terms of it were arrived at in August of that year; is that right? A No, sir.

Q Well, now, when did you and Mr. Williams come to an agreement as to the bank purchasing the mortgage for your benefit? A I don't remember this, but as I explained before, it is prior to the sale; it was between six weeks and two months we have made that arrangement.

40 Q Why was the sale delayed for six weeks or two months after you and Mr. Williams had come to an understanding as to the terms upon which the bank was to purchase that mortgage? A Because Mr. Williams tells me you have got to get the money, it will probably take two months because there are so many assignments over there that he would like to clear up and therefore it would take about six weeks' time.

Joseph Okin, cross.

By Mr. Lindabury.

Q Did you read over this agreement before you signed it? A I did.

Q And you knew, according to its terms, that it shows the bank is to be absolute owner of the mortgage? A Yes, sir.

Q Was that mentioned? A Yes, I think the arrangement was made before; it was made only to protect the \$3,000; it was not my intention that I signed it for the purpose that the mortgage belonged to the Broad & Market Bank that they were the original owners; my understanding was that I paid \$3,000 bonus.

10

Q You knew what the agreement contained? A Yes, sir.

Q You knew that in accordance with the agreement that the Broad & Market National Bank appeared to be the absolute owner under the sale? A Yes, sir.

Q And you knew that? A But I trust the Broad & Market Bank.

20

By the Vice-Chancellor.

Q You knew that that was what the agreement provided for? A Yes, sir.

By Mr. Lindabury.

Q Now, at the time you had assigned to various people the full value of that mortgage? A Not at that time.

Q About that time? A Not at that time when I signed the agreement.

30

Q Have you paid the amounts that you owed to the people to whom you made assignments on that mortgage? A Yes, sir; they have been cleaned up, I gave to every one different securities.

Q Have the assignments been cancelled of record? A I think they have.

Q Are you sure of that? A The record shows that they were reassigned.

Q Did you pay the Geismar mortgage? A I gave them some security; I sold them another mortgage at West End on which I allowed them—I don't remember; I think I allowed them \$1,000 or \$2,000.

40

Q You say at the time you cleared up some of the assignments by giving subsequent security? A Yes, sir.

Joseph Okin, re-direct.

Q Now, listen to what I am asking you. I asked you whether you had paid the Geismar mortgage?

10 *The Vice-Chancellor.* I don't see how that is material. The real material question is whether at the time he made the agreement with the Broad & Market National Bank, dated October 30, 1916, he had cleared up all of those interested in the mortgage that were subsequent to the Broad & Market Bank; he says he had; whether he had actually paid them does not make any difference.

Q Do you understand the question as directed—at the time when this sale took place and the agreement was made with the Broad & Market Bank whether at that time you had paid Cook & Genung and Cohn, trustee? A Yes, sir.

Q Prior to that time? A Yes, prior to that time.

20 Q You had paid them by giving them some other security? A Yes, sir; I gave them some other security.

Q Did they release you? A Yes, sir; I have got the releases in my office.

Q Did you take any evidence that they had released their interest in it? A Yes, I took the assignment of it; I have the assignment in my desk; if you want to see it I will bring it here this afternoon.

Re-direct examination by Mr. Newman.

30 Q Mr. Okin, in what manner was the Geismar mortgage indebtedness taken care of? A I don't remember exactly; I had a first mortgage to the amount of \$8,000 and I only took from Mr. Geismar \$7,000; I transferred the first mortgage to Mr. Geismar and he gave me \$7,000.

Q Isn't it the fact that that transaction resolved itself into a suit brought by Mr. Geismar for a deficiency judgment on the South 11th street property foreclosure and that the settlement of \$1,200 assignment was in settlement of the \$1,200 deficiency?

40 A Mr. Geismar had a bond; I think I signed a bond for \$1,200 which I paid him; with that mortgage I only took \$7,000 and I gave him a mortgage for \$8,000, and he withdrew the suit against me.

Q Isn't it the fact that at the time in question Mr. Geismar had an action pending against you for some \$2,000 for deficiency on the bond and that an adjustment was made by an assignment

Saul Cohn, direct.

of the mortgage of \$1,200 in the Majestic Theatre property and an assignment on the Long Branch property, the mortgage in that instance being held by one _____ as assignment of the \$8,000 mortgage for \$7,000? A Yes, sir.

Q In other words, on this \$1,200 mortgage the assignment was never paid? A A thousand dollars I gave him on that mortgage—I settled for that. 10

Q That \$1,200 was in part payment of the suit that was pending against you for a deficiency judgment on the South 11th street property? A That was \$1,200 and I signed a bond on which I gave him \$1,000 on the West End property.

SAUL COHN, sworn.

Direct examination by Mr. Newman.

Q Mr. Cohn, you acted as attorney for Nathan Shiman and others, did you not? A Yes, sir. 20

Q And you also acted as attorney for Mr. Okin? A Yes, sir.

Q Now, bringing your mind back to the original transaction before the sale under the Shiman mortgage, did you have charge of that? I am talking about the original power of sale and the assignment to Shiman; did you have that in charge? A I had complete charge of it for both sides.

Q Did you have to do with serving of notices that you were going to sell under the power of sale? A I did.

Q Was there any intention at that time to oppress Mr. Okin? A There was not, as I remember it; if I may be permitted to answer the question more fully. In the spring of 1916, the note which Mr. Okin had given two years prior had become due; he had in March, 1914, I think, issued a note for \$19,000, which was the balance then due Shiman; I procured that loan from Mr. Shiman, who is a friend of mine in New York; he helped Mr. Okin out and \$6,000 had been paid on the original mortgage of \$25,000; then Mr. Okin wanted a two years' period to pay what he owed Shiman and I procured that for him and he made an assignment to Shiman and I took an assignment with complete power of sale to avoid the necessity of judicial proceeding to collect the amount; that is the assignment from Joseph Okin to Mr. Shiman; when the note became due in the spring of 1916 Mr. Shiman wanted to collect this money and I sent for Mr. Okin and I told him that they would like to have the money, and he said, "Can 30 40

Saul Cohn, direct.

I have some time within which I will get it," and I said, "I will get you all the time you need," because, I said Mr. Shiman took this loan because I was morally behind it; I knew, of course, having represented Mr. Okin, that he had made a series of assignments between 1914, the spring of 1914, and the time that this note of his to Shiman became due he had made a series of assignments to various of his creditors by which from a mathematical standpoint he had no interest in the mortgage, because his assignments practically totaled all his interest in the mortgage, but as those assignment I held as trustee for persons who had been good enough to endorse his paper which was held by the City Bank and others I held as security. Subsequently Mr. Okin liquidated from his own resources all interest in the notes in which these folks were accommodation endorsers and the beneficiaries of this trust to me assigned their interest in the mortgage.

Q Was that before the sale? A Yes, that was before the sale. Now, Cook & Genung held an assignment of \$11,000 and Waldo Genung and myself made a deal which suited him at the time, we gave him a mortgage in another property.

Q I don't really want to go into that. A (Continuing.) But at the time that I was ready to exercise that power of sale Mr. Okin, through me, through the assignment held by me, had a complete real interest in the mortgage with the exception of the Geismar mortgage of \$1,200; I do not remember the exact details; I am a little afraid my memory has not possession of some facts—that was the only thing we did not have in.

Q Now, let us go to the power of sale under the mortgage? A Yes.

Q Now, under this power of sale did you arrange for the sale? A Yes, sir.

Q With whom did you arrange it? A Well, there was quite a period that had elapsed between the due date of the note and the date of the sale; it was between March and practically the 1st of November of that year; up to that time I had had a number of talks with Mr. Stewart and Mr. Williams and Mr. Okin over the phone; most of the adjournments were requested by Mr. Okin; I am quite positive in one or two instances Mr. Williams called me up on the phone and we arranged to adjourn the sale for a week or two. For a month I was not present at any of the negotiations that Mr. Okin had with Mr. Williams, but,

Saul Cohn, direct.

of course, I knew that such negotiations were going on and I had the power from Mr. Shiman to extend the collection of his money for a reasonable period on the agreement.

Q Did you have any talk with Mr. Williams or Mr. Stewart with regard to the conduct of the sale? A Yes, sir.

Q What was the talk and when was it had? A Some time (10
in the fall of 1916, I had a talk with Mr. Stewart with regard to
the method to be followed to give him such a title to this mort-
gage as he thought he should have; I had served a number of
notices and he wanted positive proof that these various persons,
Geismar and others, had been served, even the persons who ap-
peared to have an equitable interest in that mortgage, inasmuch
as I was named in the mortgage as their trustee; of course, I
proposed that we go through the simple plan of buying the mort-
gage at the sale and assigning the mortgage to the bank, but (20
Mr. Stewart absolutely refused to have it that way; he wanted
it the way it was finally had; he thought that the Broad & Mar-
ket Bank would be better protected with his standpoint for the
bank, he would rather have it that way, it made no difference to
me, because I was getting Mr. Shiman's money, and I was will-
ing to do it the way Mr. Stewart asked me to do it. It was my
intention that Mr. Okin take an assignment of the note and then
it be assigned to the bank, but Mr. Stewart wanted it—

By Mr. Stewart.

Q Are you testifying now—when you say that you wanted (30
Mr. Okin to take an assignment of that Shiman mortgage at the
sale. Are you testifying now meaning that you told me that?
A I believe I said to you.

By the Vice-Chancellor.

Q Did you tell this to Mr. Stewart or not? A My best
recollection is that I did.

By Mr. Newman.

Q In any event, because of offers that you had with Mr. (40
Stewart the rate was held and you conducted the sale, did you?
A Yes, sir.

Q Do you remember that? A Well, there was not very much
talking; we all knew what we wanted.

Saul Cohn, direct.

By the Vice-Chancellor.

Q What was done was carried through by you for Mr. Shiman? A Yes, sir.

By Mr. Newman.

10 Q Mr. Stewart was there? A Yes, and I am quite sure Mr. Williams was there and Mr. Stewart was there; I had prepared a number of assignments which I am quite sure Mr. Stewart saw there and which he approved as to form; and then he wanted me to make some affidavits which I gave him; I think he has all those papers as to the way the service was made of these subsequent encumbrances and I gave him all these incidental papers that he wanted and they gave me at that time a check, not for \$19,000, but I think for \$16,000, because Mr. Okin gave me
20 \$3,000 in some other form, quite a complicated form, but in a form that was satisfactory to Mr. Shiman.

Q At that time did the bank give this check to you or how was that conducted? A Well, I think they gave me a cashier's draft for the amount.

Q Do you know for how much? A It must have been for \$16,000, because I know it took a year or two to get the other \$3,000 for Mr. Shiman.

Q Now, did you have any conversation with Mr. Williams or Mr. Stewart as to how the money was to be advanced to purchase the mortgage on the arrangement between the parties? A
30 I had no part in the conversation between them; all I had to do was to consummate the arrangements at the office.

Q Were you present when the notes were delivered? A I don't think I knew they were delivered because at the closing I brought up the subject of the notes and Mr. Okin said, I need not bother with them; he and Bernstein had gone into the bank and made the necessary arrangements; there were no notes passed over at the sale that I can remember.

By the Vice-Chancellor.

40

Q Were you present when the agreement between Mr. Okin and Mr. Bernstein on the one part and the Broad & Market National Bank on the other part? A I am quite certain I was; I think I was the subscribing witness—not as a witness—I took the acknowledgment.

Saul Cohn, direct.

By Mr. Newman.

Q At that time do you remember who else was present when this agreement was signed? A Mr. Bernstein was there and Mr. Williams, whether Mr. Bernstein was there at the time Mr. Williams was there I am not quite so clear; it is three years ago, but Mr. Stewart was there and myself and Mr. Williams and Mr. Okin. 10

Q Was there anything said at that time in addition to the agreement as to the arrangement between the parties? A I don't think so; all those things had been settled between them; I had nothing to do with that.

Q You said something about receiving \$16,000, I think that was the amount for the Shiman interest? A Yes, by a bank check.

Q Then you said something about having received \$3,000 subsequently? A Well, when I settled with Shiman I was \$3,000 short and Mr. Okin gave me a mortgage for \$3,000 on property on Cedar and Spruce streets and I collected that and gave Mr. Shiman what he owed him and I gave Mr. Okin the difference. 20

Q And that was paid by the Broad & Market Bank? A Yes.

Q That is the \$16,000? A Yes, sir.

Mr. Newman. I call for the production of a cashier's check of the Broad & Market Bank made at the time this transaction was consummated.

(Check produced.) 30

Q Now, Mr. Cohn, looking at this check, dated November 13, 1916, to the order of Nathan Shiman for \$19,810.67? A Yes, I got that check and I sent it over for endorsement and I gave Mr. Okin \$3,000; I know we were \$3,000 short, because I went through this other transaction; I base my statement on the fact that we had \$3,000 coming to us for a long time; I know that we were short \$3,000 for some time.

Q Now, Mr. Cohn, is there any other circumstances in connection with this matter that you are familiar with that would through any light on it? A I don't think so. 40

Mr. Newman. I offer in evidence a check dated November 13, 1916, of the Broad & Market National Bank to the order of Nathan Shiman, David Shiman and the Aetna Realty Company, for \$19,810.67—cashier's check—and

Saul Cohn, cross.

bears the endorsement of Nathan Shiman, David Shiman and the Aetna Realty Company, which has passed through the bank and has been collected.

(Check admitted in evidence and marked Exhibit C. 10.)

Cross examination by Mr. Lindabury.

10 Q You represented Mr. Okin in the preparation of this agreement? A Yes, surely.

Q And you approved that agreement as being according to the agreement of the parties? A Yes, sir; I approved that agreement as it stands.

Q And you approved representing Mr. Okin and it contains the agreement made as communicated to you by Mr. Okin, is that right? A Yes, it contains my opinion of what they were trying to do at the time; I don't know if it covers all the agreement
20 that they had between themselves.

Q Did it cover the agreement as made by Mr. Okin with the bank as communicated to you by Mr. Okin or somebody else? A Substantially it does; but I do not know if he did communicate it to us; you do—Mr. Stewart and I had several talks about that agreement, it was in various forms before it was finally got into this form.

Q It was the result of conferences between you and Stewart? A Yes, sir.

Q Stewart representing the Broad & Market Bank and you representing Okin, is that right? A Yes.
30

Q And you had been advised of all that Okin wanted in the agreement? A Yes, sir.

Q And you insisted on it going in as far as the bank would agree to it? A Yes, sir.

Q And it was finally finished in this form and executed as we have got it here? A Yes, sir.

Q Do you know whether there was an agreement between the parties drawn up that contained things in the agreement not what the parties wanted? A Mr. Okin related it to me—

Q Can you answer my question "Yes" or "No"? A I can; I can tell you what Mr. Okin told me at the time.
40

Q You do not quite get my question. What I am asking you is this: Whether these negotiations resulted in this written instrument that is marked C. 8; at the conclusion of the negotiations with Mr. Stewart when you handed that fin-

Saul Cohn, cross.

ished document to Mr. Okin and he to his client, did you know then that there was an agreement between Mr. Okin and the bank that was different from this written agreement? A You are asking me to consider whether I think it was different; it was not by implication; it was my idea of what that understanding was and that really did not militate against those connected in any way. I do not think that that paper was contrary to that arrangement; I thought that Mr. Williams and Mr. Okin would never disagree, he had been kind to Mr. Okin for many years; Mr. Okin was trying hard to pay his creditors and they both understood the situation thoroughly; Mr. Williams knew of all those assignments and he knew what Mr. Okin's purpose was in making this transaction.

10

Q There was put in this agreement this clause, Mr. Okin: "And the parties of the second part (this man and Bernstein) further covenant and agree that they have no equity of redemption in said mortgage except such as is provided for in this agreement." You remember that clause going in? A I remember it.

20

Q And that they agreed to it at the time, and the bank insisted on it going in? A I think Mr. Stewart wanted it in and I saw no objection to it.

Q Mr. Stewart wanted it in? A Yes, Mr. Stewart wanted it in and I agreed to it.

Q And you agreed to it? A Certainly.

Cross examination by Mr. Stewart.

30

Q You say that there were several drafts of agreement before we finally came to the one which was signed? A Yes, sir.

Q And the fore part of the agreement which was signed, the first three pages, were drawn in your office, were they not? A I would have to be a magician to say whether we used those sheets.

Q Well, I will call your attention to the last sheet, which is on different paper and different type? A I think the fourth sheet was drawn in our office and possibly the balance was not.

Q That is a fact as a matter of fact? A Yes, sir.

40

Q Isn't it a fact that when we came to sign this agreement up, I came to your office with a complete agreement, that there was a date left out in the beginning, which I had you put in, June 1, 1916; that is in your handwriting on the first page? A I think so.

Saul Cohn, cross.

Q That on the third page of the agreement is in my handwriting? A Yes, sir.

10 Q "Of said mortgage to be subject to a first mortgage of \$6,500 now on said premises or if any mortgage in like sum to be upon said premises, to take the place of the mortgage now upon said premises"; and that was put in there at your request so that Mr. _____, who ever were the owners of the property, if Mr. Okin should ultimately become the owner of the property, he would have the right to have the \$50,000 mortgage abrogated? A I think it would be dangerous to say who put that question. I would rather say that we both agreed on it.

Q Oh, we did both agree to it? A I think that being a provision for Mr. Okin I may have asked for that nominally.

20 Q Then the last page as I had drawn it did not meet with your approval and you drew the last page in your office to meet with your approval of that agreement? A I think we discussed the last page; we both thought that this was better than what was drawn, but whether it all came from me or not I can't say

Q And then the sale had taken place some days after this agreement was signed? A I think it was about a week or ten days later.

Q And Okin and Bernstein signed it in your office and then it was taken from your office over to the bank and the certificate of the bank put on it? A I think so; the details I can't remember very well.

30 Q And this transaction—well, the sale took place on October 30th, the drawing of the agreement and other arrangements took about two weeks, so that the instrument in question, which was delivered to you was acknowledged on the 30th day of October; the same day as it is recorded? A I have a good deal of trouble in trying to remember these things now.

By the Vice-Chancellor.

Q Then, do you say that it was not signed by the Broad & Market National Bank until ten days or thereabouts thereafter?

40 A No, I think that that agreement is about a week or ten days after the date of the sale.

By Mr. Stewart.

Q The date of the sale was the 30th of October? A Well, I will tell you what happened: Then Mr. Okin and Bernstein,

Saul Cohn, cross.

who were in the office, signed this and I turned them over to you and I got them back some time later and I recorded them some time later.

Q And the fact is that this agreement in its entirety was all fixed up and allowed to be signed by Okin and Bernstein and the bank on the day that the sale took place? A Yes, sir; 10
it was intended to be a simultaneous transaction, the purchase by the bank and the making of this agreement by Okin; the turning over of the bank drafts to me, so the carrying out of one general plan to fix this situation up.

By the Vice-Chancellor.

Q I call your attention to the draft and ask you if that fixes the date of the delivery of the paper delivered to you? A I would say that this draft and the duplicate were delivered at 20
the same time.

Q On the same day that the draft bears date? A Yes, sir; I think the way I got it, I sent the papers to Mr. Stewart and he returned them to me with the bank's signature and the bank's draft.

By Mr. Stewart.

Q See if I can refresh your recollection as to the difference in the date upon which the Broad & Market agreed to sell this bond and mortgage of Okin and Bernstein and the date of the draft to Bernstein; wasn't it a fact that on the day that this 30
sale took place Mr. Bernstein was not present at the time of the sale and was present immediately after the sale and that he had to hurry out for something? A He must have been there because I took his acknowledgment as of the 30th.

Q But do you remember that he had to hurry out and didn't stop? A I can't remember that.

Q And the result was that while Okin and Bernstein had signed the two papers in your office they were left there until word was gotten over from the bank or from me and that Bernstein had delivered his note to the bank and the bank was ready 40
to sign the agreement? A I cannot remember that; it don't make any difference; I sent you the agreements when I had my people sign them and then I waited your sending in a check and I paid no attention as to why the interval elapsed in the matter.

Saul Cohn, cross.

Q Mr. Cohn, you said if I recall correctly that one thing that held up this sale was that I insisted on notice being served on certain parties in interest; am I quoting you correctly? I don't want to put words in your mouth. A I don't recall saying that, but during the period between October and November, I saw you a number of times and you made some request about how you wanted it carried out.

Q I show you D. 1 I, which is the notice which you prepared and served on the various parties in interest as holders of assignments of interests in this \$60,000 mortgage and call your attention to the fact that it is dated April 14, 1916? A Yes, sir.

Q And that it is acknowledged by the Broad & Market Bank on the 15th of April, 1916, by Joseph Okin on the 17th of April, 1916; by Cook & Genung on April 26, 1916; by Jacob Fischel, solicitor for Joseph Meyer, on April 25, 1916; on the 15th of April, 1916, by Edward Beitman; on the 17th of April, 1916, by Philip Spies and on the 25th of April, 1916, by A. D. Marx? A Yes, sir.

Q Now, at the time that that notice was served you had not had any conversation with me about this thing at all, had you? A No, sir.

Q And that notice was the notice which you prepared for Shiman in order to carry out the requirements of the provisions of the assignments of the interest in the mortgage made by Mr. Okin to Shiman Brothers and the Aetna Realty Company, so that you might make a sale which would be legal, isn't that so? A That notice was pursuant to the power of sale.

Q And at the time that this notice was marked D. 1 I was prepared by you, you had no notice at all whether the Broad & Market Bank was going to buy this mortgage for their own interest or for Mr. Okin? A I had, sir.

Q But in what way did you get that notion that the Broad & Market Bank were going to protect their interest in that? A Mr. Okin had been to see them and had reported to me just what it was trying to do.

Q Well, prior to the service of this notice you had notified Mr. Okin that you were going to sell out that mortgage prior to the power of sale? A I told him they were going to get it started; I was not going to press him.

Q But the services of this notice on the various people was simply made by the people in your office so that the sale might

Saul Cohn, cross.

be legally carried on and not from any notice from my office? A Absolutely no.

Q And as to whether your notice was sufficient or not, with reference to the service of the notice on Jacob Meyer, which Mr. Fischel had signed as solicitor, and I quibbled on the question as to whether that notice was good or not? A I know between June 11th and the time that the sale was scheduled we had a number of talks as to whether we had served Geismar and you also wanted proof, as I recollect it, that the notice of the adjournment of the sale had been properly given, and I gave you, I am quite sure, some statement or affidavit, which you showed me recently, to satisfy you. 10

Q Now, Mr. Cohn, I will show you the copy which was served on me when the assignment from D. A. Marx, Philip Spies, Inc., and Emanuel Beitman was made on me on May 2, 1916, that was made for the purpose of showing that Marx, Spies and Beitman had no longer any interest in this mortgage and that Mr. Okin had paid them off? A It was made for the purpose of putting me in a position where I could assign the paper to any bank or any lender; it was made for the purpose of putting the mortgage in Mr. Okin's name so that he could use it as collateral. 20

Q And the other was so that Mr. Okin could use it as collateral, is that right? A Yes, sir.

Q Why was it put in Mr. Okin's name instead of Saul Cohn's? A Because I had at the time an interest in the mortgage with Mr. Okin personally; it was a personal matter between him and myself, and he made an assignment to me as trustee for those creditors and the purpose was to put the thing in such a position that there would be no trust declaration aforesaid that would encumber it in any way. 30

Q And could not that have been done by putting it in Mr. Okin's name? A Yes, but I was acting for these people, but in order to relieve the word of "trustee" that had been made to me; in order to get the record relieved of that outstanding trust—it was no declaration—they conveyed their interest to me.

Q You testified, I think, that on one or two occasions these adjournments were had at Mr. Williams' request? A I am quite sure Mr. Williams called me up on the phone. 40

Q Isn't it the fact that what did take place was that Mr. Okin had come in to see you and told you that he had not yet been able to arrange matters whereby he could raise money and

Saul Cohn, cross.

10 you called up Mr. Williams and told him that an adjournment would be had? A I think we had a number of conversations; I think on several occasions I called Mr. Williams up to find out whether his arrangement had been completed. I knew there was no other person who would take this mortgage because Mr. Okin had suggested no one else; it was only to call Mr. Williams up—I knew Mr. Williams quite well.

Cross examination by Mr. Newman.

Q I see that the assignment which has been marked C. 5, vesting the title from Shiman to the Aetna Realty Company, was recorded on the 13th of November, 1916? A Yes, sir.

Q So that the entire transaction as between the bank and Shiman was consummated on the day that that paper was recorded and delivered? A I think so.

20 Q The note and the whole thing is one date? A Yes.

Q Just one more question. There has been some reference made to this agreement, and Mr. Lindabury has called your attention to this clause in the agreement, “and the parties of the second part further covenant and agree that they have no equity of redemption in said mortgage except such as is provided for in this agreement.” What was the intent in placing that in the agreement?

30 *Mr. Lindabury.* I wish to object to any interpretation other than what the words say, on the ground that it is a written agreement.

The Vice-Chancellor. I think, Mr. Newman, the only thing Mr. Cohn can testify to is what was told him by Mr. Okin and for that reason it would be admissible. I am going to let Mr. Okin testify to it directly because what Mr. Cohn would say would be the result of a conversation which he said he had with Mr. Williams when the minds met, but to allow this witness to testify to what Mr. Okin told him I think would be improper.

40 *Mr. Lindabury.* I will withdraw my objection.

Mr. Newman. I am perfectly willing to let the agreement stand for what it is worth. I will offer this stipulation in evidence: “It is stipulated and agreed by and between the solicitors of the parties herein that it contains the original mortgage and also the various assign-

William Okin, direct.

ments showing the history of the title and the deed to the Federal Trust Company." It is a sort of abstract of title; it may assist the Court in arriving at the circumstances.

WILLIAM OKIN, sworn.

10

Direct examination by Mr. Newman.

Q Mr. Okin, you are the son of Joseph Okin? A Yes, sir.

Q And you are familiar with this transaction had with the Broad & Market National Bank? A Yes, sir.

Q And did you have occasion to call on Mr. Williams, the president of the Broad & Market National Bank prior to the sale under the Shiman assignment? A Yes, sir.

Q And did you have a conversation with Mr. Williams relative to the arrangement with the bank in regard to the purchasing of the mortgage? A Well, I came in on some other matter and while in there I brought the matter up and what Mr. Williams told me confirmed what my father told me about the arrangement.

20

Q Tell us what Mr. Williams said to you and you to Mr. Williams, as near as you can? A Well, I came in on some other matter, and I said I understood from my father that he has made some arrangement whereby you are going to take up that Shiman matter and he said, "Yes," and he said something about his just taking the bank over and it had some loans and he made up his mind he was going out to make some money for the bank.

30

Q Was there anything said as to how much? A \$3,000 was the amount we were to pay.

Q Was there anything said on that occasion as to how much the loan was to be and how it was to be secured? A Why, the conversation was that he told me he had arranged with my father that they were to pay Shiman \$19,000 due Shiman, and my father was to give him \$3,000 for that; that was, he took another note to cover the \$19,000, and take a mortgage and hold the mortgage to secure the notes he had.

40

Mr. Lindabury. I object to the conversation.

Mr. Stewart. I make the same objection.

The Vice-Chancellor. I will overrule the objections.

William Okin, direct.

Q Was there anything said as to who was to make the note?

A Not then; that don't come up then, but later on.

By the Vice-Chancellor.

Q Did you see Mr. Williams again? A Oh, I probably
10 stopped in there once or twice a week on different matters and
this would come up.

By Mr. Newman.

Q On other occasions what was said with reference as to who
was to make that note? A I don't remember that Mr.
Williams said anything about that; I took it that my father was
to be the maker of the note; on the other hand, I think I heard
differently.

Q Well, subsequently, after this transaction was closed did
you see Mr. Williams? A On different occasions; yes, sir.

Q And do you recall seeing him some time in last year when
20 the question of the foreclosure came up of the mortgage? A
Why, yes; I spoke to him between the time of the making of
this agreement with the bank and the time when the note became
due with reference to asking him to write the owners that the
taxes were not paid that he would start a foreclosure, and then
another time I came in to see him with reference to the interest
on this mortgage which was due, and he said he had made ar-
rangements with the Federal Trust Company and the Federal
Trust Company was giving him some money to pay up this and
30 the interest; later on when I came in I got the check; I think
the check was payable to myself and my father for the surplus
over the \$34,000.

Q When the interest became due you always received a check?

A Yes, sir.

Q And did you know that the notes were renewed every six
months? A Why, yes.

Q And then you know that Bernstein was the maker of that
note? A Yes, I did at the time this agreement was signed.

Q Now, do you remember in the spring of 1919, calling on
40 Mr. Williams after he had had some interview with your father?

A Yes, my father came up to me one day—

Q Tell us what was said by Mr. Williams? A Anyway,
after what my father told me I went over to Mr. Williams and I
told him the same thing, that he had nothing to do with that

William Okin, direct.

mortgage and I supposed that he had misunderstood and he said that is not what I told him; "I told your father, I have agreed to extend this mortgage for another year, that the owners have given me some outside security or money"; I don't remember whether he used the word "money" or "security," and if I remember rightly he mentioned the sum of \$12,000, and after some further talk he said we probably get the attorneys to give him an additional six months, and I said that it is hardly fair to extend the due date of this mortgage for another year, you ought to give my father another year's time—well, he said, "I will think it over and you talk it over with your father," and I walked out and I saw my father and told him that he was mistaken. He said you and your father have treated the bank all right and he patted me on the back and I walked out.

10

Q Did you go back and see them again? A I don't think I did; my father went back and saw them and he came back and told me.

20

Q You said something about your father having a year—you meant a year beyond the due date of the mortgage? A What I said to Mr. Williams was this.

Q The mortgage was then already due? A Yes, I guess it was then about a month past due.

Q Now, you said something about the owners, that Mr. Williams had said that the owners had given him additional security? A Yes, sir.

Q Who did he refer to as the owners? A Well, he didn't mention any name in particular; he said, they have given me some outside security; I asked him who they were and what the amount was, and he wouldn't tell me; he said, "You can rest assured that what he said was for my father's interest."

30

Q Do you know of your own knowledge who were the real owners of this property? A Well, I know that my father sold the property to Mr. Meyer and later his mother and Charley were the actual owners and the Federal Trust Company had the deed for the property and still have it.

ADJOURNED FOR RECESS TILL 2 P. M.

40

Harry Bernstein, direct.

AFTERNOON SESSION.

Mr. Newman. Can we stipulate on the record that Mr. Bernstein had no interest in this matter whatsoever and he was simply an accommodation?

Mr. Stewart. No.

10

Mr. Newman. Then I will call Mr. Bernstein.

HARRY BERNSTEIN, sworn.

Direct examination by Mr. Newman.

Q You are a brother-in-law of Mr. Joseph Okin? A Yes, sir.

Q And you are the Harry Bernstein mentioned in this transaction? A Yes, sir.

20 Q You know nothing about the transaction? A No, sir.

Q You never had a deposit or did any business with the Broad & Market National Bank? A Yes, I was a depositor there.

Q You signed your name to a note for \$19,810.67, did you not? A Yes, sir.

Q You were given nothing for that? A No, sir.

Q You know nothing about the transaction? A No.

Q You simply put your name to this note at the request of Mr. Okin? A Yes, sir.

30 Q And when this note became due at various times from November, 1916, up to the present time, you have always made the note? A Yes, sir.

Q And that is all you know about it? A Yes, sir.

No cross examination.

Mr. Newman. We rest. If there are any exhibits that we have not offered I suppose there will be no objection to offering them later.

Mr. Stewart. No.

40

Waldo S. Genung, direct.

DEFENDANT'S CASE.

Mr. Stewart. I will call Mr. Genung.

WALDO S. GENUNG, sworn.

Direct examination by Mr. Stewart.

10

Q You are connected with Cook & Genung, a corporation? A Yes, sir.

Q What is your position there? A Treasurer of the company.

Q And did Mr. Joseph Okin have a \$11,200 interest in the mortgage which is here in dispute now? A Yes, sir.

Q And the record shows that that was assigned on the 14th day of September, 1914? A Yes, sir.

Q After September 14, 1914, did you have any conversation with Mr. Okin about going after your interest in the Meyer mortgage? A Why, yes.

20

Q And that was in the summer of 1916? A It was about the time the notice was given that the Shiman interest was to be sold.

Q And did Mr. Okin tell you that he had seen Mr. Williams in reference to this sale? A Yes, sir.

Q Did Mr. Okin say anything to you about your protecting your interest?

30

Mr. Newman. I object to that; it is a leading question.

Q Did Mr. Okin have any conversation with you with regard to protecting your interest? A He did.

Q What was that conversation?

Mr. Newman. I object; I cannot see its materiality.

The Vice-Chancellor. I overrule the objection.

A Well, he suggested, according to my recollection, this conversation of which I speak was held after we had received notice of the sale of the Shiman interest in this mortgage. We received a notice that Shiman demanded his money and that the mortgage would be sold on a certain date. Then Mr. Okin came to see me about it and suggested that our company buy the mortgage to protect our claim—our third interest in this

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Francis Williams, direct.

\$60,000.00 mortgage, and we talked for and against the matter—discussing it in various ways.

10 Q Was there any further conversation regarding it? A Mr. Okin told me at one of the conversations with reference to the matter that the Broad & Market National Bank would make us a loan of \$40,000.00 on our paper—on our Cook & Genung paper, we simply attaching to our note this mortgage in case we wanted to buy it in.

Q Did you see Mr. Williams regarding it? A I did not.

Q Did Mr. Okin say that he had any talk at all with Mr. Williams? A He said the Broad & Market National Bank would do this. He did not say who agreed to do it for the Broad & Market Bank.

20 Q Did he at any conversation say anything with reference to the Broad & Market Bank protecting their interest in the mortgage? A Well, he said the Broad & Market Bank preferred not to buy it—otherwise they would not make a proposition to buy it, but if we would allow them to make our note they would lend us the money to buy it up.

Q Did you see Mr. Williams after that? A No; I don't think I did.

Q Do you remember at any time subsequent to that that you came in with Mr. Okin and saw Mr. Williams? A I don't recall it; no, Mr. Williams.

No cross examination.

30 FRANCIS WILLIAMS, sworn.

Direct examination by Mr. Stewart.

Q Mr. Williams, you are the president of the Broad & Market National Bank? A Yes, sir.

Q And did you handle the matter of the purchase of this interest in this Okin-Meyer mortgage? A Yes, sir.

40 Q When did you come to the Broad & Market National Bank as president? A I came as vice-president on December 1st, 1914.

Q And did you take active management of the bank at that time? A Yes, sir.

Q And at that time did Mr. Joseph Okin have this \$15,000.00 note in there which was subsequently enforced at the time of the sale of the Okin interest in the mortgage to Shiman Brothers? A Yes, sir.

Francis Williams, direct.

Q Now, when did you first learn that Shiman was going to sell out the interest of Okin in this mortgage in question? A Sometime in the spring of 1916.

Q And how did you learn it? A From Mr. William Okin.

Q And did you have at that time any conversation with him as to how he might handle the purchase of the mortgage? A Yes, sir. 10

Q Was there more than one conversation with Mr. William Okin regarding this matter? A Yes, many.

Q Did you have conversations also with his father, Joseph Okin? A I meant Joseph, not William.

Q Now, Mr. Joseph Okin says that when he received the notice of the sale from Mr. Saul Cohn that he saw you in reference to your handling the purchasing of this mortgage for him—for his benefit, is that right? A Yes.

Q Now, what took place at that time? A I told him that we were only interested to the extent of our note and interest in the mortgage of \$15,000.00 and that he go out and try to get some of the subsequent creditors to advance the money and pay the Broad & Market Bank off; that is what I would like to see done. 20

Q And what did he say to that? A He tried to do that, and he brought Mr. Waldo Genung in to see me.

Q What took place then? A Mr. Genung asked me if I had any objection to their buying the mortgage, and I said that I certainly had not, and I would be pleased if they would buy it, and he wanted to know if we were going to buy it, and I said if nobody else did we would because we could not afford to lose \$15,000.00. 30

Q What was the result of the conversation between yourself, Mr. Genung and Mr. Okin? A He said he would have to think it over, to see what to do to protect his interest; he never came in again.

Q And after that, did Mr. Okin come in and see you again regarding this sale? A He did.

Q Do you remember his coming in and talking about the Metropolitan Lumber Company? A He did, and Mr. Jacobson came in with him. 40

Q What took place then? A He wanted to know if we would advance the money to the Metropolitan Lumber Company if they would buy the mortgage, and we talked on that line a long time,

Francis Williams, direct.

and Jacobson came in finally and said, he was out, and that ended the negotiations as to the Metropolitan Lumber Company.

Q Did you have subsequent conversations with Mr. Okin relative to the purchase of this mortgage? A Yes, many of them—many of them.

10 Q Well, now, just tell us what the final conversation was that you had with him which resulted in the buying of this mortgage. A Why, he wanted to know if we would buy it in; I said, we had to if nobody bid any more, I certainly would buy it up; he said, well, I am making a loan of \$25,000.00; I said, you always have that option between now and the sale, and then you won't lose anything; I said, suppose you can't; he said, won't the bank do something in return for it; I said, that is not fair for you, and in order to buy it the bank will do what was fair, and we arrived at the agreement, which was as written.

20 Q How did it come that Harry Bernstein was brought into this deal? A Why, we already had the \$15,000.00 note; the bank was limited at that time to \$27,000.00, and even though we bought it in the examiner knew that it was so reported on all our reports, and the government knew that that \$15,000.00 note was secured by the interest in the mortgage, and in order not to conflict with the statute we simply took in their name.

Q When you say that it was reported to the government, was that prior to the sale? A Oh, yes, but I do not know how long.

30 Q Now, when you took the note of Bernstein and continued the note of Okin, why did you take any notes at all? A Simply as a matter of record; I understand we have no mortgages in the bank; the note kept me in touch with the transaction and with the agreement that I was to turn over the excess interest to him.

Q That is under the agreement? A Yes, under our agreement.

Q Does the bank have any real estate ledger or did it at that time? A No.

40 Q Did it have any mortgage ledger at that time? A No.

Q Mr. Okin said that he reported to you, if you offered to sell him this for \$34,000.00 and \$3,000—that the arrangement was if they gave you \$3,000 the bank would foreclose when the mortgage was due, and if they bought it in they were to have a further year to redeem? A That is not true.

Francis Williams, direct.

Q Did you ever have any arrangement with Mr. Okin and Mr. Bernstein, either or both of them, that the bank was to hold this as a pledge for their notes? A I did not.

Q What was the arrangement as between the agreement being a pledge for the notes or the notes being a pledge for the agreement? A It was explained to Mr. Okin that these notes were simply taken as a matter of convenience to the bank. 10

Q Mr. Saul Cohn testified that his recollection was that these adjournments were made at your request; what do you say as to that? A Why, his recollection is at fault.

Q Can you explain how it came about that these adjournments were had after conversation that you and Mr. Okin had? A They were all at the suggestion of Mr. Okin; I simply called up to make sure (I think Mr. Cohn will bear me out) there was to be no sale at which he was not there, so that our interest would not be wiped out. I was very careful about that, so that our interest would not be wiped out; that was our only interest in calling up Mr. Saul Cohn, to ask him about that. 20

Q There were several adjournments had between the original notice and the final sale? A Yes, sir; several.

Q How was the \$3,000 paid which is recited in the agreement, as part consideration for this? A I think we had a blank check; I think Mr. Shiman gave Mr. Okin a \$3,000 check; I am not sure about that.

Q Now, William Okin testified that he found the taxes were unpaid and he came and reported that to you? A Yes, sir. 30

Q And he said you told him to see Mr. Cohn? A Yes, sir.

Q And at one time that the interest was in arrears? A Yes, sir, and I called up Mr. Smith about it three or four times.

Q Now, Mr. Williams, recite the alleged conversation between you and him in which he says that Williams told him that he (Williams) had received additional security from these people and that he (Williams) had given a one-year extension; is that right? Did you have a conversation with him in which you told him that? A That is not true; but I must have been given something or I would not extend the time; I never said I had extended it; and I never said I was given any additional security. 40

Francis Williams, direct.

By the Vice-Chancellor.

Q When he said so, was it true or not? A I told him I would not tell him anything about it; I told him his right was in the agreement; I told him if he wanted to buy the mortgage in he could have it.

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By Mr. Newman.

Q Well, did you extend the payment of the mortgage, and did you accept any additional security at that time? A We never extended the time in which the money will be paid, under which it will affect Mr. Okin. Now, I don't think—

The Vice-Chancellor. It is a question, Mr. Stewart; what are Mr. Okin's rights? If I find the facts as the complainant contends, will you still say that the agreement you made would not affect those rights?

20

The Witness. You are asking about confidential matters of the bank, and unless I am instructed to answer I will not answer. I don't think you have any right to inquire into outside matters of the bank.

The Vice-Chancellor. Mr. Stewart, I do not see how I can say it will affect Mr. Okin's right unless I know what the substance of the arrangement is that has been made; I don't care who it is with; I don't think it is material.

30

The Witness. I can tell you privately, your Honor, what the arrangement was.

Mr. Newman. You can give it to the Court later, and the Court can determine whether it is a proper matter to go into the record or not.

The Vice-Chancellor. Go ahead; I think we will do it that way.

By Mr. Stewart.

40

Q Mr. Joseph Okin, I think, testified that he called to see you and said that his son William had told him that additional security had been given and that you had given a year's extension of time to these people, not naming whoever they happened to be, and that he said to you, "What right have you got to give an extension, that is my mortgage, or words to that

Francis Williams, cross.

effect, and that you said the mortgage was absolutely owned by the bank"; can you recall such a conversation? A That is true.

Q Did you at that time call Mr. Okin a "squealer" and other kinds of names? A No.

Q Mr. Williams, did you get from Mr. Meyer this paper which I show you? A Yes, sir. 10

Q And was that gotten before you purchased the mortgage at the sale? A It was.

Q At the date indicated at the bottom of it? A Yes, sir.

Mr. Stewart. I offer the paper in evidence.

(Admitted and marked D. 1.)

Mr. Stewart. I offer affidavit of Mr. Saul Cohn in evidence.

(Admitted and marked D. 2.)

Mr. Stewart. I offer in evidence two notices. 20

(Admitted and marked D. 3 and D. 4 respectively.)

And I offer the original notice with acknowledgment on.

(Admitted and marked D. 5.)

Cross examination by Mr. Newman.

Q Now, Mr. Williams, without telling us about any agreement or any security or the name of any individual that you may have received anything from or made any arrangement with, let me ask you this: what that arrangement or agreement or understanding was that impels you now to refuse to foreclose the mortgage. 30

Mr. Stewart. I object to that question.

The Vice-Chancellor. I will sustain the objection.

Mr. Newman. I take an exception to your Honor's ruling.

Q Let me ask you another question, without naming the individual; was not this arrangement or agreement made for the benefit of the present owners of the property? 40

(Same objection, same ruling—and exception.)

The Vice-Chancellor. I will state for the record that I have talked with Mr. Williams on the subject of this agreement or whatever it may be, and he stated for the

Francis Williams, cross.

10 record that whatever his agreement is it is in writing and is expressly subject to whatever rights Mr. Okin may have in the mortgage, whether the rights as are contended for by the complainant or whether they are such as are contended for by the defendant, and I suppose the written agreement will be produced to me to see if I desire it.

Q Now, Mr. Williams, your bank bought this mortgage? A Yes, sir.

Q You are the owner of the mortgage? A Yes, sir.

Q At the same time that your check dated November 13, 1916, was delivered to Mr. Shiman over the purchase price, you took back a note for a like amount made by Mr. Bernstein? A Yes.

Q And you took Mr. Bernstein as the maker of the note at that time because Mr. Okin at that time owed the bank \$15,000.00 and you could not have the same maker? A Yes.

20 Q You received at the same time \$3,000 in cash, did you not? A Either in cash or something; I got \$3,000.

Q So that in reality if you received \$34,000 you received all that was due you; isn't that true? A \$34,000.

Q \$31,000? A No.

Q Why do you say that? A Because I have an agreement to pay \$34,000.

Q But the \$3,000 that you are asking to be paid was not for any money loaned? A It was in the agreement.

30 Q So that the \$3,000 you are to receive was because of the fact that it is stated in the agreement? A Oh, yes, sir; certainly.

Q That is your point? A Yes, sir.

Q You took these notes and they were renewed every six months? A Yes, sir.

Q You have stated that you had no real estate ledger or no mortgage ledger, is that correct? A Yes, sir.

Q You carried these notes as an asset of the bank, didn't you? A Yes.

40 Q And the notes were live assets and renewed from time to time? A Yes, sir.

Q You didn't carry the mortgage as an asset of the bank? A Yes, sir.

Q Did you carry both the notes and the mortgage as assets of the bank? A Yes, sir.

Francis Williams, cross.

Q Have you your books here? A No.

Q You were asked to produce your books? A That is pretty broad; if you had specified the book I would have brought it; you might have tied up the whole bank; if you will tell me what book you want I will produce it.

Q Now, as a matter of fact, then you carried both the notes and the mortgage as assets of the bank? A Certainly, the Bank Examiner saw them every time he made an examination. 10

Q I didn't ask you that. A I am simply telling you, the Bank Examiner was told the whole transaction.

Q But, as a matter of fact, you claim there is nothing due on those notes, don't you? A How do you mean?

Q Is there anything due the bank on these notes? A There is \$34,000 due under the mortgage.

Q And nothing due on the notes? A Not after the mortgage is paid up. 20

Q Well, assuming the mortgage is not paid? A Then I have the notes as collateral.

By the Vice-Chancellor.

Q At what value are you carrying the asset of the mortgage? A Just at the amount of the mortgage.

Q Well, that is \$59,000? A No, I didn't mean that; I meant \$34,000, the price we paid for it.

Q And you are also carrying the notes at \$34,000? A Simply as a matter of record. 30

By Mr. Newman.

Q Did you put them both in your assets? A Oh, no, sir; we are carrying the mortgage and the notes as one.

Q Then you are carrying the notes as a live asset? A Certainly, I told you they are in our records.

Q And on the books of the bank it appears that Joseph Okin owes the bank \$15,000? A Yes, sir.

Q And it also appears that Mr. Bernstein owes the bank \$19,000? A Yes, sir. 40

Q That is on the ledger? A Yes, sir.

Q There is no question about it? A I don't think so.

Q And so far as this mortgage is concerned this mortgage is collateral for these notes? A It is not.

Francis Williams, cross.

Q Notwithstanding the fact that it appears that you have a claim or an indebtedness from Mr. Okin of \$15,000 and Mr. Bernstein of \$19,000 you still own this mortgage? A We do.

By the Vice-Chancellor.

10 Q Why did you carry the notes as collateral for the mortgage? A Because that is the way the Department likes them carried; it is simply done to please the Department.

By Mr. Newman.

Q Mr. Bernstein, as I understand it, never discounted any notes at your bank up to this time? A I can't tell you that; he may have.

Q You are not sure of it? A No, I am not sure of it.

20 Q You never remember doing any business with him up to this time? A Sure, I know the man; he is a depositor; I probably discounted some small notes for him before that.

Q Do you know him very well? A No.

Q Did you think he was good for \$19,000? You didn't care?
A Not until I had the mortgage.

Q I don't blame you. Now, don't you recall, Mr. Williams, and I know you want to be fair about the matter, that prior to the making of this agreement Mr. Okin came to see you for the purpose of having the bank purchase this mortgage; you remember that? A Yes, sir.

30 Q And didn't you at that interview say to him that the bank wanted to purchase the mortgage for and on his behalf? A No.

Q And didn't you say to him that the bank would hold the mortgage as collateral for his note? A I did not.

Q And didn't you say at that interview to him further that while the bank could not take his note, as you have explained because of its limit in borrowing powers, that he would have to get someone to give an additional note? A Yes, sir.

40 Q Can you tell why it was that you wanted a note of \$19,000 from some third person if you were purchasing absolutely this mortgage? A I have answered that before; the Department wanted it carried that way.

Q In other words the National Banking Department did not like the idea of having a second mortgage? A They wanted it so that the examiner could go over the books.

Francis Williams, cross.

By the Vice-Chancellor.

Q Was there any objection under the National Banking law to your purchasing this mortgage? A I cannot say that.

Q Well, you already had taken an assignment of the interest of \$15,000? A Well, that is prior to my time; there is nothing in that against the statute; it says that you cannot take a mortgage for a past debt. 10

Q You are not changing your position in buying this mortgage; you were simply buying the lien that you already had; you were protecting your second lien on the mortgage? A Yes, sir.

By Mr. Newman.

Q Didn't you swear in your affidavit after that in one of your answering affidavits that neither Mr. Okin or Mr. Bernstein owed the bank one dollar? A I think not. 20

Q And if you did swear to that, you didn't mean it, did you? A That they didn't owe the bank any money?

Q Yes. A Except under this mortgage. As a matter of fact it is not true; Mr. Okin owes the bank on other notes.

Q I am confining myself to this transaction; today Mr. Okin owes the bank \$15,000 on the note? A On the mortgage he does.

Q He does not owe them anything on the note? A I have answered that quite a number of times.

Q And Mr. Bernstein does not owe the bank anything on the note? A I have his personal note for \$19,000 as collateral. 30

By the Vice-Chancellor.

Q Do I understand in your contention, when the time comes, you have a right to foreclose this mortgage in case the mortgage is not paid and in case you do not realize the \$34,000 that you have a right to hold Mr. Okin on his note and hold Mr. Bernstein on his note? A I have told Mr. Okin that I would not hold him. 40

Mr. Newman. I have told Mr. Okin plainly and I think he will bear me out that there would be no liability on his part.

Francis Williams, cross.

By Mr. Newman.

Q I call your attention to the fact that in the copy of an affidavit, because it is not the original affidavit, you make the following statement that "Okin and Bernstein, their heirs, ex-
 10 executors, administrators and assigns are indebted under the terms of the contract in the sum of \$34,000 if they desire to purchase the bond and mortgage and not \$31,000, and that if they do not desire to purchase the bond and mortgage they are indebted to the bank by reason of said agreement in no sum whatever"; is that correct? A That is right; that is just what I have told you verbally.

Q And then it follows that these notes are not real assets and are not alive? A No; they are not real assets; the mortgage is an asset.

Q And notwithstanding that you carry them as an asset on
 20 the books of the bank and so reported to the banking authorities? A I reported the notes with the mortgage as a matter of convenience as I have already testified.

Q And so you only have the notes renewed every six months and carry them as a live asset? A Yes; just as I do with other matters.

By the Vice-Chancellor.

Q Now, assuming that the \$15,000 note falls due and Mr. Okin refuses to renew it; what sort of an asset would you carry?

30 A Well, then, I will have to go to the mortgage.

Q And the same thing applies to the Bernstein note? A Yes, sir; I will have to go to the mortgage.

By Mr. Newman.

Q Then, as I understand it, if you should be compelled at any time to foreclose the mortgage and you should not realize as much as \$34,000 on the sale of the property, Okin and Bernstein are relieved of any liability to the Broad & Market Bank?

40 A I have already told Mr. Okin that and I have already testified to that.

Mr. Stewart. That is our case, your Honor.

The Vice-Chancellor. Have you any rebuttal, Mr. Newman?

Mr. Newman. No, your Honor.

Francis Williams, cross.

Mr. Lindabury. I wish to stipulate on behalf of the Federal Trust Company that that company has not entered into any agreement with the Broad & Market National Bank nor had any negotiations with that bank with respect to the extension of the time for the payment of the mortgage in question and they have paid interest on the full \$59,000 during the full period. 10

Mr. Fischel. I should like to make the same stipulation on behalf of my clients.

Mr. Newman. No; we won't agree to that.

The Vice-Chancellor. Well, he may call his witness if you won't agree to the above stipulation, but I don't think it is very material, and no testimony has been offered to prove it, except what Mr. Williams has said.

The Vice-Chancellor. And that the interest of Okin, whatever it may be, whether contended by you or by the defendants, is not to be affected in any way. 20

Mr. Newman. Well, I will let the stipulation go in in that way.

The Vice-Chancellor. Now, gentlemen, I suppose you want to argue the matter. I think this testimony written up for me. Do you want to argue it now or do you want to wait until you get copies of the testimony?

Mr. Stewart. I prefer to wait until I get a copy of the testimony because I think there are various points that should be brought out through oral argument that do not appear. 30

The Vice-Chancellor. Well, I think we had better wait until the testimony is written out to argue the case.

Mr. Stewart. Yes; and at that argument I will renew my motion for the dismissal of the bill of complaint.

The Vice-Chancellor. Of course, Mr. Stewart, if there should appear to be anything in the case presented by Mr. Newman which does not appear in the bill of complaint, I will allow him to amend his bill, so we will get down to the merits after all. 40

CASE CLOSED.

Exhibit C. 3.

EXHIBIT C. 3.

10 KNOW ALL MEN BY THESE PRESENTS, That I, Joseph Okin, of
the City of Newark, in the County of Essex and State of New
Jersey, party of the first part, in consideration of the sum of
twenty-one thousand five hundred dollars, lawful money of the
United States of America, to me in hand paid by Nathan Shiman
and David Shiman of the City of New York, County of New York,
and State of New York, and Aetna Realty Company, a body
corporate of the State of New Jersey, party of the second part,
at or before the ensealing and delivery of these presents, the
receipt whereof is hereby acknowledged, have granted, bargained,
sold, assigned, transferred and set over, and by these presents
do grant, bargain, sell, assign, transfer, and set over unto the
20 said party of the second part, a certain indenture of mortgage
bearing date the twenty-ninth day of May, One thousand nine
hundred and fourteen, made by Joseph Meyer on lands in the
Southerly line of Springfield Ave., Newark, N. J., to secure the
payment of the sum of sixty thousand dollars, which mortgage
is not yet recorded, but is to be recorded in the Register's Office
of Essex County simultaneously herewith

TOGETHER with the bond or obligation therein described, and
the money due and to grow due thereon, with the interest. To
HAVE AND TO HOLD, the same unto the said party of the second
part, their executors, administrators, successors or assigns for
its and their use forever subject to the proviso in the said inden-
30 ture of mortgage mentioned; AND I do hereby make, constitute and
appoint the said party of the second part my true and lawful
attorney, irrevocable, in my name, or otherwise, but at their
proper costs and charges to have, use and take all lawful ways
and means for the recovery of all the said money and interest;
and in case of payment, to discharge the same as lawful as I
might or could do if these presents were not made; AND I do here
by covenant, promise and agree, to and with the said party of
the second part, that there is now due and owing upon the said
40 Bond and Mortgage the sum of fifty-nine thousand dollars.

It is understood and agreed that this assignment is made as
collateral security for the payment at maturity of the sum se-
cured by a certain note bearing date March 2, 1914, made by the
said Joseph Okin to the parties of the second part hereto, on

Exhibit C. 3.

which there is now due the sum of twenty-one thousand five hundred dollars.

It is further understood and agreed that upon default by the said Joseph Okin, his executors, administrators or assigns, in the payment of the principal of said note, or of any semi-annual instalment of interest thereon, the said parties of the second part shall have full and complete power and authority to sell at public or private sale the mortgage made by the said Joseph Meyer to the said Joseph Okin, together with the bond secured thereby, upon sixty days' notice in writing, delivered either personally to the said Joseph Okin or left at his usual place of abode in the State of New Jersey with some member of his family, or mailed to his last known address if not a resident within this State, said notice to designate the time and place at which the proposed sale of the said mortgage and the bond accompanying the same will be conducted, and the amount due on said mortgage to the said parties of the second part hereto, their executors, administrators, successors or assigns; and to sell, assign and deliver the said mortgage and the bond accompanying the same, or any part thereof, to the purchaser of the said bond and mortgage at said sale, and after deducting all costs and expenses for collection, sale and delivery of said bond and mortgage, to apply the residue of the proceeds of such sale or sales to the payment of the amount due the said parties of the second part, their executors, administrators, successors or assigns, on the said mortgage, and return the overplus to the said Joseph Okin, his executors, administrators and assigns; and upon any such sale the purchaser of the said bond and mortgage may purchase the same, discharged from any right of redemption of the said Joseph Okin, his executors, administrators and assigns.

It is expressly understood and agreed that the interest of the said parties of the second part hereto, their executors, administrators and assigns, in and to the aforesaid mortgage and the bond accompanying the same shall be superior and prior to the interest which the said Joseph Okin, his executors, administrators and assigns, may from time to time have therein; and that upon a default of the mortgagor named in the said mortgage and the bond accompanying the same, his heirs, executors, administrators and assigns, to perform the terms, covenants and conditions contained in the said bond and mortgage, the said party of the second part shall have all the right given to the mortgagee named

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Exhibit C. 3.

in the said mortgage in case of such default and may exercise the same, first giving thirty days' notice to the said Joseph Okin of their intention to do so. And in case of any foreclosure of said mortgage by either the party of the first part hereto or the parties of the second part hereto, the other party shall be joined
 10 as a party to said foreclosure cause.

It is further understood and agreed that the said Joseph Okin, his executors, administrators and assigns, shall have the right to pay the debt secured hereby at any time before maturity, with interest up to the date of payment, and that upon the payment of the said debt, the said parties of the second part hereto, their executors, administrators and assigns, will re-assign the afore-said bond and mortgage executed by the said Joseph Meyer to the said Joseph Okin without any condition or qualification whatsoever.

20 IN WITNESS WHEREOF I have hereunto set my hand and seal this tenth day of June, One thousand nine hundred and fourteen.

JOSEPH OKIN. (SEAL)

Signed, sealed and delivered
 in the presence of

W. D. MORGAN.

30

40

Exhibit C. 3.

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.

BE IT REMEMBERED, That on this tenth day of June, in the year of our Lord One thousand nine hundred and fourteen, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Joseph Okin, who, I am satisfied, is the assignor in the within Deed of Assignment named; and I, having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

10

W. D. MORGAN,
M. C. C. of N. J.

ASSIGNMENT
 OF MORTGAGE.

20

JOSEPH OKIN

To

NATHAN SHIMAN and DAVID
 SHIMAN and AETNA REALTY
 COMPANY.

Dated June 10th, 1914.

RECEIVED in the Register's Office of the County of Essex, N. J., on the 11th day of June, A. D. 1914, at 9:31 o'clock in the forenoon, and recorded in Book 118 of Assignments of Mortgages for said County, on pages 141-142.

30

THOMAS P. ALWORTH,
Register.

40

Exhibit C. 4.

EXHIBIT C. 4.

KNOW ALL MEN BY THESE PRESENTS, That I, Joseph Okin, of the City of Newark, in the County of Essex and State of New Jersey, party of the first part, in consideration of the sum of fifteen thousand dollars, lawful money of the United States of America, to me, in hand paid by The Broad & Market National Bank, a corporation of the United States of America, having its principal office in the City of Newark, in the County of Essex and State of New Jersey, party of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, have granted bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer, and set over unto the said party of the second part a certain indenture of mortgage bearing date the twenty-ninth day of May, One thousand nine hundred and fourteen, made by Joseph Meyer, on lands in the Southerly line of Springfield Avenue, Newark, Essex County, New Jersey, to secure the payment of the sum of sixty thousand dollars, which mortgage is recorded in the Register's office of the County of Essex in Book S 32 of Mortgages, page 465.

TOGETHER with the bond or obligation therein described, and the money due and to grow due thereon with the interest. To HAVE AND TO HOLD, the same unto the said party of the second part, its successors or assigns for its and their use forever subject to the proviso in the said indenture of mortgage mentioned; AND I do hereby make, constitute and appoint the said party of the second part my true and lawful attorney, irrevocable, in my name, or otherwise, but at its proper costs and charges to have, use and take all lawful ways and means for the recovery of all the said money and interest; and in case of payment, to discharge the same as lawful as I might or could do if these presents were not made; AND I do hereby covenant, promise and agree, to and with the said party of the second part, that there is now due and owing upon the said Bond and Mortgage the sum of fifty-nine thousand dollars.

This assignment is made subject to a prior assignment of said bond and mortgage made by the said Joseph Okin to Nathan Shiman, David Shiman and Aetna Realty Company, a corporation, to secure the payment of \$21,500, which assignment is dated June 10th, 1914, recorded on June 11th, 1914, in Book

Exhibit C. 4.

of Assignments of Mortgages for Essex County, on page .
 And the said bond and mortgage above mentioned are hereby
 assigned as collateral security for the notes of said Joseph Okin
 heretofore given by him to said Broad & Market National Bank
 and for any and all renewals thereof, as well as for other note
 or notes of the said Joseph Okin that may hereafter be given 10
 to said bank and any and all renewals thereof; and the interest of
 the said Broad & Market National Bank in the above mentioned
 bond and mortgage, under this assignment is to terminate and
 said interest in said bond and mortgage is to be re-assigned to
 the said Joseph Okin or to such person as he may direct when-
 ever the entire amount due upon the note or notes hereby se-
 cured shall be paid.

IN WITNESS WHEREOF I have hereunto set my hand and seal this
 18th day of June, One thousand nine hundred and fourteen. 20

JOSEPH OKIN. (SEAL)

Signed, sealed and delivered
 in the presence of

ALFRED F. SKINNER.

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.

BE IT REMEMBERED, That on this 22nd day of June, in the year 30
 or our Lord One thousand nine hundred and fourteen, before
 me, the subscriber, a Master in Chancery of New Jersey, per-
 sonally appeared Joseph Okin, who, I am satisfied, is the as-
 signor in the within Deed of Assignment named; and I, having
 first made known to him the contents thereof, he did then ac-
 knowledge that he signed, sealed and delivered the same as his
 voluntary act and deed, for the uses and purposes therein ex-
 pressed.

ALFRED F. SKINNER, 40
M. C. C. of N. J.

Exhibit C. 5.

ASSIGNMENT
OF MORTGAGE.

JOSEPH OKIN

To

THE BROAD & MARKET NATIONAL
BANK.

10

Dated June , 1914.

RECEIVED in the Register's Office of the
County of Essex, N. J., on the 23rd day
of June, A. D., 1914, at 3:27 o'clock in
the afternoon, and recorded in Book
119 of Assignments of Mortgages for
said County on pages 143-144.

20

THOMAS P. ALWORTH,
Register.

EXHIBIT C. 5.

30

KNOW ALL MEN BY THESE PRESENTS, that we, Nathan Shiman
and David Shiman, of the City, County and State of New York,
and the Aetna Realty Company, a corporation of the State of
New Jersey, with its principal office in the City of Newark,
County of Essex and State of New Jersey, parties of the first
part, in consideration of the sum of \$19,810.67 to us in hand paid
by the Broad and Market National Bank of Newark, a corpora-
tion of the United States of America, with its principal office
located in the City of Newark, County and State aforesaid, party
of the second part, receipt whereof is hereby acknowledged, have
bargained, sold, granted and conveyed, assigned, transferred
and set-over, and by these presents do bargain, sell, grant, con-
vey, assign, transfer and set-over unto the said party of the
second part, its successors and assigns, a certain indenture of
mortgage made by Joseph Meyer to Joseph Okin in the sum of
\$60,000.00 dated the 29th day of May, 1914, and recorded on the
11th day of June, 1914, in Book S. 32 of mortgages for Essex
County, pages 465, etc., on lands in the City of Newark, together

40

Exhibit C. 5.

with the bond or obligation therein described, and the moneys due and to grow due thereon, and also together with a certain promissory note made by Joseph Okin to the order of the parties of the first part, dated the second day of March, 1914, in the sum of \$21,500.00

TO HAVE AND TO HOLD the same unto the party of the second part, its successors and assigns forever, subject only to the proviso in the said indenture of mortgage mentioned: And we do hereby make, constitute and appoint the said party of the second part, our true and lawful attorney, irrevocable, in our names, or otherwise, but at its proper costs and charges, to have, use and take all lawful ways and means for the recovery of all the said money and interest; and in case of payment, to discharge the same as fully as we might or could do if these presents were not made: And we do hereby covenant, promise and agree, to and with the said party of the second part, that there is now due and owing upon the said bond and mortgage, the sum of Fifty-Nine Thousand Dollars, with interest thereon from May 29th, 1916, and that there is due and owing upon said note the sum of \$19,000.00 for principal with interest thereon from March 2nd, 1916, and we do further covenant and agree that the aforesaid sale and this conveyance is made by virtue of the power of sale contained in the assignment of mortgage by Joseph Okin to us, the parties of the first part, and that we have in every manner complied with the conditions precedent to the conduct of said sale as in said assignment mentioned.

And we do further covenant and agree that the said Joseph Okin made default in the payment of the interest and principal due on said note on the second day of March, Nineteen Hundred and Sixteen.

IN WITNESS WHEREOF, we, the parties of the first part have hereunto set our hands and seal, this fourth day of November, Nineteen Hundred and Sixteen, and the Aetna Realty Company has caused these presents to be signed by its president and its corporate seal affixed hereto, and attested by its secretary, the day and year aforesaid.

NATHAN SHIMAN (L. S.)

DAVID SHIMAN (L. S.)

AETNA REALTY COMPANY

By Wm. E. Lehman (L. S.)

President.

Exhibit C. 5.

Signed, sealed and delivered
in the presence of

JOSEPH E. COHN

ATTEST:

10 By M. R. BUCKSBAUM
Secretary.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. }^{ss}

20 Be it remembered that on this fourth day of November in the
year of our Lord One Thousand Nine Hundred and Sixteen,
before me, the subscriber, personally appeared, Nathan Shiman
and David Shiman, who I am satisfied are the assignors in the
within Deed of Assignment named; and I having first made
known to them the contents thereof, they did each acknowledge
that they each signed, sealed and delivered the same as their
voluntary act and deed, for the uses and purposes therein ex-
pressed.

JOSEPH E. COHN

An Attorney at law of New Jersey

30 STATE OF NEW JERSEY, }
COUNTY OF ESSEX. }^{ss}

40 Be it remembered that on this fourth day of November in the
year of our Lord, One Thousand Nine Hundred and Sixteen,
before me, the subscriber, a Master in Chancery of New Jersey,
personally appeared William E. Lehman who I am satisfied is
the President of the grantor, the Aetna Realty Company, in the
within Indenture named, and I having first made known to him
the contents thereof, he did acknowledge that he signed, sealed
and delivered the same as the voluntary act and deed of said
corporation, for the uses and purposes therein expressed, and
he further acknowledged that the said within Indenture is the
voluntary act and deed of said corporation made by virtue of
authority from its Board of Directors, and that said deed was
sealed with the corporate seal of said corporation, and that he

Exhibit C. 5.

was the president of said corporation at the time of the signing of the same.

SAUL COHN

A Master in Chancery of New Jersey

10

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

BE IT REMEMBERED that on this fourth day of November, in the year of our Lord, One Thousand Nine Hundred and Sixteen, before me, the subscriber, personally appeared Moses R. Bucksbaum who I am satisfied is the Secretary of the grantor, the Aetna Realty Company in within indenture named, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as the voluntary act and deed of said corporation, for the uses and purposes therein expressed, and he further acknowledged that the said within indenture is the voluntary act and deed of said corporation made by virtue of authority from its Board of Directors, and that said deed was sealed with the corporate seal of said corporation, and that he was the president of said corporation at the time of the signing of the same.

20

M. R. BUCKSBAUM.

Sworn to and subscribed the day and year above written.

30

SAUL COHN
A Master in Chancery of New Jersey.

40

Exhibit C. 8.

ASSIGNMENT.

Nathan Shiman and David Shiman and
the Aetna Realty Company, a corpora-
tion of New Jersey

to

10 The Broad and Market National Bank
of Newark.

Dated November 4th, 1916.

Compared

Book held by 7

Paper held by 3

Read by 3

20 Received in the Register's Office of the
County of Essex, N. J. on the 13th day
of November A. D., 1916 at 11:53
o'clock in the forenoon, and Recorded
in Book 130 of Assignment of Mort-
gages for said County, on pages 539-
541

WALTER A. EVANS,
Register.

30

EXHIBIT C. 8.

WHEREAS, The Broad and Market National Bank of Newark,
hereinafter called the "Bank", has this day purchased at pri-
vate sale a certain bond and mortgage given by Joseph Meyer to
Joseph Okin, bearing date the 29th day of May, 1914, for Sixty
Thousand Dollars, and recorded in Book S 32 of Mortgages
for Essex County pages 465, etc., upon which there is due Fifty-
nine Thousand Dollars, for principal and interest thereon from
June 1, 1916, which sale was held under a power of sale given
40 in an assignment of a Twenty-one Thousand Five Hundred Dol-
lar interest in said mortgage, which said assignment is dated
the 10th day of June, 1914, and recorded in Book 118 of As-
signments of Mortgages for said County on pages 141, etc., and

WHEREAS, a further assignment of an interest in said mort-

Exhibit C. 8.

gage was made by Joseph Okin to the said Bank, amounting to Fifteen Thousand Dollars, which assignment was dated the 18th day of June, 1914, and recorded in Book 119 of Assignments of Mortgages pages 143, etc., and

WHEREAS, said Joseph Okin and one Harry Bernstein are desirous of buying from said Bank, said mortgage made by said Meyer to said Okin, recorded as aforesaid, and said Bank is willing to sell the same on the terms and conditions hereinafter set forth. 10

Now This Indenture Witnesseth, that the said Broad and Market National Bank of Newark, a corporation of the United States of America, with its principal office in the City of Newark, County of Essex and State of New Jersey, of the first part, for and in consideration of the covenants and conditions hereinafter entered into by the said Joseph Okin and Harry Bernstein, hereinafter called the parties of the second part, and in consideration of Three Thousand Dollars, lawful money of the United States, to be paid by the parties of the second part to the said Bank, as hereinafter set forth, covenants and agrees that it will assign and convey to the said parties of the second part, the said bond and mortgage on or before the 29th day of May, 1920, upon the parties of the second part, performing the agreements and covenants herein contained by them to be performed. 20

The Bank further covenants and agrees that the interest received by it upon the said mortgage, pending the purchase of the same by the parties of the second part, will be applied by it as follows: 30

FIRST: To the payment to it of six per cent. interest upon the balance of the purchase price of the said mortgage: viz:— the sum of Thirty-four Thousand Dollars from the date hereof.

SECOND: To the re-payment to said Bank of any moneys it may expend in the payment of taxes, assessments or other municipal liens levied or assessed against property described in said mortgage, or in the redemption from the sale of the property by reason of any taxes, assessments or other municipal liens levied against the same. 40

THIRD: To the re-payment to it of any moneys it may expend for foreclosure costs and counsel fees, incurred by it in proceedings brought by it for foreclosing said mortgage.

FOURTH: To the payment of any accrued interest on any of the foregoing items.

Exhibit C. 8.

FIFTH: To the payment of any surplus of said interest arising from said mortgage to the parties of the second part.

10 The Bank further covenants and agrees that should it foreclose said mortgage and take title to the premises described therein at Sheriff's sale at any time before May 29, 1920, it will convey said premises by Deed of Bargain and Sale to the parties of the second part for whatever sum is due the Bank on said sum of \$37,000.00 plus accrued interest, taxes, assessments and other municipal liens paid by it and foreclosure costs, including Sheriff fees, and will accept in payment of same, a purchase money mortgage for \$34,000.00 balance due, with interest at six per cent. to contain the usual tax, interest and insurance default clauses, and to be accompanied by a bond given by the parties of the second part in the penal sum of \$68,000.00, said bond and mortgage to run until the 29th day
20 of May, 1920, and the balance of said purchase price to be paid said bank in cash on the delivery of the said deed; said conveyance to be subject to a first mortgage of \$65,000.00 now on said premises or of any mortgage in like sum put upon said premises to take the place of the mortgage now upon said premises.

The parties of the second part covenant and agree with the Bank that they will pay at once on the signing of this agreement, Three Thousand Dollars in cash and on or before May 29, 1920, will pay the balance of the \$34,000.00, plus any accrued
30 interest thereon from the date hereof at six per cent. per annum, and all sums of money paid by the Bank for taxes, assessments and other municipal liens and accrued interest thereon, assessed or levied against the premises described in said mortgage or for the redemption of the said property from any sale or sales thereof, by reason of any municipal liens, taxes and assessments, or accrued interest thereon, not theretofore paid to the said Bank out of the interest received by it on the mortgage aforesaid as hereinbefore provided.

40 The parties of the second part further covenant and agree that should they fail, to perform this agreement in every particular on or before the 29th of May, 1920, that they shall have no right to or claim against said mortgage, time being of the essence of this contract, and that upon default by them, the parties of the second part, the party of the first part shall hold

Exhibit C. 8.

said mortgage absolutely free and discharged of any right in or claim against the same by reason of this agreement.

And the parties of the second part further covenant and agree that they have no equity of redemption in said mortgage, except such as is provided for in this agreement.

It is further mutually covenanted and agreed by the parties hereto that this agreement shall be binding on the successors, assigns, heirs and personal representatives of the parties hereto. 10

It is further mutually covenanted and agreed by the parties hereto, that should the mortgage herein agreed to be sold and conveyed be paid off at any time before May 29th, 1920, the proceeds shall be applied to the payment of the sum of Thirty-four Thousand Dollars to the bank, with accrued interest thereon, and the balance, after deducting any moneys which may have been paid for taxes, assessments or other municipal liens, foreclosure costs, counsel fees, or cost of redemption of the property from the sale of the same by reason of taxes, assessments or other municipal liens levied against the same shall be paid over to the party of the second part. 20

IN WITNESS WHEREOF, the party of the first part has caused these presents to be signed by its President, and its corporate seal affixed hereto and attested by its Cashier, and the parties of the second part have hereunto set their hands and seals this thirtieth day of October, Nineteen Hundred and Sixteen.

JOSEPH OKIN, (L. S.)
HARRY BERNSTEIN, (L. S.) 30

(L. S.) THE BROAD & MARKET NATIONAL BANK OF NEWARK,
FRANCIS WILLIAMS, *Pres.*

Signed, sealed and delivered:
in the presence of:

H. C. GARDNER,
Cashier.

Acknowledgment.—492.—G. N. Hogan, Newark, N. J. 40

Exhibit C. 8.

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

10 On this Thirtieth day of October, in the year of our Lord One Thousand Nine Hundred and Sixteen, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Joseph Okin and Harry Bernstein, who, I am satisfied, are the grantors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

SAUL COHN,
A Master in Chancery of New Jersey.

20

AGREEMENT.

Between The Broad and Market National Bank of Newark,

and

Joseph Okin and Harry Bernstein.

Dated October 30, 1916.

Compared

Book held by 4

Paper held by 6

Read by 6

30

Received in the Register's Office, County of Essex, N. J., on the 22nd day of November, A. D., 1916 at 9:33 o'clock in the forenoon, and Recorded in Book G. 36 of Mortgages for said County, on pages 418-420.

40

WALTER A. EVANS,
Register.

Exhibit C. 10.

EXHIBIT C. 10.

CASHIER'S CHECK.

No. 2999

Newark, N. J., Nov 13 1916 191

THE BROAD AND MARKET NATIONAL BANK
OF NEWARK

10

Pay to the order of Nathan Shaimann, David Shaimann &
Aetna Realty Co.

Nineteen thousand eight hundred ten 67/100.....Dollars
\$19810 67/100

H. C. GARDNER,
Cashier.

Endorsement on reverse of Exhibit C. 10.

20

NATHAN SHIMAN.

DAVID SHIMAN.

AETNA REALTY Co.

Wm. E. Lehman, Prest.

30

40

Defendant's Exhibit by Stipulation.

DEFENDANT'S EXHIBIT BY STIPULATION.

ASSIGNMENT OF MORTGAGE.

10

JOSEPH OKIN

to

COOK & GENUNG COMPANY, a New Jersey
corporation.

Book 120-46.

Secure \$11,200.00.

Dated Sept. 14, 1914.

Ack'd Sept. 25, 1914.

Rec'd Sept. 24, 1914.

ASSIGNS mortgage S. 32-465.

20

SUBJECT to two prior assignments recorded in 119-143 (Broad & Market National Bank, Assignment), and 118-141 (Shiman Assignment).

Recites that it is given as collateral security for five notes and that in case of default, Okin's interest in bond and mortgage assigned may be sold by giving notice, etc., and to apply proceeds first to notes, etc.

Okin to give notice of default in provisions of Shiman's assignment and Broad and Market assignment.

30

40

Memorandum of Vice-Chancellor.

MEMORANDUM OF VICE-CHANCELLOR.

IN CHANCERY OF NEW JERSEY.

April 26, 1920.

47-118.

10

Between

JOSEPH OKIN, *et al.*,

Complainants,

On Bill, etc.

and

BROAD & MARKET NATIONAL BANK OF NEW-
ARK, *et al.*,

Defendants.

Memorandum.

20

Jacob I. Newman, Esq., for complainants.

Lambert & Stewart, Esqrs., for defendant, Broad & Market National Bank.

Harrison P. Lindabury, Esq., for defendant, Federal Trust Company.

FIELDER, V.-C.

Complainants seek to have the mortgage in question decreed to be collateral in the hands of the Broad & Market National Bank, as security for a debt owing by complainant Okin to the bank and that the bank be directed to realize upon its pledge by foreclosing the mortgage, paying any surplus which may arise on the foreclosure sale to complainants.

30

When title to the mortgage was acquired by the bank, it entered into a written agreement with complainant Okin, which purports to fix his rights in the mortgage. The agreement recites that the bank has purchased the mortgage; that Okin desires to buy it and that the bank is willing to sell on or before May 29, 1920, upon terms and conditions specifically set forth and the agreement expressly declares that Okin has no equity of redemption in the mortgage, except as therein provided.

40

Prior to the execution of the agreement and in its preparation Okin had the advice and assistance of his own counsel. He tes-

Memorandum of Vice-Chancellor.

10 testified that he had read the agreement over before signing it and that he knew its contents and that it represented the bank to be the absolute owner of the mortgage. His counsel testified that he had participated in the preparation of the agreement; that he approved its final draft and that it contains the agreement between Okin and the bank, as communicated to him by Okin before the agreement was drawn.

20 The bill of complaint charges neither fraud nor mistake and reformation of the agreement is not prayed. It is a well established rule that when the parties have put their agreement in writing and such writing is on its face complete and purports to contain the whole contract between them, the written agreement shall be the only evidence of the contract as finally concluded. The testimony on behalf of complainants, designed first to contradict the agreement and to show that the bank held the mortgage as a pledge and not as owner and second, to supply the provision, on which the agreement is silent, that the bank should foreclose the mortgage when it fell due, cannot be considered. Complainants must be held bound by the terms of the agreement, which appears to be an option given Okin in consideration of \$3,000, to purchase the mortgage on or before May 29, 1920, with no obligation on his part to buy.

30 As to the other relief prayed for by complainants I consider the bill prematurely filed. Until Okin offers to perform his part of the agreement and tenders the bank the amount of money he admits is due thereunder and the bank refuses to perform, the complainants have no ground for equitable relief. I would observe as to the extension of time which complainants allege has been given by the bank for the payment of the principal of the mortgage, that Okin's option on the purchase of the mortgage was duly recorded and that any one subsequently dealing with the bank with respect to the mortgage, has notice of complainants' rights.

The bill will be dismissed.

Order Dismissing Bill.

ORDER DISMISSING BILL.

Filed May 12, 1920.

This matter coming on to be heard before the Hon. James F. Fielder, in the presence of Jacob L. Newman, counsel with the complainant, and Lambert & Stewart, of counsel with the defendant, The Broad & Market National Bank of Newark, and in the presence of Harrison P. Lindabury, of counsel with defendant, Federal Trust Company, and Jacob Fischel, of counsel for defendants, Moses Mendel, Ellen E. Mendel, Charles F. Kraemer and Freda Kraemer, and the pleadings and proofs having been read, the arguments of the respective counsels having been heard and considered, and the Court having duly considered said pleadings, proofs and arguments, and it appearing to the Court that the complainant is not entitled to the relief sought and prayed for in his bill of complaint, it is thereupon, on this 11th day of May, 1920, by Edwin Robert Walker, Chancellor of the State of New Jersey,

ORDERED, ADJUDGED and DECREED that the complainants' bill be and the same is hereby dismissed without prejudice and with costs, and that there shall be allowed to Lambert & Stewart, solicitors of the defendant, The Broad & Market National Bank of Newark, a counsel fee of \$200 to be taxed as a part of their taxed costs, and that there shall be allowed to Harrison P. Lindabury, solicitor of the defendant, Federal Trust Company, a counsel fee of \$100 to be taxed as a part of its taxed costs, and that there shall be allowed to Jacob Fischel, solicitor for the defendants, Moses Mendel, Ellen E. Mendel, Charles F. Kraemer and Freda Kraemer, a counsel fee of \$50 to be taxed as a part of their taxed costs, and it is further

ORDERED that execution issue for said costs, according to the practice of this Court.

Respectfully advised,

JAMES F. FIELDER,
V.-C.

*Stipulations***ORDER SUBSTITUTING SOLICITOR.**

Filed July 22, 1920.

10 It appearing to the Court that Jacob L. Newman, Esquire, solicitor of the complainants in the above-stated cause, has consented to the substitution of Aaron Marder, Esquire, as solicitor for the complainants, in his place and stead, as appears by the consent hereunder written; it is, on this 22nd day of July, nineteen hundred and twenty,

ORDERED, That Aaron Marder be substituted as solicitor for the complainants, in the place and stead of said Jacob L. Newman, Esquire.

E. R. WALKER,
C.

20 I hereby consent to the making and entry of the above order.

JACOB L. NEWMAN,
Solicitor of Complainant.

STIPULATIONS.

Filed September 16, 1920.

30 It is hereby stipulated by and between the respective solicitors for the complainants and defendants that on the appeal of the complainants from the decree or order made in the above-entitled matter the defendants, Federal Trust Company, Moses and Ellen Mendel and Charles F. Kraemer and Freda Kraemer, need not be made parties thereto.

It is further stipulated that complainants and defendant, Broad & Market National Bank, be the only party appellee to said appeal.

August 31st, 1920.

40 AARON MARDER,
Solicitor of Complainants.

HARRISON P. LINDABURY,
Solicitor of Defendant, Federal Trust Company.

JACOB C. FISCHER,
*Solicitor of Defendants, Moses and Ellen Mendel,
and Charles F. Kraemer and Freda Kraemer.*

Notice of Appeal.

NOTICE OF APPEAL.

Filed September 13, 1920.

The complainants hereby appeal from the final decree or order in this Court dismissing the bill of complainants after final hearing, and from the whole and every part of said order or decree which was filed in the office of the Clerk of Chancery on the 12th day of May, 1920, to the Court of Errors and Appeals in the last resort in all causes. 10

Dated, Sept. 10, 1920.

AARON MARDER,
Solicitor for and of Counsel with Appellants.

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

AARON MARDER,
Of Counsel with Appellants.

Service of the within notice of appeal acknowledged this 10th day of September, 1920.

CHARLES H. STEWART,
Solicitors of Broad and Market National Bank.

30

40

Petition of Appeal.

PETITION OF APPEAL.

Filed September 20, 1920.

New Jersey Court of Errors and Appeals

10

JOSEPH OKIN, *et al.*,

Complainants-Appellants,

vs.

BROAD & MARKET NATIONAL BANK, *et als.*,

Defendants-Appellees.

On Appeal.

On Bill, etc.

*Petition of
Appeal.*

20

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

The petition of complainants, the appellants in the above-stated cause, respectfully shows that your petitioners find themselves aggrieved by an order and decree made in the Court of Chancery by His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 12th day of May, 1920, wherein your petitioners were complainants, and the Broad & Market National Bank, *et als.*, were defendants, in this respect, to wit: That the said order and decree adjudges as follows:

30

“It is thereupon, on this 11th day of May, 1920, by Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed that the complainants’ bill be, and the same is hereby dismissed without prejudice and with costs.”

Your petitioners appeal from that part of the order or decree of the Chancellor, which decrees as aforesaid, upon the ground that the same was erroneous, for that the said bill of complaint should not have been dismissed, for the reason that the transactions between said Okin and the defendant bank were usurious.

40

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

AARON MARDER,

Solicitor and Counsel for Complainants-Appellants.

Stipulation re Exhibits.

ANSWER TO PETITION OF APPEAL.

Filed September 23, 1920.

The answer of the Broad & Market National Bank of Newark, one of the above-named respondents, to the petition of appeal of the above-named appellants. 10

This respondent, acknowledging all or any of the matters which in the said petition of appeal are contained to be true for answer thereto, nevertheless, says, and admits that a decree was on the 12th day of May, 1920, made and entered in the Court of Chancery in the cause for that purpose mentioned in said appeal as therein stated; but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said decree is agreeable to equity and it prays that the same may be affirmed with costs to be adjudged to this respondent. 20

CHARLES H. STEWART,
Solicitor and of Counsel with Respondent,
9-11 Clinton St., Newark, N. J.

STIPULATION.

IT IS HEREBY STIPULATED, by and between Aaron Marder, solicitor for and of counsel with complainants-appellants, and Charles H. Stewart, Esquire, solicitor for and of counsel with Broad & Market National Bank, that complainants' Exhibits C. 1, C. 2, C. 6, C. 7 and C. 9 need not be printed, and further that all of defendant's exhibits need not be printed in the state of the case. 30

It is further stipulated and agreed that all the technical steps required by the assignment, Okin to Shiman, introduced in evidence as Exhibit C. 3, were taken by the Broad & Market National Bank, so that the legal title would vest in said Broad & Market National Bank.

Dated, October 15, 1920. 40

AARON MARDER,
Solicitor for Complainants-Appellants.

CHARLES H. STEWART,
Solicitor for Defendants-Appellees.

LETTERS TO THE EDITOR OF THE JOURNAL

1901

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New Jersey Court of Errors and Appeals

Between

JOSEPH OKIN, *et als.*,

Complainants-Appellants,

and

BROAD & MARKET NATIONAL BANK, *et als.*,

Defendants-Respondents.

On Bill, &c.

On Appeal.

SUPPLEMENTAL BRIEF FOR COMPLAINANTS- APPELLANTS.

This supplemental brief is submitted on points raised in the respondent's brief, and not considered in appellant's original brief.

ANSWER TO POINTS 1 AND 4.

It is contended by the bank in Points 1 and 4 of respondent's brief that the two-year limitation of R. S. 5198 applies to the case at bar and further that the law of the State of New Jersey on usury has no application to the point in issue.

Section 5198, 6 Fed. Stat. Ann. (2nd Ed.), p. 747, reads as follows:

“(Consequences of taking usurious interest.) The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. *In case the greater rate of interest has been paid*, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the *usurious transaction occurred*. That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county in the county or city in which said association is located having jurisdiction in similar cases (R. S.)” (Italics ours.)

A distinction is drawn between the two classes of cases arising under the statute in *Haseltine v. Central National Bank*, 183 U. S. 132, 22 Sup. Ct. Rep. 50, where it is held, Mr. Justice Brown writing the opinion, that in the first class the interest is *reserved* in contradistinction to the second class, where the interest has actually been *paid*.

The remedy indicated by the statute applies to the second class *only*, and is held to be exclusive as to the *second* class since the act which creates the penalty, viz., the recovery of double interest in "an action in the nature of an action of debt," also gives the remedy. *Schuyler National Bank v. Gadsden*, 191 U. S. 451, 24 Sup. Ct. Rep. 129. See also cases cited under section 5198 of R. S. in 6 Fed. Stat. Ann. (2nd Ed.), pp. 754-755.

The rule is, however, that the *retaining* of a usurious discount is not the *paying* of usurious interest. *McCarthy v. First National Bank*, 223 U. S. 493, 32 Sup. Ct. Rep. 240, so that where a usurious discount is retained the case is still under the first class. See also cases cited in 6 Fed. Stat. Ann. (2nd Ed.), pp. 753, 757-759. In the McCarthy case, Mr. Justice Lamar, in delivering the opinion for the Court, on page 241 of the Sup. Ct. Rep., says:

"That the statute does not begin to run from the date of the loan, nor from the date of the satisfaction of the debt, but from the date interest is paid, appears from an analysis of the two classes of cases referred to in Rev. Stat. 5198, noting that the 'interest paid' in the last clause is used in contradistinction to interest 'reserved or charged,' in the first sentence of the section. Banks may make ordinary loans and charge interest to be collected at the maturity of the note. But, as they usually reserve and deduct it in advance, by way of discount, the statute is framed so as to apply to cases where the interest is paid by the debtor as well as to those in which it is reserved by the bank. These deductions by way of discount are not treated as payments. *They do not come out of the debtor's pocket*, though they *lessen* the amount which he receives when *the loan is made*, and when sued he may *plead* usury and escape liability for the amount *thus charged or retained*. But such *reservation* by the bank, not being a *payment made by the debtor*, he of course cannot *avail himself* of the right to maintain a *suit given only* to those who have *paid interest*." (Italics ours.)

This Court, in *National Bank of Rahway v. Carpenter*, 52 N. J. L. 168, also decided that the retention of usurious discount was not *payment* of interest; and it further holds that the discount of the

paper of a third person with retention of usurious discount is payment for "Carpenter thus parted with his whole title to the paper and his right to enforce it against Hancock, and the bank acquired that title and right." The last situation, however, is not at all analagous in the case at bar.

In the case at bar all Okin got for the Bernstein \$19,000 note was \$16,000; a check to Shiman, *et al.*, for \$19,000 was made out and cashed and \$3,000 was returned to the bank (Cohen test., p. 53, ll. 19-38).

Hence, in the case at bar, since there was in effect a usurious retention of \$3,000, there was no actual payment of the \$3,000 and the case falls within class one, and, as a result, the two-year bar does not operate, and, further, *ex necessitate*, the New Jersey statutes concerning usury must apply, for the Federal statute does not provide for the procedure to be followed in the cases of the first class, and it cannot be said that the borrower is remediless despite the fact that the statute gives him a substantive right, that is, a forfeiture of all interest.

Where the State law and national act do not conflict, as where in the instant case the national act provides a substantive right, but does not provide the remedy, the State laws operate. *Davis v. Elmira Savings Bank*, 161 U. S. 275, 16 Sup. Ct. Rep. 502, where Mr. Justice White says: "It is certain that in so far as not repugnant to acts of Congress, contracts and dealings of national banks are left subject to the state law * * *."

It will be noted also that the consequence of usury reserved, the forfeiture of all interest, is the same both in the Federal act and in the State statute.

ANSWER TO POINT 7.

The bank in Point 7 of the respondent's brief contends that the complainant should not be granted the aid of a Court of Equity without signifying in his bill a disposition to do what is right, viz., without making a tender of the amount which he claims to be the amount due the bank.

It should be pointed out on this score that:

(1) Okin's obligation to repay did not arise until May 29, 1920, or, as it was worded in the instrument, his right to purchase the mortgage expired at that time. The bill was filed, consequently, before his obligation to repay arose, and equity did not demand a tender of the amount he thought due.

(2) The bill was filed, to have the Court determine the respective equitable interests of Okin and the bank in said mortgage, and again equity did not demand a tender of the amount due.

(3) Okin was the real owner of the mortgage and was entitled to foreclose (the learned Vice-Chancellor below stated, for the purpose of the record, that any agreement between the bank and the owners was subject to Okin's rights) p. 71, l. 40; p. 72, l. 10; and since Okin was entitled to foreclose, equity did not demand a tender of the amount due.

Respectfully submitted,

AARON MARDER,
Solicitor for and of Counsel with
Complainant-Appellants.

New Jersey Court of Errors and Appeals

Between

JOSEPH OKIN, *et als.*,

Complainants-Appellants,

and

BROAD AND MARKET NATIONAL BANK OF
NEWARK, *et als.*,

Defendants-Respondents.

On Bill, etc.

BRIEF ON BEHALF OF THE BROAD AND MARKET NATIONAL BANK OF NEWARK.

This is an appeal by the complainants from the decree advised by the Hon. James F. Fielder, Vice-Chancellor, before whom the cause was heard.

Statement of facts in the case as proven or admitted are that on or about May 29, 1914, complainant, Okin, was the owner of certain lands in the City of Newark, located on the southerly side of Springfield avenue, known as No. 99-103 Springfield avenue, upon which was erected at that time a large theatre building; that on or about that date Okin conveyed said premises to one Joseph Meyer and took as part payment for the consideration for the purchase of said premises a purchase money mortgage covering said premises in the sum of \$60,000, which mortgage was executed by the said Joseph Meyer and was a second lien on said premises; that said mortgage was dated May 29, 1914, and recorded in the Register's Office of Essex County in Book S 32 of Mortgages, page 465; that by reason of the mutual adjustments made between Meyer and Okin at the time of the conveyance and execution of the mortgage there was credited on the principal of said mortgage the sum of \$1,000, leaving a balance of principal due from the date of the mortgage of \$59,000; that said mortgage was to run for five years and to be payable on May 29, 1919.

Said mortgage was assigned by said Okin to Nathan Shiman and David Shiman and Aetna Realty Company on the 10th day of June, 1914, and said assignment was recorded June 11, 1914, in Book 118 of Assignments of Mortgages for Essex County, on pages 141, etc. (pp. 78 and 81, Exhibit 3). Said assignment

recited that it was made as collateral security for the payment at maturity of the sum secured by a certain note bearing date March 2, 1919, made by the said Okin to the assignees in said mortgage upon which there was due at the date of the assignment \$21,500, said assignment contained a further provision that it was understood and agreed that upon default by the said Joseph Okin, his executors, administrators or assigns, in the payment of the principal of said note, or any semi-annual installment of interest thereon, the said assignee should have full and complete power of authority to sell at public or private sale the mortgage made by Meyer to Okin, together with the bond secured thereby, upon sixty days' notice in writing delivered either personally to said Okin or left at his usual place of abode in New Jersey with some member of the family, or mailed to his last known address if not a resident of said State, which notice should designate the time and place at which the proposed sale should take place, the amount due on said mortgage to the said assignees, and to sell, assign and deliver the said mortgage and bond accompanying the same to the purchaser of said bond and mortgage at said sale, and that upon such sale the purchaser of the bond and mortgage might purchase the same *discharged from any right of redemption of the said Joseph Okin*, his executors, administrators and assigns.

It further contained a covenant that the interest of the said Shiman Brothers, *et als.*, and their assigns in and to the aforesaid mortgage and bond should be superior and prior to the interest of said Okin, and his assigns, and that upon default of the mortgagor in said mortgage to perform its terms and covenants the said assignees should have all the right given to the mortgagee named therein, in case of default, provided thirty days' notice of their intention to exercise such right should be given to the said Okin. (See Exhibit 3, p. 78, *et seq.*)

On or about June 18, 1914, Okin assigned to the respondent, Broad and Market National Bank of Newark, an interest of \$15,000 in the aforesaid mortgage, which assignment was recorded in Book 119 of Assignments of Mortgages for Essex County, page 143, and was expressly subject to the prior assignment to Nathan Shiman, *et als.*, above recited, and was given to secure the repayment of an antecedent loan in that amount made by the bank to the complainant (pp. 2 and 14, state of case, paragraph 4 of bill and paragraph 7 of answer). That in addition to the assignment of the interest in said bond

and mortgage made to Shiman and others, and to the Broad and Market National Bank, sundry other assignments were made by Okin to Cook and Genung Co. (p. 94), and to other parties until he had divested himself of all interest in said mortgage and bond (p. 2, state of case, paragraph 3 of bill and p. 44).

In April, 1916, the appellant Okin having failed to meet his obligation to Nathan Shiman and others, according to the terms of the note, which note was secured by the assignment of the bond and mortgage in question, Shiman Brothers caused notice to be served on the said Okin on April 17, 1916, that they would sell the bond and mortgage according to the terms provided in the assignment of the same (Exhibit C. 3) and the said Okin acknowledged service of a copy of such notice on April 17, 1916 (pp. 41 and 42).

It is stipulated that all the technical steps required by the assignment, Okin to Shiman, Exhibit C. 3, were taken by Nathan Shiman *et als*, so that the legal title to the bond and mortgage is vested in the Broad and Market National Bank (p. 101, also p. 2 of the appellant's brief, l. 12).

The sale of the bond and mortgage under the terms of the assignment to Shiman took place on the 30th day of October, 1916, and the assignment itself from Shiman to the Broad and Market National Bank was recorded on the 13th day of November, 1916.

At the time of the service of the notice by Shiman, *et als*. on Mr. Okin, Mr. Okin was indebted to Shiman, *et als*. in the sum of about \$19,500, to the Broad and Market National Bank in the sum of \$15,000, and to Cook & Genung Co. in the sum of about \$10,000, and to Saul Cohn, Trustee, in the sum of about \$12,000, and to some other person in the sum of about \$2,500 (pp. 44, 50).

The controversy which is the subject of this litigation has arisen through Mr. Okin at that time endeavoring to extricate himself from his financial difficulties.

That at the time the notices were served, Joseph Okin called on Francis Williams, President of the Broad and Market National Bank and had many conversations with him as to how Mr. Okin might handle the purchase of the mortgage (p. 67), and was informed by Mr. Williams that the Bank was only interested to the extent of the note of Mr. Okin's which they held and their interest in the mortgage of \$15,000, and that he should go out and try to get some of the subsequent

creditors to advance the money to pay the Bank off, and that as a result of that advice Mr. Joseph Okin brought Mr. Waldo Genung to see Mr. Williams, and Mr. Williams told Mr. Genung that he had no objection to Mr. Genung buying the mortgage; that he would be pleased if he would buy it and informed Mr. Genung (in answer to a question) that the bank would only buy in the mortgage if nobody else would because the Bank could not afford to lose \$15,000; that Mr. Genung said he would have to think the matter over to see what he could do to protect his interest, and that he never came back, and after that Mr. Joseph Okin came in and talked about the Metropolitan Lumber Company, and that a Mr. Jacobson came with him, and that he, Okin, wanted to know if the Bank would advance the money to the Metropolitan Lumber Company if they would buy the mortgage, but that finally Mr. Jacobson came in and said that the Metropolitan Lumber Company was out of it (pp. 67 and 68).

Mr. Okin does not deny this testimony of Mr. Williams, but upon being asked whether about April, 1916, he called to see Mr. Williams with reference to raising money to take care of the Shiman note and with reference to trying to arrange through Metropolitan Lumber Company to buy the mortgage, simply says, that he might have tried but he doesn't remember (pp. 42 and 43).

He admits on page 43 that he did try to make an arrangement with Waldo Genung of Cook & Genung Company, to buy the mortgage, and that he told him, the only way to save his interest in the mortgage was to pay off the Broad and Market National Bank and Nathan Shiman. He says he does not remember whether he told Mr. Genung that Mr. Williams had said that he didn't want to buy the mortgage at all if nobody else would buy it. Genung verifies Williams' statement in the main (p. 65).

He does not remember whether he told him that Mr. Williams had said that he would not buy the mortgage, except to protect his own interest, and that all he would pay for it was the amount due Shiman and the \$15,000 due the Bank.

He admits that Williams did tell him, Okin, that the only way that the Bank would buy the mortgage was if nobody else would pay Shiman Brothers and the amount due the Bank, but if there was anybody else that wanted to pay more than that they could have it (p. 44).

After these numerous conversations, adjournments of the sale were had from time to time at Mr. Okin's request (pp. 45 and 50, l. 42, and p. 69). And Mr. Okin was unable to arrange to pay Shiman Brothers off (p. 45). That through Saul Cohn, Shiman Brothers informed him that the mortgage would be sold on the 31st day of October, 1916 (p. 45).

About two weeks before this date the mortgage and bond were put up for sale at Mr. Cohn's office and Mr. Williams, Mr. Okin and Mr. Stewart, the solicitor for the Bank, were present (p. 45). An adjournment was taken of the sale till October 30th.

At the time of the sale of the mortgage in question, Mr. Okin, through Mr. Saul Cohn, had liquidated the various assignments subsequent to that made to the Broad and Market National Bank, with the exception of one of \$1,200 to a party by the name of Geismar (p. 50, l. 25) so that he had an interest in the bond and mortgage, which interest he stood to lose, if he could not pay off Shiman Brothers and the bank.

From Mr. Williams' testimony, he being the president of the respondent bank, it appears that Mr. Joseph Okin had owed the bank \$15,000 from some time antecedent to that date, and the bank had taken an assignment of a \$15,000 interest in the mortgage in question, by an instrument dated June 18, 1914, and recorded June 23, 1914 (Exhibit C. 4, pp. 82 and 84).

That in the spring of 1916, Mr. Williams learned from Joseph Okin that Shiman Brothers were going to sell out the interest of Okin in the mortgage in question (p. 67, ll. 1 to 14).

That Mr. Okin applied to Mr. Williams with reference to the bank handling the purchase of the mortgage for his, Okin's, benefit, and that Mr. Williams told him as above noted that the bank's sole interest was to the extent of their \$15,000 loan, and that he, Okin, should go out and try to get some subsequent creditor to pay the bank off, and that Okin made the efforts heretofore set forth; that as a result of these various interviews Mr. Williams told Mr. Okin that if nobody paid more than enough to clear up the indebtedness to Shiman and to the bank, the bank would buy it in, and that Okin stated that "he was making a loan of \$25,000" (p. 68), and that Mr. Williams informed him that he always had the option between the date of the conversation and the date of sale of redeeming the mortgage, but questioned Okin as to what situation he would be in, if he could not raise the \$25,000, and that Okin wanted to know

if the bank would not do something for him, Okin, if it got something in return for it, and that Mr. Williams replied that that would not be fair to him, Okin, and that finally an agreement was arrived at, which is the agreement in question (Exhibit C. 8, p. 88, *et seq.*)

Mr. Williams denies that there ever was any arrangement with Okin and Mr. Bernstein that the bank was to hold the mortgage (after it had purchased it at the Shiman sale), as a pledge for the notes, and that it was explained to Mr. Okin that the taking of the notes from him and Harry Bernstein was a mere matter of convenience to the bank (p. 69, ll. 1 to 10), and that the notes were taken in addition to the agreement because the bank did not have any real estate ledger, and the notes therefore kept Mr. Williams in touch with the transaction, and when he was to turn over the excess interest to Okin under the agreement (p. 68, ll. 30, etc., and p. 72, ll. 35, etc.), and the notes and mortgage were both carried as live assets of the bank (p. 73, ll. 38 to 44), as one item (p. 73, ll. 10-34), and that his understanding of the transaction was that the notes were collateral to the agreement and that if he did not get the \$34,000 called for under the agreement he would then have the notes to resort to (p. 73, ll. 17 to 22, and p. 76).

In response to a question of the Vice-Chancellor (p. 73, l. 27), he stated that the bank was carrying the mortgage as an asset of \$34,000 and the notes at \$34,000 merely as a matter of record, but that both amounts are not carried in the assets of the bank (p. 73, ll. 34, etc.).

He further stated on the same page at the bottom, that the mortgage was not carried as collateral for the notes and in reply to a question of the Vice-Chancellor he stated that he was carrying the notes as collateral for the mortgage, "because that is the way the department liked them carried. It is simply done to please the department" (meaning the U. S. Treasury Department). (See also p. 76.)

Mr. Williams specifically denies that he ever told Mr. Okin that the bank wanted to purchase the mortgage for and on behalf of Mr. Okin, or that the bank would hold the mortgage as collateral for Okin's note.

Mr. Williams repeats his understanding that the notes are collateral for the mortgage, and that Okin and Bernstein owe the money on the agreement and not primarily on the notes (p. 75).

Mr. Williams further testifies (p. 76) that if Okin and Bernstein do not exercise their right of purchase under the agreement that in that event they were not indebted to the bank in any sum whatsoever.

The agreement, itself (Exhibit C. 8, p. 88), recites that the bank purchased the bond and mortgage in question on October 30, 1916, and that Joseph Okin and Harry Bernstein are desirous of buying the same from the bank, and that the bank is willing to sell the same to them on the terms and conditions therein ~~after~~ set forth, "Now this Indenture witnesseth" that the bank in consideration of the covenants and conditions therein after entered into between said Okin and Bernstein *and in consideration of \$3,000 to be paid by Okin and Bernstein* agrees that it will convey the said bond and mortgage to Okin and Bernstein on or before the 29th day of May, 1920, *upon the parties of the second part performing the agreements and covenants therein contained by them to be performed*, the bank agreed that the interest received by it upon the said mortgage, pending the purchase of the same by Okin and Bernstein, should be applied as follows:

1st. To the payment of six per cent. interest on the balance of the purchase, viz., \$34,000.

2nd. To the repayment of any moneys it expended in payment of taxes, assessments, municipal liens, or in the redemption from the sale of property by reason of any taxes, etc.

3rd. To the repayment of any moneys it might expend for foreclosure costs and counsel fees in foreclosing the mortgage.

4th. To the payment of any accrued interest on any of the foregoing items.

5th. To the payment of any surplus of said interest from said mortgage to Okin and Bernstein.

It further agreed that should it foreclose the mortgage and take title to the premises at sheriff's sale, at any time before May 29, 1920, it would convey to Okin and Bernstein, "for whatever sum is due the bank on said sum of \$37,000, plus accrued interest, taxes, assessments, foreclosure costs, sheriff's fees, etc., and would accept in payment of the same a purchase money mortgage for \$34,000. balance due with interest at six per cent., the mortgage to run until May 29, 1920, and the balance of the purchase price to be paid said bank in cash on the delivery of the deed."

Okin and Bernstein agreed that they would at once pay on the signing of the agreement \$3,000 in cash and on or before May 29, 1920, would pay the balance of \$34,000 plus accrued interest, etc.; they further agreed that should they fail to perform the agreement in every particular on or before May 29, 1920, "*that they shall have no right of redemption to or claim against said mortgage, time being of the essence of the contract, and that upon default by them, the bank should hold the mortgage absolutely freed and discharged of any right in or claim against the same, by reason of the agreement.*"

They further agreed that *they had no equity of redemption in said mortgage, except as provided for in the agreement.*

The agreement was therefore an option to purchase.

Prior to May 29, 1920, that being the last day on which Okin and Bernstein might purchase the mortgage, Mr. Okin served on the Broad and Market National Bank the notice found on pages 40 and 41 in the printed state of case, demanding of it that it should serve immediate notice on the owners of the property embraced in the mortgage demanding payment of the principal and interest due on the mortgage, and that upon failure of the owners to make payment accordingly within ten days from the date of the notice served by Okin, Okin demanded that the bank should commence foreclosure proceedings and notified the bank that upon its failure to comply with the demands set forth in said notice, that it was his intention to institute a suit in the Court of Chancery and make the bank defendant therein for the purpose of effecting the collection of the mortgage, and obtain such further relief as he might be entitled to by virtue of the agreement existing between the bank and him, being the agreement, Exhibit C. 8, page 88.

The bank, not having complied with Mr. Okin's request, Mr. Okin filed the bill in this suit, which bill after full hearing was dismissed by the Vice-Chancellor (pp. 95-96) and an order entered accordingly (p. 97).

From this order Okin has taken this appeal.

The complainant in his brief (p. 3, top of page) limits the question to be reviewed to the question of usury, and insists that under the pleadings and proof the Vice-Chancellor should have found that the agreement was a device to cloak a usurious exaction of \$3,000 and should have advised a decree to the effect that the bank's interest in the mortgage was \$31,000 less the interest it had received on the loan to Okin, tainted with usury, namely, the interest on \$19,000.

POINT I.

At the outset we desire to call the Court's attention to the provision of the Federal Statutes, Section 9759 of U. S. Compiled Statutes, 1913, title Usury (formerly Section 5198), which provides that the taking of usury when knowingly done shall be deemed a forfeiture of the entire interest which the bill, note, etc., carried with it, but it further provides that in case a greater rate of interest *has been paid, the person so paying, may recover back, in an action in debt twice the amount of interest, thus paid provided the action be brought within two years from the time the usurious transaction occurred.*"

The bill was filed September 15, 1919, the agreement signed and the alleged usurious payment made November 13, 1916, therefore more than two years elapsed and recovery cannot be ~~made~~.

Brown v. Marion Nat. Bank, 169 U. S. Rep. 416.

In construing this section the courts held if the borrower had paid usurious interest he cannot avail himself of such payment as a set-off or counterclaim against the principal of the loan ~~used~~ ^{owed} on, but must bring a separate action therefor.

Barnet v. Munsey National Bank, 98 U. S. 555;

Hazeltine v. Cent. Nat. Bank, 183 U. S. 132;

Stevens v. Monongahela Bank, 111 U. S. 197; ~~Mass~~

Peterboro Nat. Bank v. Childs, 133 N. Y. 248;

Driesbach v. Nat. Bank, 104 U. S. 52;

Nat. Bank of Auburn v. Lewis, 81 N. Y. 15;

Ellis v. 1st Nat. Bank of Olney, 11 Bradw. 275;

Cox v. Beck, 83 Fed. Rep. 269.

And numerous other cases which will be found in Pratt's Digest of National Bank Laws, 1908 Edition, at page 112.

POINT II.

To subject the bank to the penalty provided in the Statute for taking usury there must be paid not only a larger rate of interest than allowed by law, but that larger rate of interest must have been *knowingly received*.

Timberlake v. 1st National Bank, 43 Fed. Rep. 231.

We contend that it cannot be *presumed that the bank knowingly received* usurious interest, the receipt of which is denied.

1. Because we claim that the evidence shows that the bank purchased the mortgage only to protect its own interest and that it had informed Okin, as hereinbefore set forth, that it would not purchase if anybody would pay the sum sufficient to supply the funds necessary to pay off Shiman Brothers and the bank.

2. Because the evidence does not show any agreement between the bank and Okin that it was purchasing the mortgage on Okin's behalf.

3. Because the agreement under which the \$3,000 was paid was one which deprived the bank of rights which it would otherwise have had and which therefore sustained an agreement on the part of Okin and Bernstein to pay the sum, claimed to be usurious, as a consideration for the rights which they thereby secured.

If the bank had not entered into the agreement, having purchased the mortgage, it would have had not only title to a \$59,000 mortgage, but would also have had its claim against Okin on the \$15,000 note, which it already held.

By virtue of the agreement it gave up the right which it otherwise would have had, of making an immediate sale of the bond and mortgage for cash for any sum which it saw fit.

As the evidence shows that the property cost \$205,000 and only had a \$65,000 first mortgage ahead of the mortgage bought by the bank, there was a clear equity of \$140,000 to which the bank or its assignees might look to realize the \$59,000 due on the mortgage which naturally would be a very attractive proposition to any person dealing in second mortgages.

It also lost its security which the ownership of the mortgage gave to it to offset any profit it might make on the sale thereof against any losses which it might sustain by Okin in not paying the notes which he had with the bank and which were in excess of \$15,000 (p. 75, l. 24).

It also lost the right to pursue Okin on his \$15,000 note for the reason that the agreement is a pure option for Okin and Bernstein to purchase, with no obligation on Okin's part to purchase for himself and Bernstein, for the agreement provides that the bank will assign and convey to Okin the mortgage on or before May 29, 1920, upon their performing the agreement and covenants contained in the contract, but should they fail to perform the agreement in every particular on or before that date the provision is that they shall have no right

to or claim against the mortgage, time being of the essence of the contract, and that the bank should hold the mortgage absolutely freed or discharged of any right or claim against it, by reason of the agreement.

Nowhere in the agreement will be found a provision which will sustain a suit for specific performance, or for damages for the failure of Okin and Bernstein to buy the mortgage.

The advantage to Okin and Bernstein was that all holders of participating interests subsequent to Shiman were cut off by the sale, as was also Okin's interest in the mortgage. That by the contract of sale he acquired an option to purchase the mortgage at any time within three years and eight months from October 30, 1916, relieved of any lien against it as security for the payment of any indebtedness to the bank or any other person.

We submit that it was neither inequitable, immoral or usurious, nor the taking of an unfair advantage for the bank to insist that if Mr. Okin desired to obtain an opportunity to acquire title to the mortgage that they should enter into a contract on any terms which might appeal to the bank as being the ones upon which the bank was willing to part with its title.

We further urge that the testimony clearly shows the agreement was an option of purchase.

POINT III.

The complainant must allege that usury was taken and knowingly taken.

Under the case of *Case v. Bennett*, 33 Atl. 248, starting at the bottom of page 249, V.-C. Emery says, "that in the case then before him the answer failed to set up that the bond was made upon a contract for the loan of money, or that the contract for the loan of money was made between the parties with the intention to violate or evade the Statute against usury, or that the bond and mortgage in question were given in pursuance of this corrupt intention. At common law in a plea of usury to a debt on a bond all three elements are essential. (Citations.) *And in addition the particulars of the usurious contract must be set out.* A specialty cannot be avoided by usury appearing merely on the face of the condition, but the fact must be pleaded specially, and the defendant cannot demur. (Citations.) As to the defense of usury the answer in equity must, in substantial

matters, be as certain and definite as a plea at law. (Citations.) And in equity the rule of pleading as to this defense may be somewhat stricter than at law, for while at law a general plea of usury without particulars may be bad, only on special demurrer, and may be cured by the plaintiff pleading over, our rule in equity is settled that the failure to particularize in the answer will be fatal, even on final hearing."

See also *Guild v. First Nat. Bank of Deadwood*, 4 S. D. 566;

First Nat. Bank v. Morgan, 132 U. S. 141.

But it is said this is not an answer, but a bill of complaint that is under consideration, we submit that the rule should be more strictly enforced when the complainant voluntarily comes in seeking equitable relief.

The first paragraph of the bill of complaint which relates to usury is in the seventh paragraph, page 3, in which Okin sets forth that at the time of making of the agreement he was indebted to the bank in the sum of \$34,000, which sum constituted the advance of \$19,000 of the principal made by the bank to Shiman, *et als.*, and the sum of \$15,000, which Okin then owed to the bank, which was secured by the assignment of the second interest in the mortgage in question, and that when the bank advanced the said \$19,000 it required Okin to pay the sum of \$3,000 as a consideration for the extension of time for the payment of his indebtedness of \$34,000, and complainant, Okin, avers that the said payment was usurious and that his actual indebtedness to the bank is only \$31,000 and not \$34,000, as alleged in the agreement.

We therefore submit that, assuming the facts to be as stated in the complainant's bill, that he has not sufficiently pleaded usury under the cases.

But the facts are not as stated in the bill, for at the time that the payment of the \$3,000 was made, \$34,000 was not owed to the bank by Okin, but at that time and as a part of the agreement Bernstein gave his note for \$19,000, Okin's \$15,000 note which the bank already held was allowed to run both as collateral to the agreement and \$3,000 was paid as a consideration for the option to purchase.

POINT IV.

The law of the State of New Jersey on usury has no application to the point in issue.

The penalty provided by the section of National Bank Act above quoted is exclusive.

Barnett v. Munsey Nat. Bank, supra.

Hazeltine v. Central Nat. Bank, supra.

Farmers Nat. Bank v. Deering, 91 U. S. 29.

Schuyler Nat. Bank v. Gadsen, 191 U. S. 451.

POINT V.

The ruling of the Vice-Chancellor that when the parties have put their agreement in writing and such writing is on its face complete and purports to contain the whole contract between them the written agreement shall be the only evidence of the contract as finally concluded, and that the testimony on the part of the complainants designed, first, to contradict the agreement, and to show that the bank held the mortgage as a pledge and not as an owner, and, second, to supply the provisions on which the agreement is silent that the bank should foreclose the mortgage when it fell due could not be considered, is correct in point of law.

The Vice-Chancellor further says, and the evidence clearly shows, that Mr. Okin prior to the execution of the agreement and in its purchase had the advice and assistance of his counsel. He, Okin, testified that he had read the agreement over before signing it, and that he knew its contents, and that it represented the bank to be the absolute owner of the mortgage.

His counsel testified that he had participated in the preparation of the agreement; that he approved its final draft; that it contained the agreement between Okin and bank as communicated to him by Okin before the agreement was drawn. (p 52-56)

The bill of complaint charges neither fraud nor mistake and reformation of the agreement is not prayed, therefore parol evidence should not be admitted to vary the terms of the contract, such admission being contrary to the well established rule.

Whitney v. Lowell, 33 Maine 318;

Thomas v. Scutt, 52 Hun. N. Y. 343; 5 N. Y. Sup. 365;

Thomas v. Scutt, 127 N. Y. 133;
Marsh v. McNair, 99 N. Y. 179.

In this last case, Judge Vann says:

"It is a general rule that evidence ~~that~~ ^{of} what was said between the parties to a valid instrument in writing either prior to or at the time of its execution cannot be received to contradict or vary its terms.

This rule is not universal in its application, because the courts in their efforts to prevent fraud and injustice have laid down certain exceptions, which, although correct in principle, are sometimes so loosely applied in practice as to threaten the integrity of the rule itself.

The real exceptions may be grouped into two classes, the first of which includes those cases in which parol evidence has been received to show that that which purports to be a written contract is in fact no contract at all. Thus fraud, illegality, want of consideration, delivery upon an unperformed condition and the like may be shown by parol, not to contradict or vary, but to destroy a written instrument. Such proof does not recognize the contract as ever existing as a valid agreement and is received from the necessity of the case to show that that which appears to be is not and never was a contract. * * *

The second class embraces those cases which recognize the written instrument as existing and valid, but regard it as incomplete, either obviously, or at least possibly, and admit parol evidence, not to contradict or vary, but to complete the entire agreement of which the writing was only a part. Receipts, bills of parcels and writings that ~~evidence~~ only some parts of the agreement are examples of this class which leaves the written contract unchanged, but treats it as part of an entire oral agreement, the remainder of which was not reduced to writing.

Ally expresse

Two things, however, are essential to bring a case within this class:

1. The writing must not appear upon inspection to be a complete contract, embracing all the particulars necessary to make a perfect agreement and designed to express the whole arrangement between the parties, *for in such a case it is conclusively presumed to embrace the entire contract.*

2. The parol evidence must be consistent with and not contradictory of the written instrument. * * *

"In *Eighmie v. Taylor* ⁹⁸ ~~96~~ N. Y. 288), the Court had under the consideration a written instrument that was regarded as, upon inspection, appearing to be a full, definite and complete agreement of bargain and sale, and therefore held that evidence of a verbal warranty in that case as inadmissible.

* In the course of the opinion comment was made upon *Chapin v. Dobson*, 78 N. Y. 74, in this way:

“It is said of the instrument then in question that there was nothing on its face to show that it was intended to express the whole contract between the parties, the inference being as was declared in an earlier case, *that where a contract does indicate such intention, and design, and is one consummated by the writing, the presumption of law arises, that the written instrument contains the whole of the agreement, and that where there is such a formal contract of bargain and sale executed in writing there can be no question but that the parties intended the writing as a repository of the agreement itself.*” (Citing *Filkins v. Wheyland*, 24 N. Y. 338.)

** A further illustration of the inflexibility of the first of the two requirements mentioned may be seen in the still later case of *Marsh v. McNair* (99 N. Y. 174), where the written instrument was in these words:

“This is to certify that in consideration of the crediting C. H. Marsh at the Exchange Bank of Lima \$353.72, paying mortgage (on property formerly deeded ~~by~~ J. H. Marsh in Avon to C. W. Gilson), given by Wm. T. Russell to C. H. Marsh, \$110.46 and indorsing \$35.62 upon a note made by C. H. Marsh, June 8, 1871, for \$300, we jointly and severally sell, assign and transfer all our right, title and interest in two policies Nos. 4277 and 4287 upon the lives of Chas. H. Marsh and John B. Marsh, issued by the National Life Insurance Co. of the U. S. of A. to Chauncey W. Gilson of Lima, N. Y.”

“It was held *in the absence of any claim of fraud or mutual mistake* as to the contents of the assignment it was conclusive and that oral evidence was incompetent to show that it was executed as collateral security only. * * *

“The principle upon which parol evidence is held admissible to show *a simple assignment*, although absolute in terms, was intended as security merely *is the supposed incompleteness of the instrument*, and is not regarded as contradicting the writing but ^{to} show ^{its} purposes. (Citing cases.)

“Where, however, *instead of a mere transfer of assignment*, there is a contract, appearing on its face to be complete with mutual obligations to be performed, ‘you can no more add to or contradict its legal effect by parol stipulations, preceding or accompanying its execution than you can alter it through the same means in any other respect.’ (Citing cases.)

• In the foregoing classification *collateral agreements* are not included, because they are separate, complete and independent contracts, although relating to the same sub-

ject. They are allowed to be proved by parol because they were made by parol and no part thereof committed to writing. * * *

•• Returning now to the written instrument executed by the plaintiffs in this case and it appears, upon analyzing its provisions, to be an agreement of a complete and comprehensive character. There is first a transfer in formal terms by the plaintiffs, to the defendants of a raft of hemlock lumber lying at a place named, followed by the statement that such lumber is covered by the chattel mortgage annexed, three different kinds of lumber are then enumerated, with the quantity in feet of each, the price per foot or thousand, and the amount that each kind came to at the price named. Those sums are added and the amount thereof, constituting the purchase price the defendant expressly agrees to apply on his chattel mortgage and both parties agree to correct any mistake there may be in the amount of the lumber. * * * We regard the contract as complete upon its face. What element is wanting? *If such a writing can be undermined by parol evidence what written instrument is safe? How can a man, however prudent, protect himself against perjury, infirmity of memory, or the death of witnesses. What stipulation was omitted that should have been inserted in order to bring the contract within the general rule?*

What will be left of the rule if it is established that it does not control such a contract?

Will anything of value be left if it is held that a writing which contains the full and definite terms of a contract apparently complete may be shown by oral evidence to be simply part performance of an entire verbal agreement previously made?

We think that the writing in question is governed by the rule not by the exception.

Judgment affirmed."

We contend that before the Court can reverse the Vice-Chancellor's decision, and before it can consider the question of usury, it will first have to find that the buying of the mortgage by the bank was not only ^{not} a purchase on its own behalf, but was a purchase on behalf of Okin, and that notwithstanding the plain terms of the agreement, it took the bond and mortgage as a pledge for the note of Okin and Bernstein and not the notes as collateral to the agreement.

POINT VI.

While the appellant seeks to restrict this Court in its consideration of the correctness of the Vice-Chancellor's order, dismissing the bill, to the question of usury, we submit that the Vice-Chancellor was correct in dismissing the bill not only on the ground that the agreement fully and specifically sets forth the relation between the parties, and that their relationship being thus set forth, the agreement cannot be varied by parol evidence, but also that the Vice-Chancellor was correct in dismissing the bill,

Because the bill is repugnant and inconsistent in its allegations.

Because the bill is equivocal.

Because the complainant comes into court seeking the aid of equity to compel the bank to bring foreclosure proceedings on a mortgage which the bank claims to own, and which the bill says it does own.

Because the complainant-appellant does not signify in his bill a disposition to do equity.

It alleges in paragraph 3 that Shiman Brothers by virtue of the power of sale became the owners of the mortgage and acquired all the right, title and interest of Okin therein.

Whereas the agreement, which by express reference is made a part of the bill, recites that the bank purchased the mortgage under the power of sale to Shiman Brothers; it recites in paragraph 5 that the bank became vested with the complete title and ownership of said mortgage, and that the said mortgage thereupon became the collateral security for the repayment of the principal sum of \$19,000 and for \$15,000.

It alleges in paragraph 5 that the bank became vested with the complete title to said mortgage and in paragraph 6 that the conveyance by Shiman and others to the bank was *of the paramount interest of Shiman Brothers in the mortgage.*

It alleges in paragraph 6 that the agreement under consideration provides that the financial interest of the bank in said mortgage was \$34,000 with interest from the date of said agreement, and that the balance of \$25,000 of principal in said mortgage became vested in the complainant, Okin, and Bernstein, whereas a careful reading of the agreement will disclose no such provision.

The rule is, a bill where the facts are not doubtful must not be repugnant or inconsistent within itself either in its allegations or the object sought to be attained thereby. * * *

A bill may be framed^{ed} in a double aspect, if under either phase the plaintiff is entitled to the same relief, but it is bad if only one phase shows a right to relief, or if the claims are so inconsistent as to destroy one another.

16 Cyc. 238.

POINT VII.

The complainant comes into a Court of Equity seeking its aid to compel the bank to foreclose a mortgage which it claims it owns and which the bill says it does own, and seeking the aid of the Court to compel the bank to extend the time beyond that provided in the agreement in which Okin shall have the right to perform and to have the contract declared usurious and penalize the bank, *but the complainant does not signify in his bill a disposition to do what is right and what he should do.*

He does not make a tender of the amount which he claims to be the amount due the bank, nor offer to pay the amount into court.

This he should do.

Miller v. Ford, 1 N. J. Eq. 359-364;

Ware v. Thompson, 13 N. J. Eq. 66;

Giveans v. McMurtrie, 16 Eq. 473-4; affirmed 17 Eq. 510;

Vanderveer v. Holcombe, 17 Eq. 547-50, *et seq.*;

31 Cyc., page 853;

Norton v. Baxter, 4 L. R. A. 305-308.

Assuming which, of course, is not admitted, that the mortgage was held by the bank as a pledge and not as its absolute property, the rule is that the mere offer to pay the amount of the debt, not accompanied by an actual tender of the money is insufficient to entitle the pledgor to a return of the property or to the exercise of any dominion over it.

31 Cyc. 853.

And in cases where the bill is for relief against usury the plaintiff must offer to pay the debt.

McGhee v. George, 38 Atl. 323;

Ruppel v. Guarantee, etc., Assn., 59 S. W. 1000;

Beech v. Fulton Bank, 3 Wend (N. Y.) 573;
Mason v. Gardner, 4 Bros. C. C. 436;
 29 Eng. Rep. 976.

The complainant must allege in his bill that he has done, or offered to do, or is ready to do, according to the circumstances everything necessary to entitle him to the relief he seeks, or sufficiently excuse his failure so to do. Where there is something justly due the bill must offer to pay what may be found to be due.

16 Cyc. 237.

The bill in this case does not comply with any of the foregoing requirements, therefore the bill should have been dismissed.

Lastly, we desire to point out certain errors in appellant's brief, and certain distinctions between the cases cited and the case under consideration.

We first call attention to the fact that in the case of *Cake against Shull*, 45 Equity 208, page 212, the Court says, "An obligation to repurchase or any other duty resting on the vendor, by the performance of which the property was to revert to him, would ordinarily be conclusive evidence of a mortgage, *while the absence of such obligation or duty, either expressed or implied, would be indicative of a sale.*" As we have above pointed out there is no obligation on the part of the appellant to purchase the mortgage, but merely an option to do so.

"In the case of *Lance v. Bonnell*, 58 Equity 259, where the Court says, it is to be noted, touching this claim, that Bonnell's title to both the policies was by *written contract.*"

"In that case the written contract was not between Bonnell and Lance, but was in one instance the policy of insurance issued to Bonnell on Lance's life, and in the other instance an assignment of a policy issued by the company to Lance, and by him assigned to Bonnell in the form usually used by insurance companies, and that therefore the contracts referred to by the Court did not purport to show the agreement between the parties in reference to the policies, and as a result parol evidence would be admitted."

The case of *Tallman v. Wallach*, 54 N. J. Equity 655, does not touch upon the principles involved in this case.

The case of *Diercks v. Kennedy*, 16 N. J. Equity 210, holds in addition to what was quoted by appellant, the following:

“In this case, moreover, the rate of interest forms no part of the contract for the exchange of lands. The written contract stipulates merely for the giving of mortgages. It is silent both as to the time of payment and the rate of interest. *The written contract cannot be changed by parol, much less will it be presumed, where a contract upon its face is strictly legal, that the parties had in contemplation an illegal stipulation.*”

A reading of this case shows that the portion cited by the appellant has no relevancy to the case under consideration.

On page 6 of appellant's brief he quotes “English cases to the effect that where a usurious loan is concealed under the appearance of a pretended sale, equity will look at the real transaction.”

Our contention is that Okin did not sell nor agree to the sale of the mortgage to the bank. He had no option. Shiman Brothers insisted on getting their money and held the sale, and the bank to protect its interest bought in and the proof is as above cited. Okin could not raise money to buy.

We therefore submit that the cases cited by appellant are not in point.

Turning to the second point of appellant's brief at the top of page 7, if all that is there recited were true, still the Vice-Chancellor's opinion and decree entered thereon would be correct, for the bill does not allege fraud or mistake, or ask for reformation of the instrument.

In the second paragraph on that page counsel inadvertently misstates a fact—he says regarding Bernstein, “that he never did any business with the Broad and Market National Bank.” The proof is (p. 64, l. 21), “Yes, I was a depositor there.” And in Williams' testimony (p. 74, l. 20), “Sure, I know the man. He is a depositor. I probably discounted some small notes for him before that.” On the same page in the third paragraph appellant comments on the fact that the interest payable on the \$59,000 was credited on Okin's and Bernstein's notes; that Bernstein got a check for the balance, and further on, on page 13, asks: “Q Why should the bank make a gift of this excess interest to Okin?” The answer to all this is that the agreement expressly so provided, and that all that the bank desired from Okin and Bernstein was that it, the bank, should get back the money it had invested, together with a reasonable profit for

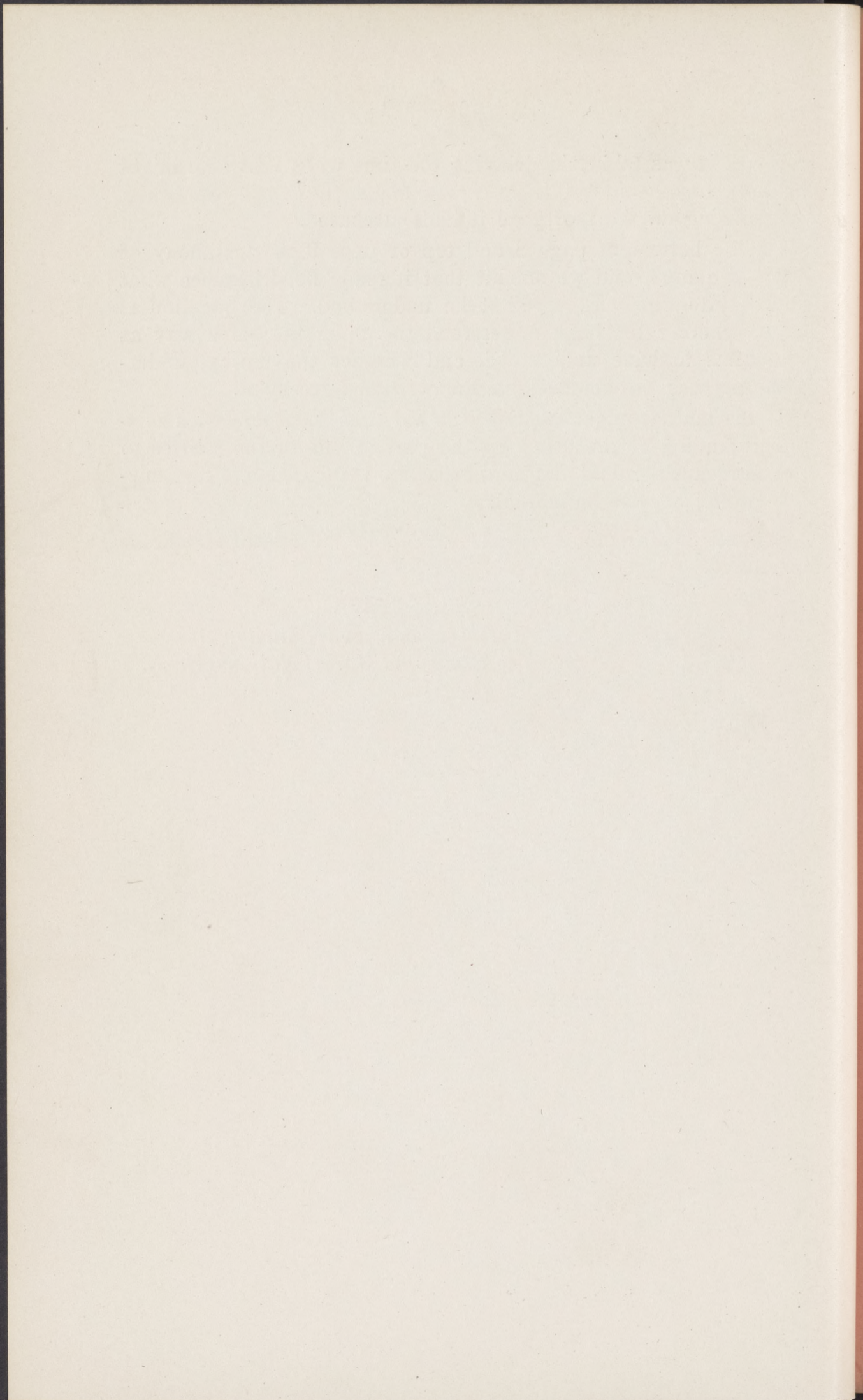
the risk it was taking in delaying the time when that sum might be paid to it, and the delay it was obligating itself to assume, in realizing on the mortgage it had purchased.

On the bottom of page 8 and top of page 9 the testimony of Okin is quoted, and we submit that it made no difference what Okin's intention was, or what he understood. The question is as to whether the bank understood the thing the same way as he claims to have understood, and whether the mutual understanding was incorporated in the written agreement.

If the mutual understanding was not thus incorporated a misunderstanding of the terms on the part of one of the parties to the agreement would not authorize its reformation. The mistake would have to be mutual:

For all the foregoing reasons we submit the appeal should be dismissed.

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*Of Counsel with and Solicitor of
The Broad and Market National Bank.*



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