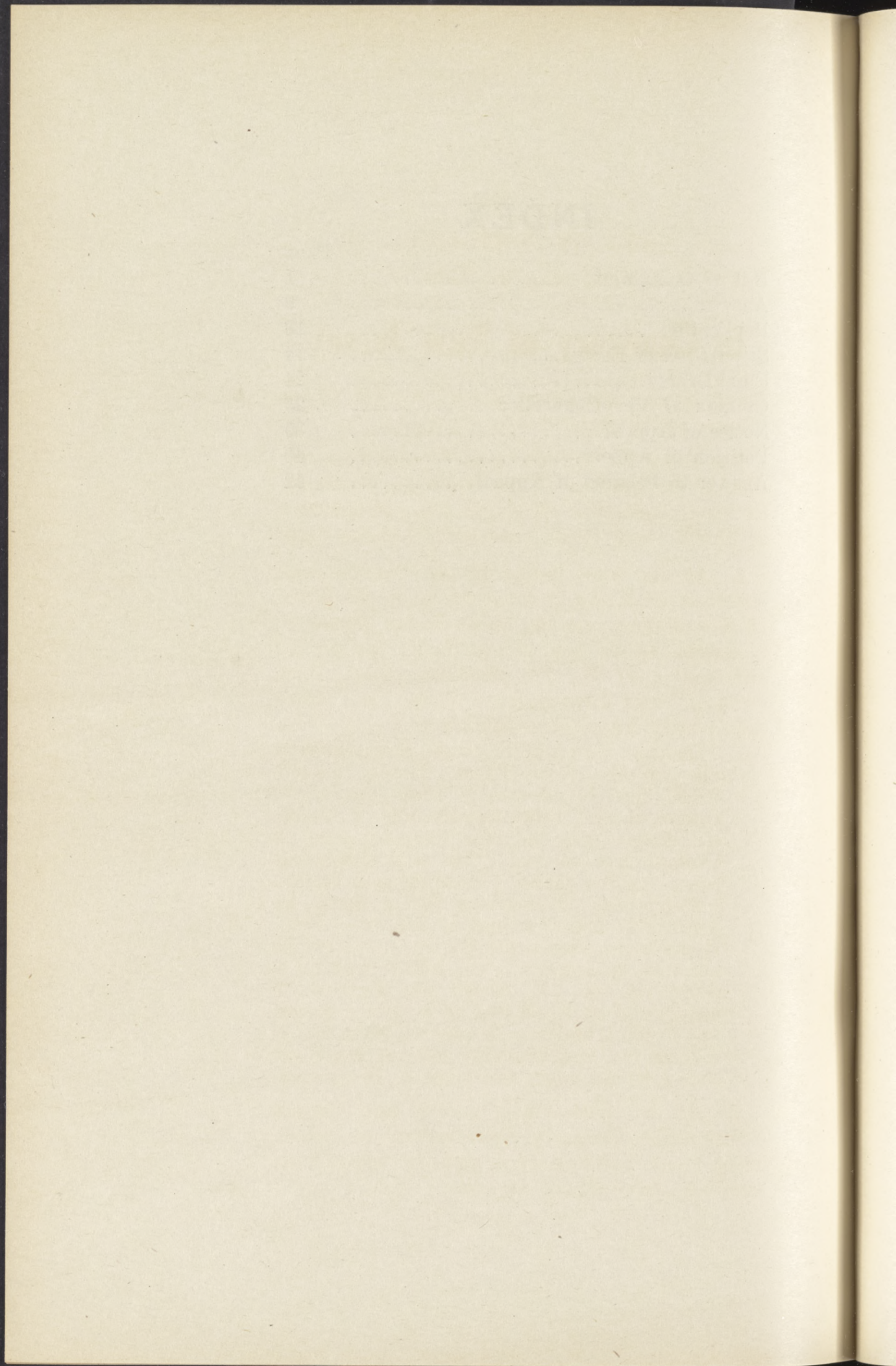


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**BILL OF COMPLAINT.**

Filed May 31, 1929.

**In Chancery of New Jersey**

*To the Honorable Edwin Robert Walker, Chan- 10*  
*cellor of the State of New Jersey:*

The complainant, Structural Gypsum Corpora-  
tion, a corporation of the State of Delaware,  
having its principal office and place of business  
at Linden, New Jersey, respectfully shows that:

1. At the times herein stated, Church Con-  
struction Company, a corporation of the State  
of New Jersey, was the owner in fee simple of  
a certain lot of land or curtilage, located at  
and known as No. 150 Harrison street, East 20  
Orange, Essex County, New Jersey, and more  
particularly described as follows:

BEGINNING at a point on the Southeasterly  
side of Harrison Street therein distant  
520.20 feet Northeasterly from the inter-  
section of said Southeasterly side of Harri-  
son Street with the Northeasterly side of  
Central Avenue and from said beginning  
point running thence (1) along said South-  
easterly side of Harrison Street North 48  
degrees 27 minutes East 87 feet to a point 30  
in the same; thence (2) South 41 degrees 33  
minutes 30 seconds East 292.37 feet to a  
point; thence (3) South 35 degrees 57  
minutes West 89.18 feet to a point; thence  
(4) North 41 degrees 33 minutes West 311.66  
feet to the Southeasterly side of Harrison  
Street to the point and place of BEGINNING.

2. At the times herein stated, said Church  
Construction Company was erecting an apart-  
ment house building upon said lot of land, or  
curtilage, hereinabove described. 40

*Bill of Complaint.*

3. On March 15, 1928, said Church Construction Company was indebted to the complainant in the sum of \$4,444.45, with interest thereon from December 23, 1927, or a total of \$4,505.91, for the agreed purchase price of Gypsum partition blocks to the amount of 49,637½ square feet  
10 of 3" hollow and 4,937½ square feet of 4" hollow, sold and delivered by complainant to said Church Construction Company, between September 16, 1927, and December 23, 1927, which materials were furnished for and actually used in the erection and construction of said apartment house building, then in course of construction and uncompleted. The last of said materials were furnished on December 23, 1927.

2. On said March 15, 1928, said Church Construction Company was also indebted to the  
20 complainant for materials furnished for use in the erection and construction of another apartment house building, located at and known as No. 160 Harrison street, East Orange, Essex County, New Jersey, which apartment house building was then in course of construction and uncompleted. Said materials last referred to, were furnished pursuant to a contract in writing between Church Construction Company and the  
30 complainant, bearing date August 11, 1927, and a large quantity of materials was still to be furnished for said building under the provisions of said contract.

3. On March 12, 1928, Church Construction Company was in default in payments due to complainant under said contract dated August 11, 1927, and by letter addressed to said Church Construction Company, bearing that date, complainant notified said Church Construction Com-  
40 pany that it was unwilling to proceed further

*Bill of Complaint.*

under said contract and notified said Church Construction Company that said contract of August 11, 1927, was rescinded. The substance of said letter was as follows:

March 12th, 1928.

Church Construction Company,  
Newark, N. J.

10

Gentlemen:

You have again defaulted in payment due us under our contract with you dated August 11th, 1927, in re Church apartment house, 160 Harrison Street, East Orange, New Jersey. As a matter of fact, and as your company must understand, you have not yet paid us anything and have wholly failed to comply with your obligations under the contract.

Under the circumstances, we are unwilling to proceed further, and hereby notify you that said contract is rescinded and that we will hold your company liable for the contract price of the materials heretofore delivered and for all loss and damage which we have sustained.

20

Yours very truly,

STRUCTURAL GYPSUM CORPORATION,  
By

4. The premises in paragraph 1 hereinabove described, at all the times herein stated, were encumbered by a first mortgage given by said Church Construction Company to defendant, National Commercial Title and Mortgage Guaranty Company, a corporation of the State of New Jersey, bearing date November 9, 1927, and recorded November 17, 1927, in Book I 62 of Mortgages for Essex County, at page 598, to secure the sum of \$250,000.00. Said mortgage was a construction mortgage and the sum of money secured by said mortgage was advanced by said

30

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*Bill of Complaint.*

defendant to Church Construction Company from time to time, as the erection of the apartment house building upon said premises progressed.

10 5. On March 15, 1928, there remained the sum of \$34,175.75 still to be advanced on account of the loan secured by said mortgage, which sum at that time was not yet due and payable but was to be advanced by said defendant from time to time as the erection of the apartment house building on said premises progressed.

20 6. On March 15, 1928, complainant was pressing said Church Construction Company for payment of said sum of \$4,444.45. At that time, complainant was entitled to file a mechanics' lien upon the said apartment house building, then in course of construction, and the lot upon which it was situated, and upon which said defendant held said \$250,000.00 mortgage, pursuant to the provisions of "An act to secure to mechanics and others, payment for their labors and materials in erecting any building and in making certain improvements to land (Revision of 1898)" and the several supplements thereto, and was threatening to file such a lien.

30 7. On March 15, 1928, complainant was also pressing said Church Construction Company for payment of the amount due it under its said contract dated August 11, 1927, for materials furnished in connection with said apartment house building at No. 160 Harrison street, East Orange, New Jersey, and was refusing to proceed with said contract and believed it would be necessary to file a mechanics' lien upon said apartment house building at No. 160 Harrison street, East Orange, New Jersey, and the land upon which it was situated pursuant to the pro-  
40

*Bill of Complaint.*

visions of said act to secure to mechanics and others, payment for their labors and materials in erecting any building and in making certain improvements to land (Revision of 1898), and the several supplements thereto.

8. On March 15, 1928, said Church Construction Company assigned to complainant the sum of \$4,500.00 of the amount thereafter to be due and payable to it from the defendant, on account of said \$250,000.00 mortgage loan, by instrument in writing, a true copy whereof is as follows:

“March 15, 1928.

Title No. 390  
CHURCH CONSTRUCTION CO.,  
150 Harrison Street,  
East Orange, N. J. 20

To The National Commercial Title and  
Mortgage Guaranty Company,  
24 Commerce St.,  
Newark, N. J.

Gentlemen:

I hereby authorize you (and this shall be your warrant and authority for so doing) to pay the sum of forty-five hundred dollars, (\$4,500) to Structural Gypsum Corporation, 53 Park Place, New York City, which said firm has furnished materials on my building at 150 Harrison St., East Orange, N. J. Said sum to be paid before final payment is made to Church Construction Co. 30

CHURCH CONSTRUCTION CO.  
Julius Church

President.”

9. Said written assignment was prepared by the defendant at its office, No. 24 Commerce street, Newark, New Jersey, and was delivered to the defendant on said 15th day of March, 40

*Bill of Complaint.*

1928, and defendant had notice of said assignment upon that date, and complainant thereupon in equity and good conscience became entitled to the funds in the hands of the defendant still to be advanced on account of said \$250,000.00 mortgage loan, to the extent of \$4,500.00, and the defendant became trustee of said funds for the benefit of complainant to the amount of said \$4,500.00.

10  
20  
30  
10. In consideration of said written assignment, complainant refrained from filing a mechanics' lien upon said apartment house building and premises at 150 Harrison street, East Orange, New Jersey, and has now lost its right to such a lien, and refrained from suing said Church Construction Company for payment of said sum of \$4,444.45 and from pressing said Church Construction Company for payment of the same until after said Church Construction Company was placed in the hands of a receiver by the New Jersey Court of Chancery, and until after it had lost its right to such a lien, and refrained from joining National Commercial Title and Mortgage Guaranty Company in a mechanics' lien suit to enforce the payment of said indebtedness.

30  
11. In further consideration of said written assignment, in connection with other considerations, complainant re-instated said contract with Church Construction Company of August 11, 1927, and proceeded to the fulfillment of the same.

12. Thereafter, in violation of its trust and of its duty to complainant, the defendant, without notice to complainant, advanced the balance of said \$250,000.00 mortgage loan upon the follow-

*Bill of Complaint.*

ing dates and in the following amounts and for the following purposes, that is to say:

Date	Amount	Payable to	Endorsed to
Mar. 30, 1928	\$6,000.00	Church Const. Co.	Bloomfield & Eisenstadt, (steam fitter) endorsed by them to Supply House.
" "	2,000.00	" "	" For payroll.
" "	1,500.00	" "	" Bloomfield & Eisenstadt, (steam fitter) endorsed by them to Supply House.
" "	5,000.00	" "	" Henry R. Isenberg, for tile work.
" "	2,675.75	" "	" Atlantic Elevator Co.
" "	2,000.00	" "	" Charles Sonvak.
Apr. 16, 1928	2,000.00	" "	" Charles Sonvak.
" "	5,000.00	" "	" Federal Trust Co., to repay note for money previously borrowed by Church Construction Company.
" "	2,500.00	" "	" Clark & Co., for flooring.
" 28,	2,000.00	" "	" Endorsed for deposit; used for payroll.
" "	2,000.00	" "	" Charles Sonvak.
May 21,	1,500.00	" "	" Endorsed for deposit; used for decorating and painting.

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\$34,175.75

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

1. That the National Commercial Title and Mortgage Guaranty Company which is the defendant to this suit, may answer this bill of complaint and each statement therein made.

2. That defendant may be decreed to account for the amount of the \$250,000.00 loan to Church Construction Company secured by mortgage of Church Construction Company to said defendant, upon the premises hereinabove described, to the extent that said loan was advanced and paid on and after March 15, 1928.

*Bill of Complaint.*

3. That the defendant may be decreed to pay to complainant the sum of \$4,500.00, with interest thereon from March 15, 1929.

10 4. That a writ of subpoena may issue commanding said defendant to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

WHITING & MOORE,  
Solicitors and Counsel with Complainant.

IRA C. MOORE, JR.,  
Of Counsel.

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30

40

**ANSWER.**

Filed July 3, 1929.

## IN CHANCERY OF NEW JERSEY.

*Between*STRUCTURAL GYPSUM CORPORATION,  
a corporation,*Complainant,**and*NATIONAL COMMERCIAL TITLE  
AND MORTGAGE GUARANTY  
COMPANY, a corporation,*Defendant.*

10

*On Bill, &c.**Answer.*

20

The answer of the defendant, The National Commercial Title and Mortgage Guaranty Company, a corporation.

This defendant, National Commercial Title and Mortgage Guaranty Company, a corporation, answering the bill of complaint, says:

1. Paragraphs 1 and 2 are admitted.

2. This defendant has no knowledge or information sufficient to form a belief as to the statements in the paragraphs 3, 2, 3, inclusive as numbered consecutively in said bill of complaint.

30

3. Paragraph 4 and 5 are admitted.

4. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraphs 6 and 7.

5. Answering paragraph 8, this defendant admits the execution of the instrument in writing

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*Answer.*

by the Church Construction Company as set forth in said paragraph and its delivery to this defendant, but denies so much of the paragraph as is hereinafter set forth;

10           “On March 15, 1928, said Church Construction Company assigned to complainant the sum of \$4,500.00 of the amount thereafter to be due and payable to it from the defendant, on account of said \$250,000.00 mortgage loan, by instrument in writing, a true copy whereof is as follows:”

for the reason that on or about March 15, 1928, nor at any time since was there or has there been any money whatsoever in the hands of the defendant due and owing to the said Church Construction Company.

20           6. Paragraph 9 is denied.

7. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraphs 10 and 11.

8. Answering paragraph 12 this defendant admits the payments set forth in the schedule in the said paragraph but denies so much of paragraph 12 as is hereinafter set forth:

30           “Thereafter, in violation of its trust and of its duty to complainant, the defendant, without notice to complainant, advanced the balance of said \$250,000.00 mortgage loan upon the following dates and in the following amounts and for the following purposes, that is to say:”

#### FIRST SEPARATE DEFENSE.

40           1. On March 22, 1928, this defendant notified the solicitors of the complainant that this defendant did not guarantee the payment of the order described in the bill of complaint by the

*Answer.*

following communication addressed to its said solicitors:

March 22nd, 1928.

Whiting & Moore,  
Essex Building,  
Newark, N. J.

Gentlemen:

10

Replying to your letter of March 21st, we beg to state that Mr. Church, President of The Church Construction Company has given us an order in the amount of \$4,500.00 payable to your clients, Structural Gypsum Corporation, which we have placed in our files.

While we do not guarantee the payment of these orders, still we shall always have this record before us and will co-operate with your clients in every way possible.

Yours very truly,

20

THE NATIONAL COMMERCIAL TITLE  
AND MORTGAGE GUARANTY COM-  
PANY.

G/MAC

2. The \$5,000 payment to the Federal Trust Company on April 16, 1928, as set forth in the schedule annexed to the bill of complaint was made upon an order by the Church Construction Company, Inc. upon this defendant, dated December 12, 1927, a copy of which is hereinafter set forth:

30

December 12, 1927.

Federal Trust Company,  
24 Commerce Street,  
Newark, N. J.

Gentlemen:

The National Commercial Title and Mortgage Guaranty Company will pay to you out of the second payment made on account of mortgage of the Church Construction Com-

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*Answer.*

pany, 164 Harrison Street, East Orange, N. J., the sum of \$5,000, being the amount this day loaned by you to the Church Construction Company for payroll.

Very truly yours,  
 FREDERIC R. PILCH,  
 Vice-President.

10

Church Construction Company hereby orders and directs The National Commercial Title and Mortgage Guaranty Company to pay to the Federal Trust Company the sum of Five Thousand (\$5,000) Dollars in the above matter.

Dated December 12, 1927.

Church Construction Co. Inc.  
 Julius Church           Pres.  
 Saul Church            Treas.

20

3. All the rest and residue of the payments set forth in the schedule annexed to the bill of complaint were made by this defendant in order that the apartment house building upon the premises described in paragraph 1 of the bill of complaint might be completed and this defendant's said mortgage be preserved as a prior and paramount lien on the said premises in pursuance of the construction mortgage agreement between the said Church Construction Company, Inc. and this defendant, and in accordance with this defendant's prior equity on the funds in its hands by virtue of the said agreement.

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LINDABURY, STEELMAN, ZINK &  
 LAFFERTY,  
 Solicitors and Counsel with Defendants.

40

**REPLICATION.**

Filed July 30, 1929.

IN CHANCERY OF NEW JERSEY.

*Between*STRUCTURAL GYPSUM CORPORATION,  
a corporation,*Complainant,**and*THE NATIONAL COMMERCIAL  
TITLE AND MORTGAGE GUAR-  
ANTY COMPANY,*Defendant.**On Bill, &c.**Replication.*

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Complainant joins issue on the answer of the defendant.

WHITING & MOORE,  
Solicitors of Complainant.

30

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## STIPULATION OF FACTS.

## IN CHANCERY OF NEW JERSEY.

	<i>Between</i>	
10	STRUCTURAL GYPSUM CORPORATION, a corporation, <i>Complainant,</i>	}
	<i>and</i>	
	NATIONAL COMMERCIAL TITLE AND MORTGAGE GUARANTY COMPANY, a corporation, <i>Defendant.</i>	
		<i>On Bill, &amp;c.</i> <i>Stipulation of Facts.</i>

20 Church Construction Company was the owner of land on Harrison street, in the City of East Orange, New Jersey, upon which it was erecting apartment houses. One of such apartment houses is known as Number 150 Harrison street, East Orange, New Jersey.

30 On or before June 10, 1927, Church Construction Company applied to National Commercial Title and Mortgage Guaranty Company for a loan of \$250,000.00 to be secured by a mortgage upon the property above mentioned, upon which the proposed apartment house was then being erected.

On or about June 10, 1927, National Commercial Title and Mortgage Guaranty Company accepted said application for the proposed loan and so advised Church Construction Company.

The mortgage given to secure payment of said mortgage loan was dated November 9, 1927, and recorded November 17, 1927, in the Register's Office of Essex County.

*Stipulation of Facts.*

The agreement between the National Commercial Title and Mortgage Guaranty Company and Church Construction Company was that the mortgage loan was to be handled as the usual construction loan to the end that the proceeds of said loan should be advanced as the building progressed in construction.

10

Pursuant to this agreement there was advanced on account of said mortgage loan, prior to March 15, 1928, the entire loan except \$34,175.75.

Structural Gypsum Corporation sold and delivered to Church Construction Company, Gypsum partition blocks which were furnished for and actually used in the erection and construction of said apartment house building above referred to. These partition blocks were furnished between September 16, 1927, and December 23, 1927. The last of said materials were furnished on December 23, 1927.

20

On March 15, 1928, Church Construction Company was indebted to Structural Gypsum Corporation in the sum of \$4,444.45 with interest from December 23, 1927, or a total of \$4,505.91, for the agreed purchase price of said partition blocks.

On March 15, 1928, Church Construction Company was also indebted to the complainant for materials furnished for use in the erection and construction of another apartment house building, located at and known as Number 160 Harrison street, East Orange, New Jersey, which apartment house building was then in course of construction and uncompleted. Said materials last referred to, were furnished pursuant to a contract in writing between Church Construction Company and Structural Gypsum Corporation,

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*Stipulation of Facts.*

bearing date August 11, 1927, and a large quantity of materials was still to be furnished for said building under the provisions of said contract.

10 On March 12, 1928, Church Construction Company was in default in payments due to complaint under said contract dated August 11, 1927, and by letter addressed to Church Construction Company, bearing that date, complainant notified Church Construction Company that it was unwilling to proceed further under said contract and notified said Church Construction Company that said contract of August 11, 1927, was rescinded. Said letter was as follows:

“March 12th, 1928.

20 Church Construction Company,  
Newark, N. J.

Gentlemen:

You have again defaulted in payment due us under our contract with you dated August 11th, 1927, in re Church Apartment house, 160 Harrison Street, East Orange, New Jersey. As a matter of fact, and as your company must understand, you have not yet paid us anything and have wholly failed to comply with your obligations under the contract.

30 Under the circumstances, we are unwilling to proceed further, and hereby notify you that said contract is rescinded and that we will hold your company liable for the contract price of the materials heretofore delivered and for all loss and damage which we have sustained.

Yours very truly,  
STRUCTURAL GYPSUM CORPORATION,  
By ”

*Stipulation of Facts.*

On March 15, 1928, Structural Gypsum Corporation was also pressing Church Construction Company for payment of said sum of \$4,444.45, with interest, above referred to, which was due for partition blocks furnished for the building upon which the National Commercial Title and Mortgage Guaranty Company held its mortgage. Structural Gypsum Corporation at that time was entitled to file a mechanics' lien upon said apartment house building and the lot upon which it was situated. Structural Gypsum Corporation was also pressing the Church Construction Company for payment of the amount then due it under its contract dated August 11, 1927, for materials furnished for the apartment house building at 160 Harrison street, East Orange, New Jersey, and was refusing to proceed with said contract and was threatening to file a mechanics' lien upon said apartment house building.

On or shortly prior to March 15, 1928, Church Construction Company agreed to give to Structural Gypsum Corporation an order for \$4,500.00 upon the National Commercial Title and Mortgage Guaranty Company to be paid to the Structural Gypsum Corporation from the balance of the \$250,000.00 mortgage loan above referred to, and on March 15, 1928, Church Construction Company executed and delivered to National Commercial Title and Mortgage Guaranty Company an instrument in writing, a true copy whereof is as follows:

10

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30

40

*Stipulation of Facts.*

“March 15, 1928.

Title No. 390,  
CHURCH CONSTRUCTION CO.,  
150 Harrison Street,  
East Orange, N. J.

10 To The National Commercial Title  
and Mortgage Guaranty Company,  
24 Commerce St.,  
Newark, N. J.

Gentlemen:

I hereby authorize you (and this shall be  
your warrant and authority for so doing) to  
pay the sum of forty-five hundred dollars,  
(\$4,500) to Structural Gypsum Corporation,  
53 Park Place, New York City, which said  
firm has furnished materials on my building  
at 150 Harrison St., East Orange, N. J. Said  
sum to be paid before final payment is made  
20 to Church Construction Co.

CHURCH CONSTRUCTION CO.,  
Julius Church,  
President.”

On March 21, 1928, Whiting & Moore, attorneys  
for Structural Gypsum Corporation, addressed  
to the National Commercial Title and Mortgage  
Guaranty Company the following letter:

“March 21, 1928.

30 National Commercial Title and  
Mortgage Guaranty Company,  
24 Commerce St.,  
Newark, N. J.

Gentlemen:

*RE TITLE NO. 390, CHURCH CON-  
STRUCTION CO.*

We represent Structural Gypsum Corpora-  
tion which company has furnished materials  
for the building of Church Construction Com-  
pany at 160 Harrison Street, East Orange.  
40

*Stipulation of Facts.*

We understand that the Church Construction Company has authorized you to pay to our client the sum of \$4,500 from the final payment to be made on the mortgage which you hold on this property.

Will you be good enough to confirm this and also advise us whether there are ample funds in your hands to be paid on account of this mortgage to take care of this payment to Structural Gypsum Corporation. 10

Yours very truly,  
ICM/RCC                      Whiting & Moore.”

On March 22, 1928, National Commercial Title and Mortgage Guaranty Company replied to said letter as follows:

“March 22nd, 1928.

Whiting & Moore, 20  
Essex Building,  
Newark, N. J.

Gentlemen: *IN RE TITLE NO. 390.*

Replying to your letter of March 21st, we beg to state that Mr. Church, President of The Church Construction Company has given us an order in the amount of \$4,500.00 payable to your clients, Structural Gypsum Corporation, which we have placed in our files.

While we do not guarantee the payment of these orders, still we shall always have this record before us and will co-operate with your clients in every way possible. 30

Yours very truly,  
THE NATIONAL COMMERCIAL TITLE  
AND MORTGAGE GUARANTY COM-  
PANY.  
G/MAC”

Title Number 390 referred to by the foregoing letters, is the designation given by the National Commercial Title and Mortgage Guaranty Com- 40

*Stipulation of Facts.*

pany to its \$250,000 mortgage loan above referred to and said letters refer to that loan.

10 In consideration of said document executed and delivered to National Commercial Title and Mortgage Guaranty Company by Church Construction Company, dated March 15, 1928, a copy of which is above set forth, Structural Gypsum Corporation refrained from filing a mechanics' lien upon said apartment house building and premises at 150 Harrison street, East Orange, New Jersey, and subsequently lost its right to such a lien, and refrained from suing Church Construction Company for payment of said sum of \$4,444.45, with interest, and from pressing said Church Construction Company for payment of the same until after said Church Construction Company was placed in the hands of a receiver  
20 by the New Jersey Court of Chancery, and until after it had lost its right to such a mechanics' lien.

In further consideration of said written instrument of March 15, 1928, above referred to, in connection with other considerations, complainant re-instated said contract with Church Construction Company of August 11, 1927, and proceeded to the fulfillment of the same.

30 Thereafter National Commercial Title and Mortgage Guaranty Company advanced the balance of said \$250,000.00 mortgage loan to Church Construction Company, upon the following dates, in the following amounts and for the following purposes, that is to say:

*Stipulation of Facts.*

Date	Amount	Payable to	Endorsed to
Mar. 30, 1928	\$6,000.00	Church Const. Co.	Bloomfield & Eisenstadt, (steam fitter) endorsed by them to Supply House.
" " "	2,000.00	" " "	For payroll.
" " "	1,500.00	" " "	Bloomfield & Eisenstadt, (steam fitter) endorsed by them to Supply House.
" " "	5,000.00	" " "	Henry R. Isenberg, for tile work.
" " "	2,675.75	" " "	Atlantic Elevator Co.
" " "	2,000.00	" " "	Charles Sonvak.
Apr. 16, "	2,000.00	" " "	Charles Sonvak.
" " "	5,000.00	" " "	Federal Trust Co., to repay note for money previously borrowed by Church Construction Company.
" " "	2,500.00	" " "	Clark & Co., for flooring.
" 28, "	2,000.00	" " "	Endorsed for deposit; used for payroll.
" " "	2,000.00	" " "	Charles Sonvak.
May 21, "	1,500.00	" " "	Endorsed for deposit; used for decorating and painting.

---

\$34,175.75

In connection with the disbursement of \$5,000 on April 16, 1928, payable to Church Construction Company, endorsed to Federal Trust Company, the National Commercial Title and Mortgage Guaranty Company had on December 12, 1927, addressed to Federal Trust Company, a letter, a copy of which is as follows:

"December 12, 1927.

Federal Trust Company,  
24 Commerce St.,  
Newark, N. J.

Gentlemen:

The National Commercial Title and Mortgage Guaranty Company will pay to you out of the second payment made on account of mortgage of the Church Construction Company, 164 Harrison Street, East Orange, N. J., the sum of \$5,000, being the amount

*Stipulation of Facts.*

this day loaned by you to the Church Construction Company for payroll.

Very truly yours,  
 FREDERICK R. PILCH,  
 Vice President.

10 Church Construction Company hereby orders and directs The National Commercial Title and Mortgage Guaranty Company to pay to the Federal Trust Company the sum of Five thousand (\$5,000) Dollars in the above matter.

Dated, December 12, 1927.

Church Construction Co., Inc.,  
 Julius Church, Pres.  
 Saul Church, Treas.

20 and to which there was added a direction in writing by Church Construction Company, copy of which follows said letter as above set forth.

Two of the remaining items disbursed by National Commercial Title and Mortgage Guaranty Company, as shown by the above list of payments, were by checks each in the amount of \$2,000.00 payable to Church Construction Company bearing the notation "for payroll." The statement of Julius Church, President of Church Construction Company, is that the proceeds of each of said two checks were actually used for payroll, paying labor of mechanics employed for the completion of said building.

30 The remaining checks as listed above all payable to Church Construction Company and bearing endorsements to Bloomfield & Eisenstadt, to Henry R. Isenberg, to Atlantic Elevator Company, to Charles Sonvak and to Clark & Company, and endorsed for deposit with the notation "used for decorating and painting," represent payments of money actually paid for work done

*Stipulation of Facts.*

toward the completion of said building subsequent to March 15, 1928.

Upon the payment of the moneys above mentioned, the building was substantially completed, but not fully completed, the final completion being effected by the receiver of Church Construction Company, appointed by the Court of Chancery of New Jersey. 10

We hereby stipulate and agree to the above statement of facts and consent that the same be used with the same force and effect as evidence taken in the above entitled cause.

Dated, October 23, 1929.

WHITING & MOORE,

Solicitors of Complainant.

LINDABURY, STEELMAN, ZINK & 20  
LAFFERTY,

Solicitors of Defendant.

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40

**FINAL DECREE.**

Filed January 4, 1930.

## IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i></p> <p style="text-align: center;">STRUCTURAL GYPSUM CORPORATION, a corporation, <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">THE NATIONAL COMMERCIAL TITLE &amp; MORTGAGE GUARANTY COMPANY, <i>Defendant.</i></p>	}	<p><i>On Bill, &amp;c.</i></p> <p><i>Final Decree.</i></p>
20			

This cause being opened to the Court by Lindabury, Steelman, Zink & Lafferty, solicitors of the defendant and the solicitors of the complainant, Whiting & Moore, having endorsed hereon their consent to the form hereof, and the pleadings and proofs having been read and testimony having been taken, and the arguments of the respective counsel having been heard and considered, and

30 it appearing to the Court that the complainant is not entitled to the relief sought and prayed for by it in its bill of complaint, it is, on this 4th day of January, 1930, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, AD-

*Final Decree.*

JUDGED and DECREED that the complainants' bill  
be and the same is hereby dismissed, with costs.

EDWIN ROBERT WALKER,  
Chancellor.

Respectfully advised,

ALONZO CHURCH,  
V.-C.

10

Approved as to form only.

WHITING & MOORE,  
Solicitors of Complainant.

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**OPINION.**

Filed December 26, 1929.

IN CHANCERY OF NEW JERSEY.

10 *Between*

STRUCTURAL GYPSUM CORPORATION, a corporation,  
*Complainant,*

*and*

THE NATIONAL COMMERCIAL  
TITLE AND MORTGAGE GUARANTY COMPANY,  
*Defendant.*

*Opinion.*

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Messrs. Whiting & Moore for complainant.

Messrs. Lindabury, Steelman, Zink & Lafferty  
for defendant.

SYLLABUS:

30 I. An equitable assignment is made only where there is an order by a creditor present or in anticipation to pay a sum of money fixed or capable of determination out of an existing fund, or one that may be reasonably anticipated.

II. Evidence examined and held that no equitable assignment was made.

CHURCH, V.-C.

40 This is a suit brought by complainant to recover from National Commercial Title & Mortgage Guaranty Company, funds that were assigned to the complainant, or said to be assigned, by the Church Construction Company. The facts have been elaborately stipulated as follows:

*Opinion of Vice-Chancellor.*

Church Construction Company was the owner of land on Harrison street, in the City of East Orange, New Jersey, upon which it was erecting apartment houses. One of such apartment houses is known as Number 150 Harrison street, East Orange, New Jersey.

On or before June 10, 1927, Church Construction Company applied to National Commercial Title and Mortgage Guaranty Company for a loan of \$250,000.00 to be secured by a mortgage upon the property above mentioned, upon which the proposed apartment house was then being erected. 10

On or about June 10, 1927, National Commercial Title and Mortgage Guaranty Company accepted said application for the proposed loan and so advised Church Construction Company. 20

The mortgage given to secure payment of said mortgage loan was dated November 9, 1927, and recorded November 17, 1927, in the Register's Office of Essex County. 20

The agreement between the National Commercial Title and Mortgage Guaranty Company and Church Construction Company was that the mortgage loan was to be handled as the usual construction loan to the end that the proceeds of said loan should be advanced as the building progressed in construction. 30

Pursuant to this agreement there was advanced on account of said mortgage loan, prior to March 15, 1928, the entire loan except \$34,175.75.

Structural Gypsum Corporation sold and delivered to Church Construction Company, gypsum partition blocks which were furnished for and actually used in the erection and construction of said apartment house building above referred to. These partition blocks were furnished between September 16, 1927, and December 23, 40

*Opinion of Vice-Chancellor.*

1927. The last of said materials was furnished on December 23, 1927.

On March 15, 1928, Church Construction Company was indebted to Structural Gypsum Corporation in the sum of \$4,444.45 with interest from December 23, 1927, or a total of \$4,505.91,  
10 for the agreed purchase price of said partition blocks.

On March 15, 1928, Church Construction Company was also indebted to the complainant for materials furnished for use in the erection and construction of another apartment house building, located at and known as Number 160 Harrison street, East Orange, New Jersey, which apartment house building was then in course of construction and uncompleted. Said materials  
20 last referred to, were furnished pursuant to a contract in writing between Church Construction Company and Structural Gypsum Corporation, bearing date August 11, 1927, and a large quantity of materials was still to be furnished for said building under the provisions of said contract.

On March 12, 1928, Church Construction Company was in default in payments due to complainant under said contract dated August 11, 1927, and by letter addressed to Church Construction Company, bearing that date, complainant  
30 notified Church Construction Company that it was unwilling to proceed further under said contract and notified said Church Construction Company that said contract of August 11, 1927, was rescinded. Said letter was as follows:

*Opinion of Vice-Chancellor.*

“March 12th, 1928.

Church Construction Company,  
Newark, N. J.

Gentlemen:

You have again defaulted in payment due us under our contract with you dated August 11th, 1927, in re Church Apartment house, 160 Harrison Street, East Orange, New Jersey. As a matter of fact, and as your company must understand, you have not as yet paid us anything and have wholly failed to comply with your obligations under the contract.

10

Under the circumstances, we are unwilling to proceed further, and hereby notify you that said contract is rescinded and that we will hold your company liable for the contract price of the materials heretofore delivered and for all loss and damage which we have sustained.

20

Yours very truly,

STRUCTURAL GYPSUM CORPORATION,

By

”

On March 15, 1928, Structural Gypsum Corporation was also pressing Church Construction Company for payment of said sum of \$4,444.45, with interest, above referred to, which was due for partition blocks furnished for the building upon which the National Commercial Title and Mortgage Guaranty Company held its mortgage. Structural Gypsum Corporation at that time was entitled to file a mechanics' lien upon said apartment house building and the lot upon which it was situated. Structural Gypsum Corporation was also pressing the Church Construction Company for payment of the amount then due it under its contract dated August 11, 1927, for materials furnished for the apartment house

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*Opinion of Vice-Chancellor.*

building at 160 Harrison street, East Orange, New Jersey, and was refusing to proceed with said contract and was threatening to file a mechanics' lien upon said apartment house building.

10 On or shortly prior to March 15, 1928, Church Construction Company agreed to give to Structural Gypsum Corporation an order for \$4,500.00 upon the National Commercial Title & Mortgage Guaranty Company to be paid to the Structural Gypsum Corporation from the balance of the \$250,000.00 mortgage loan above referred to, and on March 15, 1928, Church Construction Company executed and delivered to National Commercial Title and Mortgage Guaranty Company an instrument in writing, a true copy whereof is as follows:

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“March 15, 1928.

Title No. 390,  
CHURCH CONSTRUCTION CO.,  
150 Harrison Street,  
East Orange, N. J.

To The National Commercial Title  
and Mortgage Guaranty Company,  
24 Commerce St.,  
Newark, N. J.

30

Gentlemen:

I hereby authorize you (and this shall be your warrant and authority for so doing) to pay the sum of forty-five hundred dollars, (\$4,500) to Structural Gypsum Corporation, 53 Park Place, New York City, which said firm has furnished materials on my building at 150 Harrison St., East Orange, N. J. Said sum to be paid before final payment is made to Church Construction Co.

CHURCH CONSTRUCTION CO.,

Julius Church,  
President.”

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*Opinion of Vice-Chancellor.*

On March 21, 1928, Whiting & Moore, attorneys for Structural Gypsum Corporation, addressed to the National Commercial Title and Mortgage Guaranty Company the following letter:

“March 21, 1928.

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National Commercial Title and  
Mortgage Guaranty Company,  
24 Commerce St.,  
Newark, N. J.

Gentlemen:

*RE TITLE NO. 390, CHURCH CON-  
STRUCTION CO.*

We represent Structural Gypsum Corporation, which company has furnished materials for the building of Church Construction Company at 160 Harrison Street, East Orange.

20

We understand that the Church Construction Company has authorized you to pay to our client the sum of \$4,500 from the final payment to be made on the mortgage which you hold on this property.

Will you be good enough to confirm this and also advise us whether there are ample funds in your hands to be paid on account of this mortgage to take care of this payment to Structural Gypsum Corporation.

Yours very truly,

30

ICM/RCC

WHITING & MOORE.”

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*Opinion of Vice-Chancellor.*

On March 22, 1928, National Commercial Title and Mortgage Guaranty Company replied to said letter as follows:

“March 22, 1928.

10 Whiting & Moore,  
Essex Building,  
Newark, N. J.

Gentlemen: *IN RE TITLE NO. 390.*

Replying to your letter of March 21st, we beg to state that Mr. Church, President of The Church Construction Company has given us an order in the amount of \$4,500.00 payable to your clients, Structural Gypsum Corporation, which we have placed in our files.

20 While we do not guarantee the payment of these orders, still we shall always have this record before us and will co-operate with your clients in every way possible.

Yours very truly,

THE NATIONAL COMMERCIAL TITLE  
AND MORTGAGE GUARANTY COM-  
PANY.

G/MAC”

30 Title Number 390 referred to by the foregoing letters, is the designation given by the National Commercial Title and Mortgage Guaranty Company to its \$250,000 mortgage loan above referred to and said letters refer to that loan.

40 In consideration of said document executed and delivered to National Commercial Title and Mortgage Guaranty Company by Church Construction Company, dated March 15, 1928, a copy of which is above set forth, Structural Gypsum Corporation refrained from filing a mechanics' lien upon said apartment house building and premises at 150 Harrison street, East Orange, New Jersey, and subsequently lost its right to

*Opinion of Vice-Chancellor.*

such a lien, and refrained from suing Church Construction Company for payment of said sum of \$4,444.45, with interest, and from pressing said Church Construction Company for payment of the same until after the said Church Construction Company was placed in the hands of a receiver by the New Jersey Court of Chancery, and until after it had lost its right to such a mechanics' lien.

In further consideration of said written instrument of March 15, 1928, above referred to, in connection with other considerations, complainant reinstated said contract with Church Construction Company of August 11, 1927, and proceeded to the fulfillment of the same.

Thereafter, National Commercial Title and Mortgage Guaranty Company advanced the balance of said \$250,000.00 mortgage loan to Church Construction Company, upon the following dates, in the following amounts and for the following purposes, that is to say:

Date	Amount	Payable to	Endorsed to
Mar. 30, 1928	\$6,000.00	Church Const. Co.	Bloomfield & Eisenstadt, (steam fitter) endorsed by them to Supply House.
" " "	2,000.00	" "	" For payroll.
" " "	1,500.00	" "	" Bloomfield & Eisenstadt, (steam fitter) endorsed by them to Supply House.
" " "	5,000.00	" "	" Henry R. Isenberg, for tile work.
" " "	2,675.75	" "	" Atlantic Elevator Co.
" " "	2,000.00	" "	" Charles Sonvak.
Apr. 16, "	2,000.00	" "	" Charles Sonvak.
" " "	5,000.00	" "	" Federal Trust Co., to repay note for money previously borrowed by Church Construction Company.
" " "	2,500.00	" "	" Clark & Co., for flooring.
" 28, "	2,000.00	" "	" Endorsed for deposit; used for payroll.
" " "	2,000.00	" "	" Charles Sonvak.
May 21, "	1,500.00	" "	" Endorsed for deposit; used for decorating and painting.
	<u>\$34,175.75</u>		

*Opinion of Vice-Chancellor.*

In connection with the disbursement of \$5,000 on April 16, 1928, payable to Church Construction Company, endorsed to Federal Trust Company, the National Commercial Title and Mortgage Guaranty Company had on December 12, 1927, addressed to Federal Trust Company, a  
 10 letter, a copy of which is as follows:

“December 12, 1927.

Federal Trust Company,  
 24 Commerce St.,  
 Newark, N. J.

Gentlemen:

The National Commercial Title and Mortgage Guaranty Company will pay to you out of the second payment made on account of mortgage of the Church Construction Company, 164 Harrison Street, East Orange, N. J., the sum of \$5,000, being the amount  
 20 this day loaned by you to the Church Construction Company for payroll.

Very truly yours,

FREDERICK R. PILCH,  
 Vice President.”

Church Construction Company hereby orders and directs The National Commercial Title and Mortgage Guaranty Company to pay to the Federal Trust Company the sum of Five Thousand (\$5,000) Dollars in the above matter.  
 30

Dated, December 12, 1927.

Church Construction Co., Inc.,  
 Julius Church, Pres.  
 Saul Church, Treas.”

and to which there was added a direction in writing by Church Construction Company, a copy of which follows said letter as above set forth.

Two of the remaining items disbursed by Na-  
 40 tional Commercial Title and Mortgage Guaranty

*Opinion of Vice-Chancellor.*

Company, as shown by the above list of payments, were by checks each in the amount of \$2,000.00, payable to Church Construction Company, bearing the notation "for payroll." The statement of Julius Church, President of Church Construction Company, is that the proceeds of each of said two checks were actually used for payroll, paying labor of mechanics employed for the completion of said building. 10

The remaining checks as listed above, all payable to Church Construction Company and bearing endorsements to Bloomfield & Eisenstadt, to Henry R. Isenberg, to Atlantic Elevator Company, to Charles Sonvak and to Clark & Company, and endorsed for deposit with the notation "used for decorating and painting," represent payments of money actually paid for work done toward the completion of said building subsequent to March 15, 1928. 20

Upon the payment of the moneys above mentioned, the building was substantially completed but not fully completed, the final completion being effected by the receiver of Church Construction Company, appointed by the Court of Chancery of New Jersey.

The basis of this claim is the letter dated March 15, 1928, and addressed to Church Construction Company, authorizing defendant to pay complainant \$4,500.00. A copy is in the stipulation. 30

The first question is, whether this letter acted as an equitable assignment. An equitable assignment is made only where there is an order by a creditor, present or in futuro, to his debtor, to pay to a third person a sum of money fixed or capable of determination out of an existing fund or one that may be reasonably anticipated. This letter does not designate a fund out of 40

*Opinion of Vice-Chancellor.*

which the moneys purported to be assigned are payable. See *Seyfried et al. v. Stroll et al.*, 56 New Jersey Equity, 187. Vice-Chancellor Emery, in disposing of this case, made the following statement:

10           “But I have not been referred to any decision of our courts in which an equitable assignment has been held to have been made by an order, in which the order itself did not appear to designate and appropriate the fund in the owner’s hands, or part of it. This is the effect of the order in *Bernz v. Marcus Sayre Co.*, 7 Dick. Ch. Rep. 275, 281 (Errors and Appeals, 1894). In *Lanigan v. Bradley, &c., Co.*, 5 Dick. Ch. Rep. 201, the equitable assignment was made out altogether by parol agreement to assign and acts thereunder. Where the assignment depends upon the construction of the order itself, a plain and sure test of construction is said to be whether the order or direction to the drawee, if assented to by him, would create an absolute indebtedness payable by him at all events, or whether it would create an obligation only to make payment out of the particular designated fund. 3 Pom. Eq. Jur. p. 291, par. 1280, and cases cited. This test seems to me to be a sound one, and to be properly applicable to the present case. A simple acceptance of this order as drawn would, I think, clearly have bound Mrs. Seyfried to an absolute payment of the entire \$1,000, and could not have been restricted or construed in her favor as obliging her to pay only out of a particular fund and to the extent only of this fund. The order did not designate or appropriate any fund out of which it was payable, and the statement that the debt was for material, &c., cannot of itself extend further than being a statement of the consideration of the order. I hold, therefore, that the order did not operate as an equitable assignment, and that the claim of

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*Opinion of Vice-Chancellor.*

J. Gahagan's Sons, under this order, must be postponed to the claim of Dorsett and Gardner under their notices."

It should be noticed that the letter of March 15th, was not absolutely accepted. The reply says:

"While we do not guarantee the payment of these orders, still we shall always have this record before us and will cooperate with your clients in every way possible."

The suggestion is, that the reference, Title Number 390, on the letter and reply, constitutes a specific assignment of a particular fund existing or anticipated. In the decision of Vice-Chancellor Emery, above cited, he says:

"\* \* \* *in which the order itself* did not appear to designate \* \* \*"

I think these figures have little to do with it. If the defendant had accepted the authorization contained in the letter of March 15th, it would have been obligated absolutely to pay. What, then, was the fund particularly designated? Was there any fund? By reference to the facts it will appear that the unpaid balance of the mortgage loan as of March 15th was applied to two purposes: First, discharge of a prior assignment to the Federal Trust Company, and, second, payment of the cost of labor and material actually used toward the completion of the building. The result seems to be that the money, which it was anticipated that the Church Construction Company would eventually receive, never became payable to it but was applied to other proper purposes. Therefore, the fund, if any, out of which the \$4,500.00 was assigned, never came into existence. Hence there could have been no equitable assignment.

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*Opinion of Vice-Chancellor.*

I will advise a decree dismissing the bill of complaint. It is unnecessary to consider the other points raised by counsel.

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**NOTICE OF APPEAL.**

Service acknowledged January 22, 1930.

Filed January 23, 1930.

IN CHANCERY OF NEW JERSEY.

73/396.

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*Between*STRUCTURAL GYPSUM CORPORATION,  
a corporation,*Complainant,**and*THE NATIONAL COMMERCIAL  
TITLE AND MORTGAGE GUAR-  
ANTY COMPANY, a corpora-  
tion,*Defendant.**On Bill, &c.**Notice  
of Appeal.*

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The complainant, Structural Gypsum Corporation, hereby appeals from the final decree made in the above entitled cause by the Chancellor, on the advice of Vice-Chancellor Alonzo Church, on January 4, 1930, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

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Dated, January 15, 1930.

WHITING & MOORE,  
Solicitors for and of Counsel with Complainant.

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

IRA C. MOORE, JR.,  
Of Counsel with Complainant.

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**PETITION OF APPEAL.**

Service acknowledged January 25, 1930.

Filed January 30, 1930.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

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STRUCTURAL GYPSUM CORPORA-  
TION, a corporation,  
*Complainant-Appellant,*

*vs.*

THE NATIONAL COMMERCIAL  
TITLE AND MORTGAGE GUAR-  
ANTY COMPANY, a corporation,  
*Defendant-Respondent.*

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*On Appeal  
from the  
Court of  
Chancery.*

*Petition  
of Appeal.*

*To the Honorable the Court of Errors and Ap-  
peals in the last resort in all causes:*

The petition of Structural Gypsum Corpora-  
tion, the appellant in the above entitled cause, re-  
spectfully shows that:

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Petitioner finds itself aggrieved by a final de-  
cree made in the Court of Chancery by his  
Honor, Edwin Robert Walker, Chancellor of the  
State of New Jersey, bearing date, January 4,  
1930, in a certain cause in said Court of Chan-  
cery wherein the said Structural Gypsum Cor-  
poration was complainant and the said The Na-  
tional Commercial Title and Mortgage Guaranty  
Company was defendant, in this respect, to wit,  
that the said decree adjudges that the complain-  
ant's bill be and the same is hereby dismissed,  
with costs.

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And petitioner appeals from the decree of the  
Chancellor which decrees as aforesaid, upon the  
ground that the same is erroneous in that—

*Petition of Appeal.*

1. The pleadings and proofs established an equitable assignment from Church Construction Company to the complainant in the amount of \$4,500.00, made on or about March 15, 1928, payable from a balance thereafter due and payable by defendant, The National Commercial Title and Mortgage Guaranty Company to Church Construction Company, upon a certain \$250,000.00 mortgage loan of which assignment defendant had notice but which was ignored by defendant, and the entire balance of said mortgage loan was thereafter paid to Church Construction Company by defendant, in violation of complainant's rights; and said decree instead of dismissing the bill of complaint should have granted the relief prayed for in the bill of complaint. 10

2. Said decree was based upon a finding that no fund was designated out of which the moneys assigned were payable, which finding is erroneous in law and in fact. 20

3. Said decree is based upon a finding that the fund out of which the \$4,500.00 was assigned never came into existence, which finding is erroneous in law and in fact.

4. Upon the pleadings, evidence and proofs, complainant established a case for equitable relief and the bill of complaint should not have been dismissed but the relief prayed for by the complainant should have been granted. 30

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

WHITING & MOORE,  
Solicitors for and of Counsel with Appellant.

## ANSWER TO PETITION OF APPEAL.

Filed, February 4, 1930.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

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STRUCTURAL GYPSUM CORPORATION, a corporation,  
Complainant-Appellant,

vs.

THE NATIONAL COMMERCIAL  
TITLE AND MORTGAGE GUARANTY COMPANY, a corporation,  
Defendant-Respondent.

*On Appeal  
from the  
Court of  
Chancery.*

*Answer to  
Petition of  
Appeal.*

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The answer of The National Commercial Title and Mortgage Guaranty Company, the above named respondent, to the petition of the appeal of Structural Gypsum Corporation, the above named appellant.

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This respondent, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that a decree was, on the Fourth day of January, 1930, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, this respondent begs leave to refer thereto when the same shall be produced.

This respondent is advised and believes that the said decree is agreeable to equity; and he

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*Answer to Petition of Appeal.*

prays that the same may be affirmed with costs  
to be taxed in favor of this respondent.

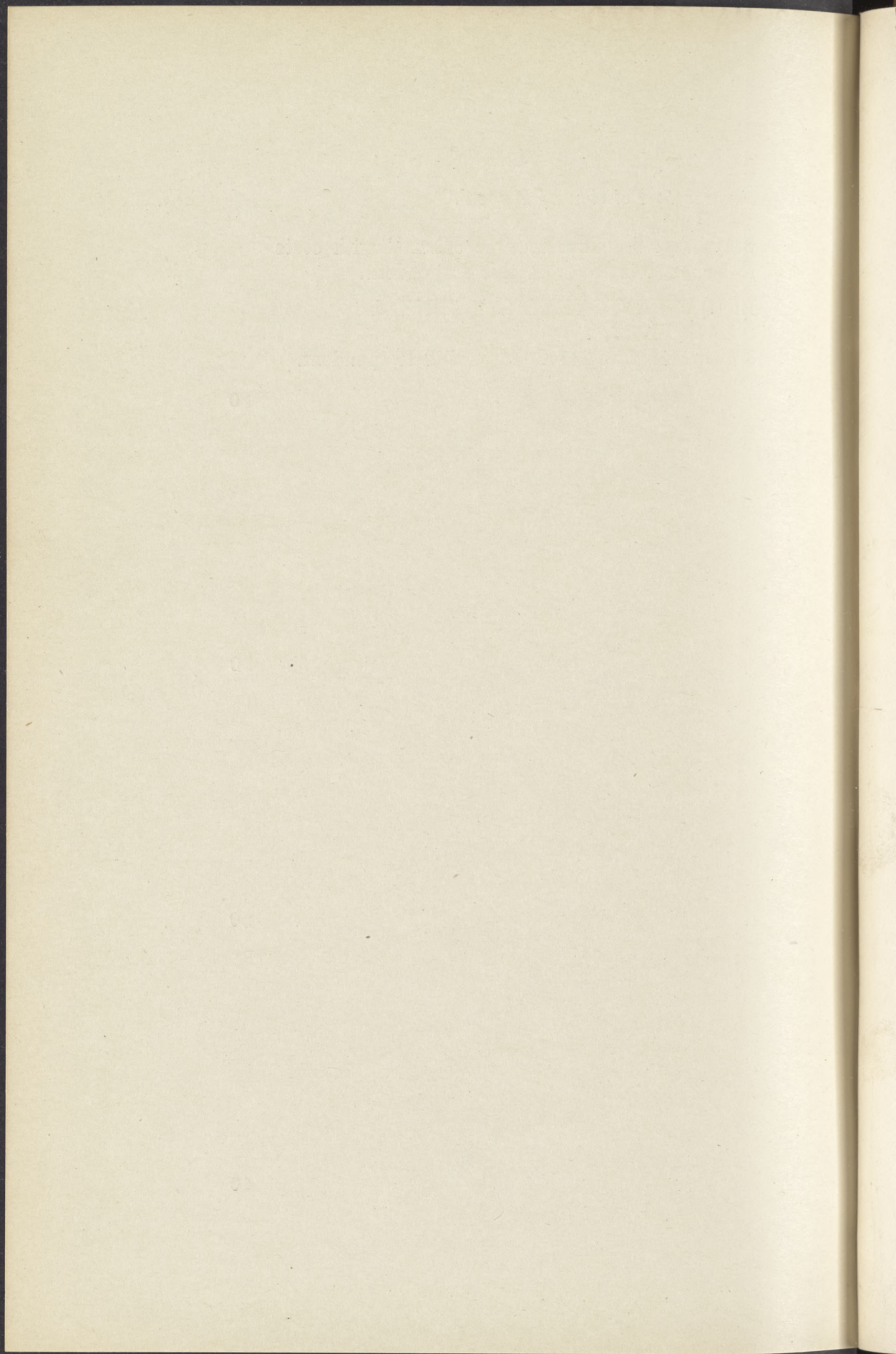
LINDABURY, STEELMAN, ZINK &  
LAFFERTY,  
Solicitors for and of Counsel with Respondent.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

STRUCTURAL GYPSUM CORPORATION, a corporation,  
*Complainant-Appellant,*

*vs.*

THE NATIONAL COMMERCIAL TITLE AND MORTGAGE GUARANTY COMPANY, a corporation,  
*Defendant-Respondent.*

*On Bill, &c.*

*On Appeal  
from the  
Court of  
Chancery.*

### BRIEF ON BEHALF OF COMPLAINANT-APPELLANT.

#### Statement of Facts.

This is an appeal from a decree of the Court of Chancery, advised by Vice-Chancellor Church, dismissing complainant's bill of complaint.

The suit was brought by the Structural Gypsum Corporation, complainant, (hereinafter referred to as the Gypsum Company) to enforce payment by the defendant, National Commercial Title and Mortgage Guaranty Company, (hereinafter referred to as the Mortgage Company) of an equitable assignment given to the Gypsum Company by the Church Construction Company.

At the time of the assignment which is the basis of this suit, the Church Construction Company was erecting apartment house buildings on Harrison street, East Orange. The Mortgage Company held a \$250,000 mortgage upon one of these buildings. This mortgage was of the type commonly referred to as a construction mortgage, and the moneys secured by it were advanced to Church Construction Company from

time to time as the erection of the apartment house building progressed.

On March 15, 1928, Church Construction Company was indebted to the Gypsum Company in the sum of \$4,444.45, with interest from December 23, 1927, or a total of \$4,505.91, for materials furnished and used in the erection and construction of the apartment house building upon which the Mortgage Company held its mortgage.

At that time the Gypsum Company was in a position to file a mechanics' lien against this apartment house property. It also had a substantial claim against the adjoining apartment house building which was being erected by the Church Construction Company. It had cancelled its contract for furnishing materials for that building and was in a position to file a mechanics' lien against it.

On or about March 15, 1928, Church Construction Company and the Gypsum Company, the complainant, reached an agreement whereby the complainant withheld filing a mechanics' lien against the apartment house building upon which the Mortgage Company held its mortgage and reinstated its contract for furnishing materials for the adjoining apartment house building.

As part of the consideration for this agreement, Church Construction Company agreed to give the Gypsum Company an order for \$4,500.00 upon the Mortgage Company, to be paid to the Gypsum Company from the balance of the \$250,000.00 mortgage loan above referred to. (Case, p. 17.) At that time \$34,175.75 was still to be advanced upon this mortgage loan. (Case, pp. 15, 20 and 21.)

Church Construction Company thereupon executed and delivered to the Mortgage Company an instrument in writing as follows:

“March 15, 1928.

Title No. 390.

CHURCH CONSTRUCTION CO.,  
150 Harrison Street,  
East Orange, N. J.

To The National Commercial  
Title and Mortgage Guar-  
anty Company,  
24 Commerce St.,  
Newark, N. J.

Gentlemen:

I hereby authorize you (and this shall be your warrant and authority for so doing) to pay the sum of forty-five hundred dollars, (\$4,500) to Structural Gypsum Corporation, 53 Park Place, New York City, which said firm has furnished materials on my building at 150 Harrison St., East Orange, N. J. Said sum to be paid before final payment is made to Church Construction Co.

CHURCH CONSTRUCTION CO.,  
Julius Church,  
President.”

The defendant does not dispute that it received this document at or about the time it was executed. Instead of honoring it, however, the defendant proceeded to pay out the balance of the mortgage money to the Church Construction Company, who in turn, used it to pay creditors other than the complainant. (Case, pp. 20 and 21.)

The complainant contends that the agreement with Church Construction Company, together with the instrument above quoted, was an equitable assignment to the complainant and that the defendant, upon receiving notice of this assignment thereupon held in trust for the complain-

ant the unadvanced mortgage moneys to the extent of \$4,500.00, and that it could not avoid its obligation to pay that sum to the complainant by paying the moneys to the Church Construction Company.

## ARGUMENT.

### POINT I.

The Church Construction Company's right to future advances from the Mortgage Company under the construction mortgage loan was an assignable property right, and, having been in part assigned to the complainant, the complainant was entitled to receive the advances covered by the assignment.

It is well settled that an assignment for a valuable consideration of a sum of money due or to grow due on the performance of an existing contract, will, upon notice thereof being given to the debtor, operate as an equitable assignment of so much of the fund as is covered thereby, subject to all valid prior charges. On notice of the assignment being given to the debtor and the possible debt ripening into an enforceable money liability, equity vests the equitable title *pro tanto* of the fund in the assignee, of whom the debtor becomes the trustee or *quasi* trustee as to the amount assigned, subject to existing equities.

*Bank of Harlem v. Bayonne*, 48 N. J. Eq., 246; aff'd 48 N. J. Eq., 646.

Payment, after notice of the assignment to any person other than the assignee, will not relieve the debtor of his liability to the assignee.

*Todd v. Meding*, 56 N. J. Eq., 83;

*Cogan v. Conover Mfg. Co.*, 69 N. J. Eq., 809.

In *Germania Building & Loan Association v. Frankel Realty Company*, 84 N. J. Eq., 164, the facts were as follows:

A mortgage was given to a building and loan association for money to be advanced as the building progressed. There was no agreement as to the time when advances should be made. After certain amounts had been advanced, the mortgagor gave an assignment of a portion of the remaining sum secured by the mortgage. The mortgagor failed to complete the building, and after the assignment conveyed the property to creditors in trust, who completed the building, and, upon a bill to foreclose, filed a cross-bill seeking to have a decree that money which had been paid by the association to the assignee, be paid to them to reimburse them for the cost of completing the building.

The Court of Errors and Appeals held that the equity of the assignee, which was prior in time, could not be superseded by the equity asserted by the grantees to have the money applied to the completion of the building.

## POINT II.

**Acceptance by the debtor is not in equity necessary to the validity of the assignment.**

The assignment takes effect from the acts of the assignor and assignee, and the debtor, so far as the right to the fund is concerned, is but the instrument through whom the transfer is to be actually made.

*Bank of Harlem v. Bayonne, supra;*  
*Brokaw v. Brokaw*, 41 N. J. Eq., 215;  
*Bradley & Currier Co. v. Berns*, 51 N. J. Eq., 437 and cases there collected.

Where an order is drawn on a particular fund and presented to the debtor, it is an equitable assignment even though the debtor refuses to recognize the assignment.

*Cope v. C. B. Walton Co.*, 77 N. J. Eq., 512.

### POINT III.

The assignment relied on by complainant designated a fund out of which the money assigned was payable and there was a valid equitable assignment from Church Construction Company to complainant.

An equitable assignment need not be in writing. It may be written or oral, or partly written and partly oral.

*Weaver v. Atlantic Roofing Co.*, 57 N. J. Eq., 547;

*Shannon v. Hoboken*, 37 N. J. Eq., 123;

*Lanigan v. Bradley & Currier Co.*, 50 N. J. Eq., 201;

*Brokaw v. Brokaw*, 41 N. J. Eq., 215.

Any order, no matter how informally expressed, or any act which makes an appropriation of a fund, is a good assignment in equity.

*Cope v. C. B. Walton Co.*, 77 N. J. Eq., 512.

The court below held that the letter upon which the complainant relies "does not designate a fund out of which the moneys purported to be assigned are payable." (See opinion, Case, pp. 35 and 36.)

The Vice-Chancellor has fallen into the error of considering only the written order from Church Construction Company to the Mortgage Company, without relation to the stipulated

facts. The facts, as stipulated upon this point, are as follows:

“On or shortly prior to March 15, 1928, Church Construction Company agreed to give to Structural Gypsum Corporation an order for \$4,500.00 upon the National Commercial Title and Mortgage Guaranty Company *to be paid to the Structural Gypsum Corporation from the balance of the \$250,000.00 mortgage loan above referred to*, and on March 15, 1928, Church Construction Company executed and delivered to National Commercial Title and Mortgage Guaranty Company an instrument in writing, a true copy whereof is as follows:

“March 15, 1928.

Title No. 390,  
CHURCH CONSTRUCTION CO.,  
150 Harrison Street,  
East Orange, N. J.

To The National Commercial Title  
and Mortgage Guaranty Company,  
24 Commerce St.,  
Newark, N. J.

Gentlemen:

I hereby authorize you (and this shall be your warrant and authority for so doing) to pay the sum of forty-five hundred dollars, (\$4,500) to Structural Gypsum Corporation, 53 Park Place, New York City, which said firm has furnished materials on my building at 150 Harrison St., East Orange, N. J. Said sum to be paid before final payment is made to Church Construction Co.

CHURCH CONSTRUCTION CO.,  
Julius Church,  
President.”

“On March 21, 1928, Whiting & Moore, Attorneys for Structural Gypsum Corporation, addressed to the National Commercial Title and

Mortgage Guaranty Company the following letter:

“March 21, 1928.

National Commercial Title and  
Mortgage Guaranty Company,  
24 Commerce St.,  
Newark, N. J.

Gentlemen: *RE: TITLE NO. 390 CHURCH  
CONSTRUCTION CO.*

We represent Structural Gypsum Corporation, which company has furnished materials for the building of Church Construction Company at 160 Harrison Street, East Orange.

We understand that the Church Construction Company has authorized you to pay to our client the sum of \$4,500. *from the final payment to be made on the mortgage which you hold on this property.*

Will you be good enough to confirm this and also advise us whether there are ample funds in your hands to be paid on account of this mortgage to take care of this payment to the Structural Gypsum Corporation.

Yours very truly,  
WHITING & MOORE.”

ICM/RCC

“On March 22, 1928, National Commercial Title and Mortgage Guaranty Company replied to said letter as follows:

“March 22nd, 1928.

Whiting & Moore,  
Essex Building,  
Newark, N. J.

Gentlemen: *IN RE TITLE NO. 390.*

Replying to your letter of March 21st, we beg to state that Mr. Church, President of The Church Construction Company has given us an order in the amount of \$4500.00 payable to your clients, Structural

Gypsum Corporation, which we have placed in our files.

While we do not guarantee the payment of these orders, still we shall always have this record before us and will co-operate with your clients in every way possible.

Yours very truly,

THE NATIONAL COMMERCIAL TITLE  
AND MORTGAGE GUARANTY COMPANY."  
G/MAC

*"Title Number 390 referred to by the foregoing letters, is the designation given by the National Commercial Title and Mortgage Guaranty Company to its \$250,000 mortgage loan above referred to and said letters refer to that loan."*  
(Case, pp. 17-20.)

It will be noted that the letter from Church Construction Company to the Mortgage Company, contains the following language: "Said sum to be paid before final payment is made to Church Construction Company." This language, when read in the light of the fact that the Mortgage Company had granted a \$250,000.00 mortgage loan to Church Construction Company upon which upwards of \$34,000.00 remained to be advanced, would indicate that the payment to the Gypsum Company was to be made from such mortgage loan.

It will be further noted that the letter from Whiting & Moore, attorneys for the Gypsum Company to the Mortgage Company, says—"We understand that the Church Construction Company has authorized you to pay to our client the sum of \$4,500 from the final payment to be made on the mortgage which you hold on this property." The Mortgage Company when replying to this letter, apparently understood what mortgage was referred to. The order from Church

Construction Company to the Mortgage Company, the letter from Whiting & Moore, to the Mortgage Company, and the reply of the Mortgage Company to Whiting & Moore, all bore the notation—"Re Title No. 390." It is expressly stipulated that Title No. 390, referred to by these letters, is the designation given by the National Commercial Title and Mortgage Guaranty Company to its \$250,000.00 mortgage loan and that said letters refer to that loan. (Case, pp. 19 and 20.)

That all three parties knew and understood that this order was to be paid from the balance of the \$250,000.00 mortgage loan granted by the Mortgage Company to Church Construction Company, there cannot be the slightest doubt. In fact, it is so expressly stated in the stipulation of facts. At page 17 of the Case, it is stipulated that the "order for \$4,500.00 upon the National Commercial Title and Mortgage Guaranty Company, (was) to be paid *from the balance of the \$250,000.00 mortgage loan above referred to,*" etc., *i. e.*, the \$250,000 loan to Church Construction Company secured by mortgage dated November 9, 1927, and recorded November 17, 1927, in the Register's Office of Essex County, (Case, p. 14.)

**POINT IV.**

The fund out of which the \$4,500.00 was assigned to complainant came into existence and was actually paid by defendant to the assignor. This did not relieve defendant of its liability to complainant.

The Court below found as follows:

“By reference to the facts it will appear that the unpaid balance of the mortgage loan as of March 15 was applied to two purposes: First, discharge of a prior assignment to the Federal Trust Company, and, second, payment of the cost of labor and material actually used toward the completion of the building. The result seems to be that the money, which it was anticipated that the Church Construction Company would eventually receive, never became payable to it but was applied to other proper purposes. Therefore, the fund, if any, out of which the \$4,500.00 was assigned, never came into existence. Hence there could have been no equitable assignment.”

See opinion, Case, page 37.

Here again, the Vice-Chancellor erroneously read the stipulation of facts. On March 15, 1928, the date of the assignment to complainant, there was still to be advanced by defendant on its \$250,000.0 mortgage loan the sum of \$34,175.75 (Case, p. 15.)

Thereafter, National Commercial Title and Mortgage Guaranty Company advanced this entire balance (Case, pp. 20 and 21.) These advances were made directly to Church Construction Company, the complainant's assignor. They were not made by the Mortgage Company to the Federal Trust Company and the various creditors of the Church Construction Company, as from the Vice-Chancellor's opinion it would ap-

pear. The stipulation of facts on this point is as follows (Case, p. 20):

“Thereafter, National Commercial Title and Mortgage Guaranty Company advanced the balance of said \$250,000.00 mortgage loan to *Church Construction Company*, upon the following dates, in the following amounts and for the following purposes, that is to say:”

Then follows a list of checks all payable to Church Construction Company.

The fact that Church Construction Company used these checks to pay a prior assignment of Federal Trust Company and to pay creditors, who, like complainant, had furnished material and labor for the erection of the mortgaged building and that the moneys were advanced to Church Construction Company for that purpose is immaterial. *The use to which this fund was put relates to its application and not to its existence.* All discussion as to whether or not the Mortgage Company was required to make these advances is likewise beside the point. The fact is that the advances were made.

Since the entire balance of this fund amounting to \$34,175.75, was paid by the defendant to complainant's assignor, it can hardly be said that there was no fund to which the assignment could attach.

Payment to the Church Construction Company, after notice of the assignment to complainant, did not relieve the defendant of its liability to the complainant.

*Bank of Harlem v. Bayonne, supra;*  
*Todd v. Meding, supra.*

**POINT V.**

Payment of complainant's assignment would not have affected the priority of defendant's mortgage lien.

It is the contention of the defendant that it had the right to control the application of the advances made by it from time to time on account of its mortgage loan to the extent necessary to insure its mortgage being a first lien.

Section 15 of the Mechanics' Lien Act, Compiled Statutes, page 3303, is as follows:

"Every mortgage given or to be given upon lands in this State shall have priority over any claim that may be filed in pursuance of this act to the extent of the money actually advanced and paid by the mortgagee and applied to the erection of any new building upon the mortgaged lands or any alterations, repairs or additions to any building on said lands; provided such mortgage be registered or recorded before the filing of any such claim."

It may very well be that the Mortgage Company had a right to see that all of the funds advanced by it were applied to the erection of the building upon the mortgaged premises in order to insure that its lien would be prior to that of possible mechanics' liens. That is a question which need not be decided at this time because the complainant's claim is for material used in the erection of this building and payment to the complainant of its claim would have secured the Mortgage Company to the same extent as the payments which were actually made to other creditors.

**POINT VI.**

The right of the mortgagee to control the application of money actually advanced upon a mortgage loan is not superior to that of the mortgagor.

Defendant contends that it had the right to control the application of the advances made by it from time to time on account of its mortgage loan to the end that its mortgage might be a lien upon a completed building. In this particular case, there was no contract expressly providing for the advances on account of the mortgage loan at definite times. Since this was a construction loan, it may be that even in the absence of contract, the mortgagee was entitled at all times to hold back sufficient moneys to cover the cost of completing the building, or even to take over the building and complete it itself. Such a right is very different from the right to dictate to the mortgagor, how the money should be distributed by him after he has become entitled to and has received payment of it.

Since the Mortgage Company had notice of the complainant's assignment, its only election was to pay the amount of such assignment to the complainant or to withhold payment altogether. The mortgagor had stripped itself of the power to agree to its application to any other purpose. Payment to the mortgagor for any purpose whatever of the funds assigned to the complainant was a violation of the complainant's rights which rendered defendant liable to complainant for the amount so wrongfully paid. The fact that payment to the mortgagor instead of to the complainant and distribution of the funds by the mortgagor among creditors other than the complainant, may or may not have been

deemed desirable or advantageous to the mortgagee is immaterial.

The situation of the mortgagor and mortgagee in the case of a construction loan is analogous to that of a contractor and owner in the case of a building contract. The mortgagee in the one case and the owner in the other, are both desirous of having the building completed and both are therefore interested in seeing laborers and materialmen paid. Both have the right to withhold funds to the extent that their contracts give them such right. Neither has any control over the application of advancements after they have become due and payable and neither has the right to deprive the contractor or mortgagor from assigning moneys which may become due and payable.

In *Shannon v. Hoboken*, 37 N. J. Eq., 123, it was held that a provision in a contract that if the contractor fails to pay for labor done or materials furnished in the performance of the contract, the other contracting parties may withhold the moneys earned under the contract and apply them to the payment of such debts, does not deprive the contractor of his right of alienation, and his assignees, notwithstanding such a provision, will be entitled to the moneys earned under the contract in the order in which they acquire title to them.

In *Lanigan v. Bradley & Currier Co.*, 50 N. J. Eq., 201, it was held that the holder of an assignment from a builder given for money loaned, was entitled to the funds so assigned in preference to creditors who served stop notices on the owner under the Mechanics' Lien Act.

In *Blauvelt v. Fuller*, 66 N. J. L. 47, the contractor gave the owner an order to hold \$500

from the contract price and pay it to a materialman. Subsequently another materialman served a stop notice upon the owner under the Mechanics' Lien Law. Held that the one who served the stop notice took the place of the contractor to the extent of his claim and acquired no higher or other rights in the fund than the latter had. By the order the contractor became divested of all right in or title to the fund to the amount of the order and the rights under the order were superior to those under the stop notice.

In *Cope v. C. B. Walton Co.*, 77 N. J. Eq., 512, it was held that where a contractor for a municipal improvement assigns in advance all moneys to be derived by it under the contract, such assignment is prior to notices filed under the Municipal Mechanics' Lien Act and defeats the claims of the creditors of the contractor doing work on or furnishing material for the improvement.

In *Brindze v. Atlantic City Policemen's Beneficial Association*, 75 N. J. Eq., 405; aff'd 77 N. J. Eq., 272, the defendant Association had a contract with the Berger Amusement Company, the complainant's assignor, wherein the Amusement Company agreed to conduct at Atlantic City, a circus for four days. Under the contract, the first \$5,000.00 derived from the sale of tickets was to go to the Amusement Company. All moneys in excess of that amount were to be divided equally between the Amusement Company and the Beneficial Association. The contract further provided that all moneys derived from the sale of tickets should be deposited and that none of said money should be drawn out until "the show was on the ground." The Amusement Company executed an assignment to the complainant of the first \$2,700.00 which

should be deposited pursuant to the contract. The circus arrived pursuant to the contract but owing to a severe storm, it was impossible to give a performance until Friday of the week named in the contract. Before the performance that day, the circus actors refused to act unless paid in advance and in order to enable the show to proceed, it became necessary for the Beneficial Association to guarantee the amounts demanded by them.

From this statement of facts, it is clear that it was greatly to the interest and advantage of the Beneficial Association to pay the money which it owed to the Amusement Company directly to the actors, or to insist that the moneys be so applied by the Amusement Company. The Court, however, held that this fact gave the Beneficial Association no equity in the funds superior to that of the assignee. Since the circus "was on the ground," the money deposited in the bank was due and payable to the Amusement Company and no right on the part of the Beneficial Association to have the funds applied so that the contract could be fulfilled, was recognized, but on the contrary, the equitable assignment was held to be enforceable.

*Germania Building & Loan Association v. Frankel Realty Co.*, 84 N. J. Eq., 164, cited under Point I above, is a case of a construction loan. In that case, the Court of Errors and Appeals, in its opinion, intimated that in the absence of an agreement as to the time when the advancements should be made, it might be necessary for the mortgagor to withhold future advances until it was assured that the mortgage would cover a completed structure. The Court found, however, that it was not necessary to determine this question in advance. In that case, the building was

in fact completed and it was conceded that the mortgagor was under an obligation to advance the full amount called for. In that case, the Court sustained an equitable assignment given by the mortgagor of a portion of the sum secured by the mortgage. The mortgagor failed to complete the building and it was completed by his creditors. It was held that the equity asserted by the creditors to have the mortgage money applied to the completion of the building was not superior to the equity of the assignee. That case is very similar to the present case.

In the present case, the entire amount of the mortgage loan was advanced to the mortgagor and it must therefore be assumed that the entire amount was due and payable to the mortgagor. In the present case, as in the Germania Building & Loan case, it is not necessary to determine whether or not the mortgagee had the right to withhold advances until it was assured that its mortgage would cover a completed structure for the reason that the right, if any, to withhold advances was not exercised. The sole question is whether or not an assignment of moneys to be advanced under a construction loan becomes effective when such moneys are actually advanced. From the authorities above referred to, it becomes clear that the assignment did become effective and that the Mortgage Company was not relieved of its liability to the assignee by paying the amount of the assignment to the complainant's assignor.

**POINT VII.**

Defendant upon making advances to Church Construction Company on account of this mortgage loan, lost its control over the moneys advanced and had no right to require that the Church Construction Company use such moneys to prefer certain of its creditors over others, especially when the creditors so preferred had acquired no prior liens upon it or rights in either the mortgaged building or the mortgage fund.

At the time the assignment was executed, the Church Company owed complainant for materials which had gone into the building on which the Mortgage Company held its mortgage. The complainant was in a position to file a mechanics' lien, the effect of which would undoubtedly be to stop the progress of the building to the detriment of both the Church Company and the Mortgage Company. In order to avoid this, the Church Company purported to use a part of the mortgage money which it was to receive, to pay for these materials. This was done with the knowledge and acquiescence of the Mortgage Company and while the Mortgage Company did not guarantee payment of the assignment, it promised to co-operate in every way possible.

The situation becomes even more clear if we look at it as of March 30, 1928, fifteen days after the execution of the assignment. On the latter date, the Mortgage Company gave to the Church Construction Company, checks aggregating \$19,175.75, which are itemized in the agreed statement of facts as follows:

Date	Amount	Payable to	Endorsed to
Mar. 30, 1928,	\$6000.00	Church Const. Co.	Bloomfield & Eisenstadt, (steam fitter) endorsed by them to Supply House.
" " "	2000.00	" " "	For payroll.
" " "	1500.00	" " "	Bloomfield & Eisenstadt, (steam fitter) endorsed by them to Supply House.
" " "	5000.00	" " "	Henry R. Isenberg, for tile work.
" " "	2675.75	" " "	Atlantic Elevator Co.
" " "	2000.00	" " "	Charles Sonvak.
	<u>\$19175.75</u>		

On March 30, 1928, the situation therefore was this: Church Construction Company owed the complainant \$4,500.00 for material which had gone into the building covered by the defendant's mortgage. It owed other creditors \$19,175.75 for labor and materials which had also already gone into the building. Neither the complainant, nor these other creditors, had been paid the amounts due them. Both the Gypsum Company and these other creditors had rights to file liens against the mortgaged land and building, but none of them had exercised such rights. All were in the same position with respect to the mortgaged property. They were not in the same position, however, with respect to the mortgage fund. The Gypsum Company had procured an assignment of the mortgage funds in an amount sufficient to pay its claim. In this way it had acquired priority over these other creditors.

The Mortgage Company with full knowledge of this priority elected to pay \$19,175.75 to the Church Construction Company for the purpose of paying these other creditors whose claims upon the building were in no way superior to those of the Gypsum Company and who had no claim whatever upon the proceeds of the mortgage loan.

It is our contention that by the assignment the Church Construction Company had divested its interest in this money to the extent of \$4,500.00 and to that extent the proceeds of the mortgage loan belonged to the Gypsum Company and could not lawfully have been paid by the Mortgage Company to the Church Construction Company, nor could it have been lawfully used to pay other creditors of the Church Construction Company.

#### POINT VIII.

**The complainant's rights in the funds used to pay the Federal Trust Company were superior to the rights of the Federal Trust Company.**

On April 16, 1928, the defendant advanced \$5,000.00 to the Church Construction Company, who, in turn, endorsed the check over to the Federal Trust Company to pay a note given for money previously borrowed. This payment is sought to be justified by an assignment dated December 12, 1927. We concede that this assignment was prior to the complainant's assignment both in time and as to notice. We point out, however, that the fund from which the Federal Trust Company's assignment was to be paid, is not the same as the fund from which complainant's assignment was to be paid. The fund designated as the source of payment of the assignment to the Federal Trust Company was "the second payment made on account of the mortgage of the Church Construction Company," etc. (Case, p. 21.)

This mortgage loan was for \$250,000.00. The agreement between the Mortgage Company and the Church Construction Company was that the mortgage loan was to be advanced as the building progressed in construction. Prior to March

15, 1928, the date of complainant's assignment, the entire loan of \$250,000.00 had been advanced except the sum of \$34,175.75. It may safely be assumed, therefore, that the "second payment made on account of this mortgage" had already been made. Whether this is so or not, at least one payment on account of that mortgage had been made prior to March 15, 1928, as only \$34,175.75 remained to be paid at that time. On March 30, 1928, six payments aggregating \$19,175.75 were made on account of the mortgage and none of these payments were used to pay the Federal Trust Company the amount of its assignment. It was not until April 16, 1928, that a check for \$5,000 was delivered to Church Construction Company, with which to pay the Federal Trust Company's assignment.

On March 15, 1928, the complainant obtained an assignment for \$4,500.00 payable from the balance of the \$250,000.00 mortgage loan then unadvanced. This balance, at that time, amounted to \$34,175.75. A part of this fund, namely, \$5,000.00, was used not to provide for the completion of the building but to pay the note of Federal Trust Company for money previously borrowed. This money was not taken from the second payment on account of the mortgage loan designated by the assignment to the Federal Trust Company but from the fund designated as the source from which complainant's assignment should be paid. In other words, complainant's money was used to pay the Federal Trust Company.

## POINT IX.

Such rights, if any, as defendant had to ignore complainant's assignment, were waived.

If the defendant ever had equities with respect to the balance of the mortgage loan superior to those acquired by the complainant by virtue of the assignment from Church Construction Company, such equities were waived, first, by its failure to object to and its acquiescence in the assignment, and second, by payment of the entire balance of the mortgage fund to the Church Construction Company.

In *Turner v. Wells*, 64 N. J. L. 269, a building contract provided that any assignment by the builder of money due or to grow due on the contract, should, at the option of the other party, be null and void. In that case, it was held that if the other party on being notified by the assignee of such assignment, did not object to the assignment for two months thereafter, when the assignee brought suit, the option had then expired and the assignment was valid.

In the present case, the defendant not only did not object to the assignment but expressly acquiesced in it. By its letter of March 22, 1928, while it did not guarantee the payment of this order, it expressly promised to co-operate with the complainant in every way possible. (Case, p. 19.)

By the assignment of March 15th, complainant acquired the rights of the Church Construction Company in the unadvanced portion of the mortgage loan to the extent of \$4,500.00. If, except for the assignment, the Church Company ever became entitled to this money, then by virtue of the assignment, it should have been paid to the complainant instead of to the Church Company.

With respect to \$4,500.00 of the mortgage loan, complainant stood in the Church Construction Company's shoes.

With full knowledge of this fact and despite its promise to co-operate with complainant in every way possible, the Mortgage Company paid the entire balance of the mortgage loan to the Church Company. All discussion as to whether or not the Mortgage Company was required to pay the entire balance of the mortgage loan is beside the point. If it had the right to withhold payment, such right was waived; payment was in fact actually made. It may be that the Mortgage Company could have required the Church Company to complete the building before making final payment and it may be that it could even have taken possession of the building and used the balance of the mortgage money to complete the building itself. The fact, however, is that all of the money was paid directly to the Church Construction Company and disbursed among the various creditors, not by the Mortgage Company but by the Church Construction Company itself. Since the Mortgage Company had notice that the complainant had acquired the Church Company's rights in this fund up to \$4,500.00, the payments to the Church Company instead of to the complainant rendered the Mortgage Company liable to the complainant for the sum wrongfully paid.

Respectfully submitted,

WHITING & MOORE,  
Solicitors for and of Counsel with  
Complainant-Appellant.

IRA C. MOORE, JR.,  
Of Counsel.

