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Bill of Complaint.

Filed December 12th, 1928.

In Chancery of New Jersey.

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

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The Complainant, Joseph Reinfeld, of the City of Newark, County of Essex and State of New Jersey, respectfully shows that:

1. On October 10th, 1927, Petti Construction Company, a New Jersey corporation with its principal office in the City of Newark, County of Essex and State of New Jersey, and Edward Petti being indebted to Joseph Reinfeld in the sum of \$70,000., executed to him a bond of that date in the penal sum of \$140,000, to secure the sum of \$70,000 payable April 10, 1928, with interest at the rate of 6% per annum, and to be paid at maturity.

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2. To secure the payment of the bond, said Petti Construction Company, a New Jersey corporation as aforesaid executed to said Joseph Reinfeld a mortgage of even date with the bond, and thereby conveyed to him in fee the lands hereinafter described on the express condition that such conveyance should be void if payment should be made according to the terms of the bond, which mortgage having first been duly acknowledged, and the certificate of acknowledgment duly endorsed thereon, was recorded in the office of the Register for the County of Essex in Book G-62 of Mortgages for Essex County, on pages 300-303.

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Bill of Complaint.

3. The mortgaged premises are described as follows:

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

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BEGINNING at a point in the southerly line of Irving Street distant westerly 260.55 feet from the southwesterly corner of Washington Avenue and Irving Street; thence (1) north 49 degrees 30 minutes west along Irving Street 75 feet; thence (2) south 40 degrees 30 minutes west 150 feet; thence (3) south forty-eight degrees 13 minutes east 75 feet; thence (4) north 40 degrees 30 minutes east 150 feet to the place of BEGINNING.

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The said sum of Seventy Thousand Dollars (\$70,000) to be advanced in connection with the erection of a three story brick building upon the premises hereinabove described is to be advanced as follows:

- | | | |
|----|--|-----------|
| | 1. When foundation is complete and has received the first tier of beams | \$1500.00 |
| | 2. When the house has been raised and received the second tier of beams | 1000.00 |
| 30 | 3. When the house has been fully raised and roof complete | 2500.00 |
| | 4. When rough plumbing and rough steam heating work has been completed and the brown coat of plaster finished throughout | 5000.00 |

The balance of the consideration named in the within mortgage shall be paid in such installments and at such times as the mortgagee shall deem proper.

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Bill of Complaint.

4. On September 21st, 1927, Petti Construction Company, a New Jersey corporation executed and delivered to Aaron Weinberg, a purchase money mortgage in the sum of \$9,540, payable in one year from its date with interest at the rate of 6% per annum, payable semi-annually, which said mortgage was recorded October 5, 1927 in Book I-62 of Mortgages for Essex County on page 350. 10

On October 10, 1927, Aaron Weinberg postponed the lien of said mortgage to the lien of Complainant's mortgage by postponement recorded November 12, 1927, in Book 96 of Postponement of Mortgages for Essex County on page 444.

On October 24, 1927, Aaron Weinberg and Sarah Weinberg, his wife, assigned a one third interest in said mortgage to Meyer Schwartz, which said assignment of mortgage was recorded October 26th, 1927 in Book 194 of Assignment of Mortgages for Essex County on page 29. 20

On June 22, 1928, Meyer Schwartz assigned said one third interest to Atlantic Construction Company, a New Jersey corporation by Assignment recorded June 23, 1928 in Book 200 of Assignment of Mortgages for Essex County, on page 50.

On October 24, 1927, Aaron Weinberg and Sarah Weinberg, his wife, assigned a one third interest in said mortgage to Louis Angert, which said assignment of mortgage was recorded October 26th, 1927 in Book 194 of Assignment of Mortgages for Essex County on page 29. 30

On September 21, 1927, Petti Construction Company executed a corrective purchase money mortgage to Aaron Weinberg, which said mortgage was recorded December 15, 1927, is in the sum of \$9,540, registered in Book B-63 of Mortgages for Es- 40

Bill of Complaint.

sex County on page 378, and re-registered in Book A-65 of Mortgages for Essex County, page 60.

10 Any interest which the said Aaron Weinberg, Meyer Schwartz, Atlantic Construction Company, a New Jersey corporation and Louis Angert, may have in said premises by virtue of said mortgages and their assignments, are subject and subsequent to the lien of Complainant's mortgage.

5. On April 2, 1928, Petti Construction Company, a New Jersey corporation, executed and delivered a mortgage to the Star Building and Loan Association in the sum of \$125,000, which said mortgage was recorded May 4, 1928, in Book D-64 of Mortgages for Essex County, on page 442.

20 Any interest which the said Star Building and Loan Association may have in said premises by virtue of said mortgage is subject and subsequent to the lien of Complainant's mortgage.

6. On September 14, 1928, Petti Construction Co., executed a mortgage to Samuel Pearl in the sum of \$738.90, which said mortgage was recorded September 14, 1928 in Book C-65 of Mortgages for Essex County on page 505, and which instrument purports to be a conditional bill of sale and is signed Samuel Pearl, trading as Newark Light Company.

30

Any interest which the said Samuel Pearl and Samuel Pearl trading as Newark Light Company may have in said premises by virtue of said mortgage or conditional bill of sale is subject and subsequent to the lien of Complainant's mortgage.

7. On November 23, 1927, Petti Construction Company, a New Jersey corporation, executed a contract with Henry Gottlieb to erect and finish

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Bill of Complaint.

the iron work on said premises for the sum of \$6,500, which said contract was filed January 12, 1928, in Book 57 of Contracts for Essex County;

On August 22nd, 1928, said Henry Gottlieb filed a mechanic's lien against Petti Construction Company, a corporation of New Jersey, builder and Edward Petti and Petti Construction Company, owner, which said lien claim is recorded in Book 24 of Mechanic's liens for Essex County on page 168 and on which summons was issued August 22nd, 1928 in the sum of \$5,450. 10

Any interest which the said Henry Gottlieb may have in said premises by virtue of said contract and said lien claim is subject and subsequent to the lien of Complainant's mortgage.

8. On September 24, 1928, Vincent Pucello, trading as Vincent Pucello & Company filed a lien claim against Petti Construction Company, Inc., builder and owner and Star Building and Loan Association, mortgagee, which said lien claim was filed in Book 24 of Mechanic's Lien for Essex County, on page 327, and is in the sum of \$4,000, and on which summons was issued October 24, 1928. 20

Any interest which the said Vincent Pucello, trading as Vincent Pucello & Company may have in said premises by virtue of said lien claim is subject and subsequent to the lien of Complainant's mortgage. 30

9. On October 1, 1928 Fred E. Miller filed a lien claim against Petti Construction Company, a New Jersey corporation, builder and owner, in the sum of \$1,000, which said lien claim was recorded in Book 24 of Mechanic's Lien for Essex Coun- 40

Bill of Complaint.

ty, on page 359, on which summons was issued October 1, 1928.

Any interest which the said Fred E. Miller may have in said premises by virtue of said lien claim is subject and subsequent to the lien of Complainant's mortgage.

10 10. On October 11, 1928 Hachmeister-Lind Company, filed a lien claim against Petti Construction Company and Edward Petti, builder and owner, which said lien claim was recorded in Book 24 of Mechanic's Liens for Essex County on page 412, and on which no summons was issued, and is in the sum of \$6,019.

20 Any interest which the said Hachmeister-Lind Company may have in said premises by virtue of said lien claim is subject and subsequent to the lien of Complainant's mortgage.

30 11. On October 2nd, 1928, Atlantic Construction Company, a corporation, filed a Lis Pendens against Petti Construction Company, a corporation, Louis Angert, Joseph Reinfeld, Aaron Weinberg, Baltz-Howell Co., Inc., a corporation, Eastern Sash & Door Company, a corporation, Star Building and Loan Association, a corporation, George Snyder, Henry Gottlieb, Samuel Pearl, trading as Newark Light Company and Vincent Pucello trading as Vincent Pucello & Co., which said Lis Pendens as recorded in Book L of Lis Pendens for Essex County, on page 98.

40 On October 4th, 1928, Atlantic Construction Company, a corporation, filed another Lis Pendens against Petti Construction Company, a corporation, Louis Angert, Joseph Reinfeld, Aaron Weinberg, Baltz-Howell Co., Inc., a corporation, Eastern Sash & Door Company, a corporation,

Bill of Complaint.

Star Building and Loan Association, a corporation, George Snyder, Henry Gottlieb, Samuel Pearl, trading as Newark Light Company, Vincent Pucello trading as Vincent Pucello & Co., and Fred E. Miller, which said Lis Pendens was recorded in Book L of Lis Pendens for Essex County on page 108.

10

Any interest which the said Atlantic Construction Company, a corporation may have in said premises by virtue of said Lis Pendens filed is subject and subsequent to the lien of Complainant's mortgage.

12. On June 8th, 1928, Petti Construction Company, a New Jersey corporation entered into a contract with George Snyder, to provide, complete and finish all plumbing and heating work for the sum of \$16,750, which said contract was filed June 25th, 1928 in Book 1217 of Contracts for Essex County.

20

Any interest which the said George Snyder may have in said premises by virtue of said contract is subject and subsequent to the lien of complainant's mortgage.

13. On October 28th, 1927, Haltz Howell Company, Inc., a corporation, recovered a judgment against Petti Construction Company, Inc., a corporation in the sum of \$310.45 and \$19.36 costs, or some other sum, which said judgment was filed February 3rd, 1928, in Book 28 of Docketed Judgments for Essex County, on page 326.

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Any interest which the said Baltz Howell Company, Inc., a corporation may have in said premises by virtue of said judgment is subject and subsequent to the lien of Complainant's mortgage.

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Bill of Complaint.

14. On October 19, 1928, Petti Construction Company filed a petition in bankruptcy and was adjudicated a bankrupt and on November 19, 1928, Max L. Rosenstein, was appointed trustee in Bankruptcy of the said Petti Construction Company.

10 Any interest which the said Max L. Rosenstein, as Trustee in Bankruptcy may have in said premises by virtue of said petition filed is subject and subsequent to the lien of complainant's mortgage.

15. The said Petti Constructoin Company and the said Max L. Rosenstein as trustee have been and still are in possession of the mortgaged premises.

20 There is due on account of the principal sum of complainant's said bond and mortgage the sum of \$70,000 together with interest from October 10th, 1927.

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

30 1. That Petti Construction Company, a New Jersey corporation, Edward Petti, Aaron Weinberg, Atlantic Construction Company, a New Jersey corporation, Louis Angert, Star Building and Loan Association, a New Jersey corporation, Samuel Pearl, trading as Newark Light Company, Henry Gottlieb, Vincent Pucello, trading as Vincent Pucello and Company, Fred E. Miller, Hackmeister-Lind Company, George Snyder, Baltz-Howell Company, Inc., a corporation, Max L. Rosenstein, trustee, who are the defendants to this suit, may answer this Bill of Complaint, without oath, and each statement therein made.

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

Bill of Complaint.

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

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

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

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PHILIP J. SCHOTLAND,
Solicitor and Counsel with Complainant.

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Answer and Counterclaim of Atlantic Construction Company.

Filed Feb. 1, 1929.

IN CHANCERY OF NEW JERSEY.

10	Between JOSEPH REINFELD, Complainant, and PETTI CONSTRUCTION COMPANY, a corporation, <i>et als.</i> , Defendants.	}	On Bill, etc. Answer and Counterclaim of Defendant Atlantic Construction Company.
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20 The defendant Atlantic Construction Company, a corporation of the State of New Jersey, having its principal office in the City of Newark, in the County of Essex and State of New Jersey, answering the complaint filed herein says:

30 1. As to paragraph 1 it has no knowledge or information from which to form a belief and demands that the complainant prove the same at the final hearing hereof.

 2. As to paragraphs 2 and 3 it admits the allegations contained therein.

40 3. Answering paragraph 4, this defendant admits the execution of the mortgage mentioned therein by the Petti Construction Company, a corporation to Aaron Weinberg, but has no knowledge or information sufficient to form a belief as to the allegation therein contained relative to the execution of the postponement therein mentioned by

Answer and Counterclaim of Atlantic Construction Company.

Aaron Weinberg, recorded in Book 96 of Postponements of Mortgages, on page 444, and demands that the complainant prove the same at the final hearing hereof.

Further answering said paragraph 4 this defendant admits the allegations therein contained relative to the assignments executed by Aaron Weinberg to Meyer Schwartz, and by Meyer Schwartz to the Atlantic Construction Company, a corporation, and by Aaron Weinberg and Sarah Weinberg, his wife to Louis Angert. 10

Further answering said paragraph 4 this defendant says that as to the execution of the corrective purchase money mortgage by the Petti Construction Company to Aaron Weinberg, that said mortgage was a re-record of the mortgage mentioned in said paragraph and recorded in Book I 62 of Mortgages for Essex County, on page 350. 20

Further answering said paragraph 4 this defendant denies that the lien of its said mortgage is subject and subsequent to the lien of complainant's mortgage, but says that the lien of this defendant's mortgage is prior, superior and paramount to the lien of the complainant's mortgage. 30

4. As to paragraphs 5, 6, 7, 8, 9 and 10, this defendant has no knowledge or information from which to form a belief and demands that the complainant prove the same at the final hearing hereof.

5. As to paragraph 11, it admits the allegations contained therein, with the exception that it denies that the interest which this defendant has 40

Answer and Counterclaim of Atlantic Construction Company.

in said premises is subject to the lien of complainant's mortgage, but says that the lien of this defendant's mortgage is prior, superior and paramount to the lien of the complainant's mortgage.

6. As to paragraphs 12, 13, 14 and 15, this defendant has no knowledge or information from which to form a belief and demands that the complainant prove the same at the final hearing hereof.

7. Further answering said bill of complaint this defendant says that the lien of the mortgage made by the Petti Construction Company to Aaron Weinberg, dated September 21, 1927, in the sum of Ninety-five Hundred and Forty (\$9540.00) Dollars, and recorded in the Office of the Register of the County of Essex in Book I 62 of Mortgages for said County on page 350, and which was further recorded in Book A 65 of Mortgages for said County, on page 60, and which was further recorded in said Register's Office in Book B 63 of Mortgages for said County, on page 378, and in which this defendant has a one-third interest, is prior, superior and paramount to the liens and encumbrances specifically set forth in paragraphs 2, 5, 6, 7, 8, 9, 10, 12, 13 and 14.

COUNTERCLAIM:

By way of counterclaim against the defendants Petti Construction Company, a corporation, Aaron Weinberg, Louis Angert, Star Building and Loan Association, a corporation, Samuel Pearl, trading as Newark Light Company, Henry Gottlieb, Vincent Pucello, trading as Vincent Pucello and Com-

Answer and Counterclaim of Atlantic Construction Company.

pany, Fred E. Miller, Hackmeister-Lind Company, George Snyder, Baltz-Howell Company, Inc., a corporation and Max L. Rosenstein, Trustee in Bankruptcy of the Petti Construction Company, and against the complainant Joseph Reinfeld, this defendant says:

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1. On September 21, 1927, the Petti Construction Company, a corporation of New Jersey, being indebted to Aaron Weinberg in the sum of Nine Thousand Five Hundred and Forty (\$9,540.00) Dollars, executed to him a bond of that date, to secure that sum, payable on September 21, 1928, with interest at the rate of six per cent. per annum, payable half yearly from the date of the bond.

20

2. To secure payment of the bond, said Petti Construction Company, a corporation, executed to said Aaron Weinberg a mortgage of even date with the bond, and thereby conveyed to him, in fee, the lands hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond, which mortgage, having been first duly acknowledged, and the certificate of acknowledgment duly endorsed thereon, was recorded in the office of the Register of Essex County in Book I 62 of Mortgages for said County, on page 350.

30

3. The mortgaged premises are described as follows:

ALL that certain tract or parcel of land and premises, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey.

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Answer and Counterclaim of Atlantic Construction Company.

10 BEGINNING at a point in the southerly line of Irving Street distant westerly two hundred sixty feet and fifty-five one-hundredths of a foot from the southwesterly corner of Washington Avenue and Irving Street; thence north forty-nine degrees thirty minutes west along Irving Street seventy-five feet; thence south forty degrees thirty minutes west one hundred fifty feet; thence south forty-eight degrees thirteen minutes east seventy-five feet; thence south forty degrees thirty minutes east one hundred fifty feet to the point of BEGINNING.

20 Being known as lots 11, 12 and 13 Block 821 on Map of Property of Peter Weiler, E. Adams, surveyor, 1877.

20 Being the same premises conveyed to the party of the first part herein by the party of the second part herein by deed of even date herewith, and about to be recorded.

30 4. By written assignment dated October 24, 1927, said Aaron Weinberg and Sarah Weinberg, his wife, assigned a one-third interest in said bond and mortgage to Meyer Schwartz, which assignment was recorded in the Essex County Register's Office on October 26, 1927 in Book 194 of Assignments of Mortgages on page 29.

40 5. By written assignment dated June 22, 1928, said Meyer Schwartz assigned said one-third interest in said bond and mortgage to this defendant, Atlantic Construction Company, a corporation, which assignment was recorded in the Essex County Register's Office on June 22, 1928, in Book 200 of Assignments of Mortgages for said County on pages 50-51.

Answer and Counterclaim of Atlantic Construction Company.

6. By written assignment dated October 24, 1927, said Aaron Weinberg and Sarah Weinberg, his wife, assigned another one-third interest in said bond and mortgage to Louis Angert, which assignment was recorded in the Essex County Register's Office on October 26, 1927 in Book 194 of Assignments of Mortgages, page 29. 10

Said interest of said Louis Angert in said land is concurrent with the lien of this defendant's interest in said mortgage.

7. On October 10, 1927, said Petti Construction Company, a corporation, mortgaged said land to Joseph Reinfeld, the complainant herein, for Seventy Thousand (\$70,000.00) Dollars, which mortgage was on October 14, 1927, recorded in the Essex County Register's Office in Book G 62 of Mortgages for said County, on page 300. 20

Any interest which said Joseph Reinfeld may have in said lands is subject to the lien of this defendant's one-third interest in the mortgage mentioned in paragraph 4 hereof.

8. By written agreement dated October 10, 1927, said Aaron Weinberg postponed his interest in the mortgage mentioned in paragraph 4 hereof, in favor of the mortgage held by the complainant, Joseph Reinfeld, mentioned in paragraph 2 hereof, which agreement of postponement was recorded in the Essex County Register's Office on November 12, 1927, in Book 96 of Releases of Mortgages for said County, on page 444. 30

Any interest which said Aaron Weinberg may have in said lands is subject to the lien of this defendant's one-third interest in the mortgage mentioned in paragraph 4 hereof. 40

Answer and Counterclaim of Atlantic Construction Company.

9. On October 28, 1927, the Baltz Howell Company, Inc. a corporation, recovered a judgment against the Petti Construction Company (Inc.) in the District Court of the City of East Orange, in the sum of Three Hundred Ten Dollars and Forty-five Cents (\$310.45) damages and Nineteen Dollars and Thirty-six Cents (\$19.36) costs, which judgment was docketed in the Clerk's office of the Essex County Court of Common Pleas on February 3, 1928, in Book 28 of Docketed Judgments on page 326.

10 Any interest which said Baltz Howell Company, Inc. a corporation, may have in said lands is subject to the lien of this defendant's one-third interest in the mortgage mentioned in paragraph 4 hereof.

10. On March 22, 1928, the Eastern Sash & Door Company, a corporation, recovered a judgment against the Petti Construction Company, a corporation, Marie Petti and Edward Petti, in the Union County Circuit Court, in the sum of Three Thousand Nine Hundred Ninety-seven Dollars and Eighty-seven Cents (\$3,997.87) damages and Sixty-four Dollars and Sixty-three cents (\$64.63) costs, which judgment was docketed in said Union County Circuit Court on March 22, 1928, and was docketed in the New Jersey Supreme Court on August 20, 1928.

Any interest which said Eastern Sash & Door Company, a corporation, may have in said lands is subject to the lien of this defendant's one-third interest in the mortgage mentioned in paragraph 4 hereof.

Answer and Counterclaim of Atlantic Construction Company.

11. On April 2, 1928, the Petti Construction Company, a corporation, mortgaged said lands to the Star Building & Loan Association, a corporation, for One Hundred and Twenty-five Thousand (\$125,000.00) Dollars, which mortgage was recorded in the Essex County Register's Office on May 4, 1928, in Book D-64 of Mortgages for said County, on page 442. 10

Any interest which the said Star Building & Loan Association, a corporation, may have in said lands is subject to the lien of this defendant's one-third interest in the mortgage mentioned in paragraph 4 hereof.

12. By written instrument dated June 25, 1928, the Petti Construction Company, a corporation, assigned an interest in an agreement embracing other lands, to George Snyder, as security for the payment of the sum of Sixteen Thousand Seven Hundred and Fifty (\$16,750.00) Dollars due to the said George Snyder for plumbing and heating work furnished and performed by him in the erection of the building upon the premises described in this defendant's mortgage, which instrument was recorded in the Essex County Register's Office on June 25, 1928, in Book D 78 of Deeds for said County on page 354; and on June 25, 1928 said Petti Construction Company, a corporation, mortgaged other lands and premises to said George Snyder, to secure the payment of the aforesaid sum of Sixteen Thousand Seven Hundred and Fifty (\$16,750.00) Dollars, due him for the aforesaid plumbing and heating work performed in the building erected upon the lands and premises described in this defendant's mortgage. 20 30 40

Answer and Counterclaim of Atlantic Construction Company.

Any interest which the said George Snyder may have in said lands is subject to the lien of this defendant's one-third interest in the mortgage mentioned in paragraph 4 hereof.

10 13. On August 22, 1928, Henry Gottlieb filed a mechanic's lien against the lands and premises described in this defendant's mortgage, in the Essex County Clerk's Office, wherein he seeks to recover a mechanic's lien against the same in the sum of Five Thousand Four Hundred and Fifty (\$5,450.00) Dollars, which said mechanic's lien is recorded in the Essex County Clerk's Office in Book 24 of Mechanic's Liens on page 168.

20 Any interest which the said Henry Gottlieb may have in said lands is subject to the lien of this defendant's one-third interest in the mortgage mentioned in paragraph 4 hereof.

30 14. By written instrument dated September 14, 1928, said Petti Construction Company, a corporation, executed a conditional bill of sale or mortgage upon the lands and premises described in this defendant's mortgage to Samuel Pearl, trading as the Newark Light Company, in the sum of Seven Hundred Thirty-eight Dollars and Ninety Cents (\$738.90) which mortgage or conditional bill of sale was recorded on September 14, 1928, in the Essex County Register's Office as No. 43 of that date.

40 Any interest which the said Samuel Pearl, trading as the Newark Light Company may have in said lands, is subject to the lien of this defendant's one-third interest in the mortgage mentioned in paragraph 4 hereof.

Answer and Counterclaim of Atlantic Construction Company.

15. On September 24, 1928, Vincent Pucello, trading as Vincent Pucello & Co., filed a mechanic's lien against the lands and premises described in this defendant's mortgage, in the Essex County Clerk's Office, wherein he seeks to recover a mechanic's lien against the same in the sum of Four Thousand (\$4,000.00) Dollars, which said mechanic's lien is recorded in the Essex County Clerk's Office in Book 24 of Mechanic's Liens on page 327. 10

Any interest which the said Vincent Pucello, trading as Vincent Pucello & Co. may have in said lands is subject to the lien of this defendant's one-third interest in the mortgage mentioned in paragraph 4 hereof.

16. On October 1, 1928, Fred E. Miller filed a mechanic's lien against the lands and premises described in this defendant's mortgage, in the Essex County Clerk's Office, wherein he seeks to recover a mechanic's lien against the same in the sum of One Thousand (\$1,000.00) Dollars, which said mechanic's lien is recorded in the Essex County Clerk's Office in Book 24 of Mechanic's Liens on page 359. 20

Any interest which the said Fred E. Miller may have in said lands is subject to the lien of this defendant's one-third interest in the mortgage mentioned in paragraph 4 hereof. 30

17. On October 11, 1928, Hachmeister-Lind Company, filed a mechanic's lien against the lands and premises described in this defendant's mortgage, in the Essex County Clerk's Office, wherein it seeks to recover a mechanic's lien against the same in the sum of Six Thousand and Nineteen (\$6,019.00) Dollars, which said mechanic's lien is 40

Answer and Counterclaim of Atlantic Construction Company.

recorded in the Essex County Clerk's Office in Book 24 of Mechanic's Liens on page 412.

10 Any interest which the said Hachmeister-Lind Company may have in said lands is subject to the lien of this defendant's one-third interest in the mortgage mentioned in paragraph 4 hereof.

18. On or about October 19, 1928, the Petti Construction Company, the defendant herein, was adjudged bankrupt by the United States District Court, and Max L. Rosenstein was duly appointed Trustee in Bankruptcy of said corporation.

20 Any interest that the said Max L. Rosenstein, Trustee in Bankruptcy of the Petti Construction Company, may have in the lands and premises hereinabove described, is subject and subsequent to the lien of this defendant's mortgage.

19. The whole amount of principal, with interest thereon from September 21, 1927, is due upon this defendant's one-third interest in said bond and mortgage mentioned in paragraph 4 hereof.

This defendant is without adequate remedy in the courts of law, and therefore prays:

30 1. That the Petti Construction Company, a corporation, Aaron Weinberg, Louis Angert, Star Building and Loan Association, a corporation, Samuel Pearl, trading as Newark Light Company, Henry Gottlieb, Vincent Pucello, trading as Vincent Pucello and Company, Fred E. Miller, Hackmeister-Lind Company, George Snyder, Baltz-Howell Company, Inc. a corporation, and Max L. Rosenstein, Trustee in Bankruptcy of the Petti Construction Company, and Joseph Reinfeld, who
40 are the defendants to this counter-claim, may an-

Answer and Counterclaim of Atlantic Construction Company.

swer this counter-claim and each statement therein made.

2. That an account may be taken of the amount due upon this defendant's interest in said mortgage mentioned in paragraph 4 hereof.

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

10

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

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

DAVID M. LITWIN,
Solicitor for Defendant Atlantic
Construction Company. 30

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Notice.

IN CHANCERY OF NEW JERSEY.

10	Between JOSEPH REINFELD, Complainant, and PETTI CONSTRUCTION COMPANY, a corporation, <i>et als.</i> , Defendants.	}	On Bill, etc. Notice and Affidavits.
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20 To DAVID M. LITWIN, ESQ.,
 Solicitor for Defendant, Atlantic Construction
 Company, and
 HARRY GERSTEN, ESQ.,
 Solicitor for Defendant, Louis Angert.

Sirs:

30 Please Take Notice that on Tuesday, February
 19th, 1929, at ten o'clock in the forenoon or as soon
 thereafter as counsel can be heard, I shall apply
 to the Chancellor at Chancery Chambers, 1060
 Broad Street, Newark, N. J., for an order striking
 out your answer and counterclaim in the above en-
 titled cause on the ground that the same is sham
 and does not constitute a defense to the bill of com-
 plaint in this cause on behalf of complainant.

Please Take Further Notice that in support of
 said motion I shall read and file the affidavits at-
 tached herewith.

Dated February 8th, 1929.

Yours respectfully,

40 PHILIP J. SCHOTLAND,
 Solicitor for Complainant.

Affidavit of David M. Popik.

IN CHANCERY OF NEW JERSEY.

Between

JOSEPH REINFELD,
Complainant,

and

PETTI CONSTRUCTION COMPANY,
a corporation, *et als.*,
Defendants.

} On Bill, etc. 10
} Affidavit.

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

David M. Popik, of full age, being duly sworn, 20
according to law, on his oath, deposes and says:

1. I am an Attorney at Law, practicing my profession and maintaining an office in the City of Newark, County of Essex and State of New Jersey.

2. I represented the complainant in the above entitled cause, in the placing of the mortgage which is being foreclosed in this suit, and in the disbursing of all of the funds. I took full charge of the entire matter and attended to all of the details on behalf of my client, Joseph Reinfeld, the complainant, and am therefore personally fully familiar with all of the facts and all of the details of the transaction. 30

3. Sometime prior to October 10th, 1927, Aaron Weinberg, Louis Angert and Meyer Schwartz called at my office and asked me to grant a construction loan of \$70,000 to the Petti Construction Company on the premises described in the bill of com- 40

Affidavit of David M. Popik.

10 plaint for the purpose of enabling the Petti Construction Company to erect a large apartment house on said lands. To induce me to procure and place such a mortgage loan they, the said Weinberg, Angert and Schwartz informed me of the fact that they were the holders of a mortgage on the land and that they would execute a postponement in favor of the mortgage that I would place. I hesitated considerably about placing the mortgage and they stated that their mortgage would be subsequent to the mortgage I would place, which was mentioned as the Reinfeld mortgage (I having mentioned the fact that I had a client by the name of Joseph Reinfeld who had money on hand and whose money I could invest in such a mortgage), and that they
20 did not want to lose their money, and in the event of a foreclosure they would purchase the property and my client would be fully protected. After two or three interviews, at each of which all of three gentlemen were present, I agreed to place the mortgage for Joseph Reinfeld, the complainant, and upon examination of the title I was surprised to find that the mortgage appeared on the record in the name of Aaron Weinberg alone.

30 4. On October 10th, 1927, the Petti Construction Company executed and delivered the bond and mortgage to Joseph Reinfeld, which is the subject matter of this suit and said mortgage was recorded on October 14th, 1927, in Book G-62 of Mortgages for Essex County, on pages 300-303. On the same day said Aaron Weinberg executed a subordination agreement postponing the lien of his mortgage on said land and premises to the lien of complainant's mortgage. I did not immediately record the postponement of lien, as I again hesitated
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Affidavit of David M. Popik.

about going through with the transaction. Finally, I decided to go through with it and forgot to record the postponement of lien until something occurred which called it to my attention. Said postponement of lien was recorded on November 12th, 1927, in Book 96 of Postponement of Mortgages for Essex County, on page 444.

5. At the time when Aaron Weinberg signed the postponement of lien of his mortgage to the lien of complainant's mortgage, both Louis Angert and Meyer Schwartz were present with him, and he signed in their presence. 10

6. Subsequent to the execution by the said Weinberg of said postponement of lien in the presence of said Angert and Schwartz, said Weinberg, assigned of record on October 24th, 1927, a one-third interest in said mortgage to Meyer Schwartz, which assignment was recorded October 26th, 1927 in Book 194 of Assignment of Mortgages for Essex County on page 29. These two assignments carried out the original representation to me that the three were the owners of the mortgage, which representation was made before the postponement of lien was executed by Mr. Weinberg alone, he being the only record holder at that time. 20

7. Sometime in the Spring of 1928, I heard remarks to the effect that because I did not record the postponement of lien before the recording of the assignments of the respective one third interest to Angert and Schwartz, a claim would be made by them that their interests in the Weinberg mortgage was prior to the lien of complainant's mortgage. I thereupon sent for Aaron Weinberg to come to my office and on the 7th day of May, 1928, he executed the affidavit, a true copy of which is hereto annexed and marked Schedule "A", and I 30 40

Affidavit of David M. Popik.

sent for Louis Angert, who came to my office on June 6th, 1928, and executed the affidavit, a true copy of which is hereto annexed and marked Schedule "B."

10 8. I disbursed the \$70,000, the proceeds of the mortgage loan to the Petti Construction Company, in accordance with the terms of said mortgage, and there is owing to complainant the full amount of \$70,000 besides interest.

DAVID M. POPIK.

Sworn and subscribed to before me
 this 8th day of February, 1929.
 Samuel K. Sobel,
 Master in Chancery :
 of New Jersey.

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—————
Schedule "A".

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

Aaron Weinberg, being duly sworn upon his oath, deposes and says:

30 That on October 10th, 1927, he was the holder of a certain mortgage made by Petti Construction Co. to deponent herein in which mortgage one, Meyer Schwartz and Louis Angert had a one third interest each therein.

40 Deponent further states that on October 10th, 1927, he postponed the said mortgage by instrument of postponement recorded in the Essex County Register's Office in Book 96 of Releases of Mortgages on page 444, to mortgage made by the said Petti Construction Co. to Joseph Reinfeld in the

Affidavit of David M. Popik.

principal sum of \$70,000, which mortgage was recorded in the Essex County Register's Office on October 14th, 1927.

Deponent further states that the said postponement was made with the full knowledge and consent of the said Meyer Schwartz and Louis Angert, and was made for the purpose of inducing the said Joseph Reinfeld to accept a mortgage upon the said premises as a prior lien to the said deponent's mortgage. 10

Deponent further states that the said Messrs. Meyer Schwartz and Louis Angert were present at the office of David N. Popik, attorney for Joseph Reinfeld on several occasions prior to the execution of the said postponement and consented that the mortgage be so postponed.

Deponent further states that subsequent to the execution of the postponement to the said Joseph Reinfeld's Mortgage he executed an assignment to the said Meyer Schwartz and Louis Angert and that the said Meyer Schwartz and Louis Angert accepted said assignment with the full knowledge that the mortgage had first been postponed to the lien of the Reinfeld mortgage. 20

AARON WEINBERG.

Sworn and subscribed before me at Newark, N. J., this 7th day of May, 1928. 30

David N. Popik,
Attorney at Law of N. J.

*Affidavit of David M. Popik.***Schedule "B".**

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

Louis Angert being duly sworn upon his oath deposes and says:

10 That on October 10th, 1927, one, Aaron Weinberg, was the record owner of a certain bond and mortgage made by the Petti Construction Company and covering certain lands located at Nos. 20-22 Irving Street in the City of Newark.

Deponent further states that he was the owner of a one third interest in said mortgage together with Aaron Weinberg and one, Meyer Schwartz, each of these persons also owning a one third interest in said mortgage.

20 Deponent further states that on October 10th, 1927, the said Aaron Weinberg postponed the said mortgage by instrument of postponement, to mortgage executed by the said Petti Construction Co., to one, Joseph Reinfeld, which mortgage was in the sum of Seventy-Thousand Dollars (\$70,000), and which was recorded in the Essex County Register's Office on October 14th, 1927.

30 Deponent further states that the said postponement of mortgage executed by the said Aaron Weinberg was so executed with deponent's consent, it being the intention of the deponent that the mortgage given to the said Joseph Reinfeld should be a mortgage prior in lien to the mortgage held by Aaron Weinberg in which deponent had a one third interest.

40 Deponent further states that the said Meyer Schwartz owner of a one third interest in said mortgage was well aware of the fact that the mortgage held by Weinberg was to be postponed, and

Affidavit of David M. Popik.

was so postponed with the said Meyer Schwartz's knowledge and consent, it having been agreed by the said Messrs. Aaron Weinberg, Meyer Schwartz and deponent that the said Joseph Reinfeld mortgage should be a prior lien.

Deponent further states that subsequent to the execution of the postponement to the said Joseph Reinfeld's mortgage, the said Aaron Weinberg assigned to deponent by written assignment, a one third interest in said mortgage, and that the said Aaron Weinberg also assigned a one third interest in said mortgage to the said Meyer Schwartz which assignments were subsequently recorded in the Essex County Register's Office. 10

Deponent's attention has been called to the fact that the postponement executed by the said Aaron Weinberg was, through an oversight on the part of David N. Popik, Attorney for Joseph Reinfeld, recorded upon a date subsequent to the record of the said assignments, and that therefore it might appear that that portion of the mortgage assigned to the said Meyer Schwartz and deponent might be a prior lien to the lien of the Reinfeld mortgage. 20

Deponent makes this affidavit in order to clarify the existing situation so that the mortgage of the said Joseph Reinfeld shall be a prior lien on the said building in respect to the mortgage postponed by the said Aaron Weinberg irrespective of the date of recording of same. 30

LOUIS ANGERT.

Sworn and subscribed before me at
Newark, N. J. this 6 day of June,
1928.

Elizabeth A. Baker,
A Notary Public of N. J.

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Affidavit of Bertram Bland.

IN CHANCERY OF NEW JERSEY.

10	Between JOSEPH REINFELD, Complainant, and PETTI CONSTRUCTION COMPANY, a corporation, <i>et als.</i> , Defendants.	}	On Bill, etc. Affidavit.
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State of New Jersey, }
 County of Essex, } ss.:

20 Bertram Bland, of full age, being duly sworn, according to law, on his oath deposes and says:

1. I am a law student in the office of Philip J. Schotland, a counsellor at Law of this State.

2. On February 7th, 1929, my employer, Mr. Philip J. Schotland, requested that I go to the Hall of Records in the City of Newark and inspect the record of the mortgage of Petti Construction Company to Aaron Weinberg and ascertain what notations were in the actual record book alongside
 30 of the mortgage.

3. On February 7th, 1929, I went to the Hall of Records, High Street, Newark, N. J. and looked at the record book of the mortgage made by Petti Construction Company to Aaron Weinberg in the sum of \$9,540, dated September 1st, 1927 and found it was recorded October 5th, 1927 in Book I-62 of Mortgages for Essex County on page 350. On the margin of said record book I found the fol-
 40 lowing notations.

Affidavit of Bertram Bland.

10-26-27 No. 17 Assignment Record Book 194,
page 29.

10-26-27 No. 18 Assignment Record Book 194,
page 29.

11-12-27 No.3 Postponement recorded in Release
Book 96, page 444.

June 22, 1928 No. 18 see re-record Book A-65, 10
page 60.

12-15-27 No 49 see re-record Book B-63, page 378.

June 23, 1928 No. 25 Assignment recorded Book
200, page 250.

10-4-28 Book 7232 see Lis Pendens Book L. P.
108.

10-2-28 Book 7215 see Lis Pendens Book L. P.
98.

BERTRAM BLAND.

20

Sworn and subscribed to before me
this 8th day of February, 1929.

Helen Jedell,
Notary Public
of N. J.

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40

Affidavit of Meyer Schwartz.

IN CHANCERY OF NEW JERSEY.

10	Between JOSEPH REINFELD, Complainant, and PETTI CONSTRUCTION COMPANY, a corporation, <i>et als.</i> , Defendants.	}	On Bill, etc. Affidavit.
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State of New Jersey, County of Essex,	}	ss.:
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20 Meyer Schwartz, of full age, being duly sworn according to law on his oath deposes and says:

30 1. I am the Meyer Schwartz who is the assignee named in a certain assignment of mortgage made by Aaron Weinberg and Sarah, his wife, dated October 24, 1927, and recorded on October 26, 1927 in Book 194 of Assignments of Mortgages for Essex County, on page 29, by which instrument there was assigned to me a one-third interest in a certain mortgage in the sum of Ninety-five Hundred and Forty (\$9540.00) Dollars, recorded in Book I 62 of Mortgages for Essex County, page 350, and I am the Meyer Schwartz who assigned said one-third interest unto the Atlantic Construction Company, a corporation, by assignment of mortgage dated June 22, 1928, and recorded on June 23, 1928 in Book 200 of Assignments of Mortgages for Essex County, on pages 50-51.

40 2. My attention has been directed to the affidavit of David N. Popik, sworn to on February 8, 1929 and annexed to complainant's notice to strike,

Affidavit of Meyer Schwartz.

dated February 8, 1929. I have read that affidavit. It is not the fact that some time prior to October 10, 1927 Aaron Weinberg, Louis Angert and I called at the office of said David N. Popik and asked him to grant a construction loan of Seventy Thousand (\$70,000.00) Dollars to the Petti Construction Company, on the premises described in the Bill of Complaint, and that to induce him to procure and place such mortgage loan we then informed him that we were the holders of a mortgage on the land and that we would execute a postponement in favor of the mortgage that he would place. Said Aaron Weinberg and I went to the office of Mr. Popik shortly before the 10th day of October, 1927, upon the direction of Mr. Joseph Reinfeld, the complainant in this cause. Mr. Louis Angert was not with us at Mr. Popik's office either on that occasion or any other occasion. The transaction with Mr. Reinfeld originated when Mr. Weinberg and I interviewed Mr. Reinfeld at his office at No. 60 Park Place, Newark, N. J., and asked him whether he would care to finance a construction mortgage for an apartment house to be erected by the owner company upon the mortgaged premises. Our interest in seeking such loan was to secure payment of the so-called land mortgage, being the mortgage for Ninety-five Hundred and Forty (\$9540.00) Dollars recorded in Book I 62 page 350. That mortgage, while then in the name of Aaron Weinberg, belonged to and was the property of said Aaron Weinberg, Louis Angert and myself in equal shares and interest. Mr. Reinfeld took the plans, examined them, and then directed us to go to the office of his attorney, Mr. David N. Popik, and there work out with him the details of payments, and the other details concerning the

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Affidavit of Meyer Schwartz.

transaction. Mr. Weinberg and I went to the office of Mr. Popik, furnished him with the details that he would need for the transaction and discussed the charges both to himself and his client. On that occasion I told Mr. Popik that we were acting for the Petti Construction Company not as
10 brokers, but at the request of Mr. Petti, and that we were also interested in putting the loan through because thereby there would be paid off, all the sooner, our mortgage for \$9540.00. Mr. Weinberg and I explained to Mr. Popik that that mortgage belonged to the three of us, Mr. Weinberg, Mr. Angert and myself, and that we were all equally interested in having that mortgage paid off as soon as possible. Neither Mr. Weinberg nor I then
20 stated that we would execute any postponement in favor of the mortgage about to be taken by Mr. Reinfeld. There was no conversation of any kind between us concerning the subject of any postponement. On no other occasions since, have I discussed with Mr. Popik, nor has there been discussed with him, in my presence, the subject of any postponement of our said mortgage.

3. It is not the fact that when Aaron Weinberg signed the postponement of lien of the aforementioned mortgage of \$9540.00 both Louis Angert and
30 I were present with the said Weinberg, and that the latter signed in our presence. I was never present on any such occasion and I never saw Mr. Weinberg execute the said postponement of mortgage. I never heard or knew of such postponement until the Spring of 1928 when I was requested by Miss Helen Jedell to postpone my one-third interest in said mortgage in favor of a mortgage
40 for One Hundred and Twenty-five Thousand

Affidavit of Meyer Schwartz.

(§125,000.00) Dollars being taken by the Star Building and Loan Association, of which Mr. Philip J. Schotland is solicitor. I declined to make such postponement.

4. Aaron Weinberg has never, to this date, informed me that he ever executed any postponement of the mortgage in which I had a one-third interest. I never authorized him to execute any postponement, and had I been consulted by him at the time he did in fact execute such postponement, I would not have consented thereto with respect to my undivided one-third interest and share in the mortgage affected.

10

5. I verily believe that in executing and delivering said postponement, said Weinberg intended either to bind only his own undivided one-third interest, or fraudulently to affect my share and interest. In either event complainant's attorney, the said David N. Popik, was informed of, and knew of my one-third interest and share in said mortgage at the time he accepted delivery from said Weinberg of said postponement of mortgage.

20

6. I sold my interest in said mortgage to the Atlantic Construction Company, and received the full consideration on June 22, 1928. I closed that transaction in the office of Mr. David M. Litwin, the attorney for the Atlantic Construction Company. My assignment of my one-third interest in said mortgage to the Atlantic Construction Company, recorded on June 23, 1928 in Book 200 of Assignments of Mortgages for Essex County, on pages 50-51, was executed and delivered by me on June 22, 1928.

30

7. I never received any payment either from complainant or his attorney, Mr. David N. Popik

40

Affidavit of Meyer Schwartz.

on account of my one-third interest in the mortgage involved in the present controversy.

MEYER SCHWARTZ.

Sworn and subscribed to before me
this 11th day of March, 1929.

10 Antoinette E. Jones,
 A Notary Public
 of New Jersey.

Order Denying Motion to Strike.

Filed May 6, 1931.

20 IN CHANCERY OF NEW JERSEY.

71/197

30	<p>Between JOSEPH REINFELD, Complainant, and PETTI CONSTRUCTION COMPANY, a corporation, <i>et als.</i>, Defendants.</p>	}	<p>On Bill, etc. Order Denying Motion to Strike.</p>
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40 This matter coming on to be heard in the presence of Philip J. Schotland, Esq., solicitor for complainant, and David M. Litwin, Esq., solicitor for defendant Atlantic Construction Company, and Meyer E. Ruback, Esq., of counsel with said

Order Denying Motion to Strike.

defendant, upon complainant's motion to strike out the answer and counterclaim of the defendant Atlantic Construction Company on the grounds that the same are sham and do not constitute a defense to the bill of complaint herein; and the Court having heard the argument for and against said motion and being of opinion that the facts set forth in said answer constitute a sufficient defense to complainant's bill and that the facts set forth in said counterclaim constitute a sufficient cause in equity: 10

It is, on this 6th day of May, 1931, ORDERED that complainant's said motion to strike said answer and counterclaim be and the same is hereby denied.

The within order is entered now as of the 19th day of February, 1929, for the reason that an order in form and substance like the within order was entered in this cause on February 19, 1929 and was lost from or misplaced in the files of this Court. 20

E. R. WALKER,
C.

Respectfully Advised,
MAJA LEON BERRY,
V. C. 30

Replication and Answer to Counterclaim.

Filed July 1, 1929.

IN CHANCERY OF NEW JERSEY.

10	Between	}	On Bill, &c. Replication and Answer to Counterclaim.
	JOSEPH REINFELD, Complainant,		
	and		
	PETTI CONSTRUCTION COMPANY, a corporation, <i>et als.</i> , Defendants.		

20 The complainant joins issue on the answer of the defendant Atlantic Construction Company.

As to the counterclaim contained in said answer, complainant says:

1. He admits paragraphs 1, 2, 3, 4, 5 and 6 of said counterclaim.

30 2. He admits paragraph 7, but denies that the interest of the said Joseph Reinfeld is subject to the lien of the interest in the mortgage of the Atlantic Construction Company and says that in truth and in fact Aaron Weinberg, the original holder of said mortgage, in which the Atlantic Construction Company now claims an interest, did on October 10, 1927, by written postponement of mortgage subordinate the lien of the said mortgage in favor of the mortgage held by complainant, which postponement of mortgage was recorded in the Essex County Register's office on November 12, 1927 in
40 book 96 of Releases of Mortgages for said County, page 444, and that said Aaron Weinberg executed said postponement of the lien of said mortgage in

Replication and Answer to Counterclaim.

favor of the complainant in the presence of Louis Angert, and Meyer Schwartz, who is the assignor of the defendant Atlantic Construction Company.

3. He admits paragraph 8 of said counterclaim, but denies that the interest of said Aaron Weinberg is subject to the lien of the interest of the Atlantic Construction Company and says that in truth and in fact their interests are concurrent and are both, as well as the interest of Louis Angert, subsequent and subject to the lien of complainant's mortgage. 10

4. Further answering the said counterclaim, complainant says that at the time that the Atlantic Construction Company purchased its interest in said Weinberg mortgage, viz: on June 22, 1928, it did so with knowledge of the execution and delivery of the postponement of the lien of said mortgage to the lien of complainant's mortgage and with knowledge of the fact that said postponement had been recorded in the Essex County Register's office on the previous November 12, 1927. 20

5. Further answering the said counterclaim, complainant says that the postponement of the lien of the Weinberg mortgage to the lien of complainant's mortgage was executed on October 10, 1927 in the presence of Louis Angert and Meyer Schwartz as well as Aaron Weinberg and that all of said parties had full knowledge of and consented to said postponement; that said Aaron Weinberg assigned a one-third interest to said Louis Angert, and a one-third interest to said Meyer Schwartz two weeks after the execution of said postponement, viz: on October 24, 1927. 30

PHILIP J. SCHOTLAND, 40
Solicitor for Complainant.

Testimony.

IN CHANCERY OF NEW JERSEY.

September 25, 1929.

	Between	}
	JOSEPH REINFELD,	
	Complainant,	
10	and	
	PETTI CONSTRUCTION COMPANY,	}
	a corporation, and Atlantic	
	Construction Company, a corporation,	
	Defendants.	

20 Transcript of shorthand notes of testimony taken in the above entitled cause before his Honor, ALONZO CHURCH, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of PHILIP J. SCHOTLAND, ESQ., for Complainant; MEYER E. RUBACK, ESQ. and DAVID M. LITWIN, ESQ., for respective Defendants.

30 Mr. Schotland: May it please your Honor, this is a bill to foreclose a mortgage held by the complainant, Joseph Reinfeld, in the sum of \$70,000. All of the other defendants in this cause have been disposed of by their answers having been stricken out and a decree *pro confesso* having been entered against them. There is no dispute as to the complainant's mortgage and the amount due on it. The only issue that is in dispute between the complainant and the answering defendant, who is here, the Atlantic Construction Company, is this:

40 Before the complainant placed his \$70,000 mortgage on this property, there was a purchase money mortgage, which was a first lien on the land, in the sum of \$9540, held by Aaron Weinberg. The

Testimony.

complainant's mortgage was granted as a construction loan for the purpose of erecting an apartment house on this land. Aaron Weinberg, to induce the complainant to grant this loan, executed a postponement of lien, or subordination of lien, making the lien of the complainant's mortgage prior to the lien of his mortgage.

When Aaron Weinberg held this mortgage in his own name, he held it, not for his own personal benefit, but he held it partly in trust for one Louis Angert and one Schwartz—Meyer Schwartz—each owning a one-third interest. 10

After Weinberg had executed the postponement of lien, subordinating the lien of this mortgage to the complainant's mortgage, he executed an assignment of one-third interest to Angert and one-third interest to Meyer Schwartz. 20

The postponement is dated October 10, 1927; the assignment was executed October 25, 1927.

The Court: That was before or after?

Mr. Schotland: After; sixteen days later. That was recorded on October 26, 1927, but the postponement was not recorded until November 12, 1927.

In other words, the postponement of lien of the mortgage was not recorded until after these assignments apportioned of that mortgage were recorded. 30

The original defendant, Weinberg, who was the original holder of the mortgage, and Angert, who had the other one-third interest, and Schwartz, who had the other one-third interest, according to the claim of the complainant, were present when the postponement was executed by Weinberg, and had actual knowledge of the execution of the postponement of that lien. 40

Schwartz, on June 22, 1928, assigned his one-

Testimony.

third interest to the defendant the Atlanti Construction Company, and their assignment was recorded on June 23, 1928, about eight months after the postponement of lien was recorded.

Now, the issue to be tried before your Honor is two-fold:

1. A factual issue, and a legal issue.

10 The factual issue to be tried, about which we are absolutely in dispute, is that the complainants claim that not only Schwartz, the assignor, had actual knowledge of the execution and delivery of the postment of the lien of the mortgage, but that the assignee, this defendant the Atlanti Construction Company, also had knowledge before they took the assignment—actual knowledge.

20 Of course, on that, the witnesses who will appear before your Honor will testify, and your Honor will decide which side prevails on the factual issue.

30 The legal issue that is involved, as to whether or not the record in the Register's Office did not give actual as well as constructive notice to the Atlanti Construction Company in June, 1928, when they purchased this interest in the mortgage by assignment, because, on the face of the first page of the record book where the mortgage is recorded there is the notation of the date that assignments were recorded and the date that a postponement was recorded, postment of its lien; and, of course, the postponement was recorded, as I said, about eight or nine months before this defendant purchased this assignment.

Those are the two issues that we are going to try.

40 Mr. Ruback: I think Mr. Schotland very accurately and quite thoroughly stated the controversies between the parties.

David M. Popik—Direct.

There is just one fact I better mention at this time.

I think it will be admitted, and, therefore, proof will be obviated, and that is this: when Mr. Litwin filed his answer and counterclaim, setting forth that his client, this answering defendant, was a bona fide purchaser and had relied on the records, and that our assignment preceded upon the records, according to this postponement, a motion was made to strike that answering counterclaim out, and the matter was argued before Vice-Chancellor Berry. 10

Mr. Schotland made the point, because there appeared in the margin of that record, the original mortgage, our mortgage, the one said to have been postponed, a notation of the Register's postponement, book and page; therefore, we had either actual or constructive notice, or both. 20

That question of law was litigated and argued before Vice-Chancellor Berry, and he took the view that that was not notice, and denied the motion.

I think Mr. Schotland will admit the disposition of the motion on that one point—I shall presently offer that order in evidence—and that the issue is *res adjudicata* as to that one point.

Mr. Schotland: I agree with what Mr. Ruback has said, with this exception: Vice-Chancellor Berry did not write any opinion or prepare any memorandum, that I know of, when he denied the motion to strike out the answer of this particular defendant. And, as I understand it, all it meant was, it goes to final hearing. He certainly could not have struck out the answer on the factual issue raised: so, while I agree with Mr. Ruback that he denied the motion, that is a fact, the motion was made and the motion was denied, but he filed no conclusions. I do not know on what grounds he 30 40

David M. Popik—Direct.

did deny the motion.

Mr. Popik.

DAVID M. POPIK, sworn for complainant.

Direct-examination by Mr. Schotland:

10 Q. You are an attorney and counselor-at-law of this State, Mr. Popik? A. Yes.

Q. And practicing your profession here? A. Yes, sir.

Q. Were you the attorney representing the complainant, Joseph Reinfeld, in the placing of this mortgage and disbursing of the funds? A. Yes, sir.

Q. And how much did you disburse? A. The full amount of the mortgage.

20 Q. Well, how much is that? A. Seventy thousand dollars.

Q. And how much is due the complainant? A. Seventy-thousand dollars, plus interest.

Q. With interest from what date? A. From the date of the mortgage.

Q. No interest whatsoever has been paid on it? A. No, sir.

30 Q. And no part of that mortgage, no part of the principal, has been repaid, either? A. No, sir.

Q. The whole amount is due? A. Yes, sir.

Q. The mortgaged premises have been sold *pendente lite* under an order of this Court by the Receiver? A. That is right.

Q. And by further order of this Court, the amount due the complainant has been allowed to be credited on his bid at that *pendente lite* sale? A. That is right.

40 Q. And the amount in dispute between the complainant and the Atlanti Construction Company

David M. Popik—Direct.

has been deposited with Mr. Schotland, as Special Master? A. Yes, sir.

Q. To secure the payment to the defendant, if the defendant should prevail? A. That is right.

Q. That is true? A. Yes, sir.

Mr. Schotland: I offer the bond and mortgage in evidence. 10

Mr. Ruback: That is complainant's bond and mortgage?

Mr. Schotland: The complainant's bond and mortgage.

(Bond and mortgage marked Exhibits Nos. C-1 and C-2.)

Mr. Schotland: And I now offer a postponement of mortgage, dated October 10, 1927, made by Aaron Weinberg to Joseph Reinfeld, the complainant in this cause, postponing the lien of a mortgage made by Petti Construction Company to Aaron Weinberg for \$9540, which bears date September 21, 1927, and which was recorded in the Register's Office of Essex County on October 5, 1927, postponing the lien of that mortgage to a mortgage of \$70,000 and interest, dated October 10, 1927, given by the Petti Construction Company to Joseph Reinfeld, the complainant. 20 30

The postponement of mortgage which I am offering in evidence was recorded in the Register's Office of the County of Essex on November 12, 1927, in Book 96 of Releases of Mortgages for said County on pages 444 and 445.

Mr. Ruback: I object to the reception of this postponement in evidence for the reason that it cannot bind this answering defendant.

To admit it would be to contravene the purpose and the provisions of our Registry Act. 40

David M. Popik—Direct.

10 From the pleadings in the case and from counsel's opening, it is already manifest before your Honor that before this postponement now offered was recorded the person making the postponement, the person making the agreement subordinating the lien of the affected mortgage, had already assigned a one-third interest to our assignor, and that assignment had already been recorded and this postponement cannot charge or bind us unless it is first made to appear that we are not entitled to the benefits of the Registry Act, that we are not holders of our one-third interest as purchaser for value without notice.

The Court: That is a matter for argument at the conclusion of the case. I will admit it.

20 (Postponement marked Exhibit C-3).

Mr. Schotland: I take it, under the facts that we have explained, that the proof as to claim of priority by virtue of the case before you, and all that, would have to be put in by the answering defendant in support of its counterclaim, because that usually is raised by his counterclaim.

30 I rest, temporarily, on that; and then you put in proof on your counterclaim to show priority of your mortgage, notwithstanding the postponement of mine.

Mr. Ruback: I do not want my argument to be understood as agreeing with the statement of counsel that that duty rests upon me. It is purely on his election whether he will go forward with further proof or not.

The Court: You are the complainant, I suppose

40 Mr. Schotland: I am submitting to you the complainant's mortgage, which is admitted, and here is the postponement of lien, and that is all there

David M. Popik—Direct.

is in evidence. Now, there is nothing in evidence as to any of the other facts. If the defendant wants to dispute the legal effect of that situation in support of their counterclaim, it is up to them to put it in.

The Court: As the case now stands, it is a perfectly clear case for the complainant, and unless you put in something to the contrary: here is a mortgage and a postponement— 10

Mr. Schotland: Yes.

Mr. Ruback: If the Court please, of course, we have no non-suits in the Court of Chancery, but it would be a regrettable waste of time for us to go forward and allow proof if the complainant had made out no case. I should like—(interrupted).

The Court: If you want to move to dismiss on this showing of Mr. Schotland's and I deny it, then you are precluded from submitting any further evidence, under the Chancery rules. 20

Mr. Ruback: That is correct, unless your Honor reserves the right of this defendant to offer his defense, in the event you do feel a prima facie case has been made out.

The Court: No.

Mr. Ruback: Now, that is my application for leave to move for a decree, reserving, however, the right to make affirmative proof. 30

The Court: I deny the motion. If you want to move to strike out the bill, you do so at your peril.

Mr. Ruback: All right.

I offer in evidence a certified copy of a mortgage purporting to have been made by the Petti Construction Company, mortgagor, to Aaron Weinberg, mortgagee, dated September 21, 1927, recorded October 5, 1927, in Book "I"-62 of Mortgages of Essex County, pages 350-362, asking your Honor, if this document be received, to disregard the mar- 40

David M. Popik—Direct.

10 ginal notations, which are not a part of the original mortgage lodged for record with the register, but which are obviously notations imposed by the register upon the margin pursuant to the Act of 1913, Chapter 168, which directs him to make marginal notes of postponements and other agreements affecting mortgages.

I am offering this certified copy of a certified copy of the original instrument, and ask your Honor to disregard the marginal notes; they not being a part of the certified copy of the original instrument.

20 Mr. Schotland: Yes. Your Honor please, a certified copy, which by law is made competent evidence, must be a certified copy of the record as it appears at the Register's Office, and the whole copy must be the one that is offered in evidence, or no part of it can be.

The Court: If the instrument is offered in evidence, it must be as Mr. Schotland says, offered in toto, and then, whether or not those marginal notes have any bearing on the case is again a matter for argument.

Mr. Ruback: I make the offer.

30 (Certified copy marked Exhibit D-1.)

Mr. Ruback: I offer in evidence an assignment of the mortgage lastly offered and received, which assignment was made by Aaron Weinberg and Sarah, his wife, to Meyer Schwartz. It is dated October 24, 1927, and was recorded on October 26, 1927, in book 194 of assignments of mortgages for Essex County, on page 29.

40 The assignment offered conveys a one-third interest in the mortgage already received in evidence and marked D-1.

Meyer Krasner—Direct.

(Assignment of mortgage marked Exhibit D-2.)

Mr. Ruback: I offer in evidence an assignment of mortgage made by Meyer Schwartz to this answering defendant, the Atlanti Construction Company, assigning a one-third interest in the mortgage marked D-1.

10

The assignment now offered is dated the 22d day of June, 1928; recorded on June 23, 1928, in Book 200 of Assignments of Mortgages for Essex County, pages 50-51.

The instrument assigns the very same one-third interest assigned by the instrument received in evidence and marked D-2.

(Assignment of mortgage to Atlanti Construction Co. marked Exhibit D-3.)

20

MEYER KRASNER, sworn for defendant.

Direct-examination by Mr. Ruback:

Q. Mr. Krasner, you are an officer of the Atlanti Construction Company? A. Yes, sir.

Q. And is that the company that purchased from Mr. Schwartz a one-third interest in a mortgage made by the Petti Construction Company? A. Yes, sir.

30

Q. What did you pay for the one-third interest? A. \$2200.

Q. And was that paid at the time the assignment was made to your company by Mr. Schwartz? A. Yes, sir.

Mr. Ruback: Cross-examine.

Mr. Schotland: No questions.

40

Meyer Krasner—Direct.

The Court: That is all?

By Mr. Ruback:

10 Q. Oh, has any part of the sum owing on that mortgage been paid to you, either by way of principal or interest? Have you received any payment on account of your one-third interest? A. No, sir, none.

Q. And do you know how much is due? A. Well, I can't say exactly, but somewheres around thirty-four, thirty-five hundred dollars. I haven't got the records with me.

Mr. Schotland: Well, that would not be a matter in dispute.

The Court: Oh, no.

20 Mr. Schotland: Because we can figure it.

The Witness: Yes. I don't know the interest.

Mr. Ruback: Then, will it be admitted on the record that, if there is anything due, it is one-third of the principal of the mortgage, with interest from the date of it?

The Court: All right.

Mr. Ruback: Counsel so admits?

30 Mr. Schotland: I do want to ask you a question, Mr. Krasner.

Cross-examination by Mr. Schotland:

Q. What officer are you of the Atlanti Construction Company? A. President.

40 Q. And who was the attorney who took charge of this transaction for the Atlanti Construction Company? A. I had no attorney, with the exception, I had authorized Mr. Litwin to draw an as-

Meyer Krasner—Cross.

signment of the mortgage. I made my own arrangements.

Q. You made no search? A. No, sir.

Q. No search at all? A. No.

The Court: That is all.

Mr. Ruback: We rest.

The Court: That would seem to put it up
to a pure question of law. 10

Mr. Schotland: I am going to bring home the knowledge by way of rebuttal. Mr. Weinberg.

AARON WEINBERG, sworn for complainant.

Direct-examination by Mr. Schotland:

Mr. Ruback: Your Honor please, counsel
has only indicated in a most general way that
he offers rebuttal. 20

Unless it be to rebut Mr. Krasner's testimony that he paid \$2200 for the mortgage and that no part has been repaid, I object to any testimony by way of rebuttal.

I think I understand what counsel desires to prove—that which should have been a part of his main case.

The Court: I want to hear all the testimony in this case and then I will hear argument both on the facts and the law. And I presume Mr. Schotland is entitled to put in whatever testimony he wants. 30

Q. Mr. Weinberg, were you the holder of the mortgage for \$9540, given by the Petti Construction Company on property in the City of Newark, located on Irving Street? A. Yes, sir. 40

Aaron Weinberg—Direct.

Q. And when you held that mortgage, did you hold it as the sole owner of the \$9540, or did anybody else have an interest with you which did not appear on the face of the mortgage? A. I was the owner, but there were two others interested in the mortgage.

10 Q. Who are those two? A. Mr. Angert, who is sitting over at the bench there, and Mr. Meyer Schwartz, who is sitting in this corner here (indicating).

Q. I see. Now, before Mr. Reinfeld granted a \$70,000 mortgage loan on this same property, did you do anything to induce Mr. Reinfeld to grant that \$70,000 mortgage? A. Yes, sir. Mr. Petti and I and Mr. Schwartz and Mr. Angert went to Joe Michael, in Mr. Popik's office, and I know Mr. 20 Popik very good and I also know Mr. Reinfeld, and I know that Mr. Reinfeld had the money to invest at that time, so I asked him if he would give the Petti a construction loan of \$70,000. He said, "If you will take care of it," he says, "I will; but providing you will postpone your mortgage."

Mr. Ruback: Just a minute. I think this conversation is with a Mr. Reinfeld. It is not being suggested that this defendant was there. We are not chargeable with conversations—(interrupted). 30

Mr. Schotland: The assignor was there.

The Court: Well, that is all right.

Mr. Ruback: Well, he did not say that; he said he knew Mr. Reinfeld, he had been to see him.

The Court: He said Mr. Schwartz was there and somebody else.

40

Aaron Weinberg—Direct.

The Witness: Mr. Angert and Mr. Petti,
the man that is sitting there.

Q. Yes. Was Mr. Popik there? A. Mr. Popik;
that is the one I was talking to.

Q. Oh, you were talking to Mr. Popik? A. Posi-
tively Mr. Popik.

Q. And what was the conversation? A. He said
that—(interrupted).

10

Mr. Ruback: I object. I do not think
any conversations had with our assignor can
bind us, unless it first appears that we did
not pay value, or that we had notice of it.

The Court: I will allow it.

Q. Tell us what happened. A. Mr. Popik said,
“If you postpone your mortgage, I will induce Mr.
Reinfeld to advance the money.”

20

Q. Did you postpone your mortgage? A. I did.

Q. Where did you sign the postponement of your
mortgage? I show you Exhibit C-3. A. In Mr.
Popik's office.

Q. You signed that in Mr. Popik's office? A.
Yes, sir.

Q. Who were present when you signed Exhibit
C-3? A. Mr. Angert and Mr. Meyer Schwartz
and Mr. Popik.

30

Q. They were all present? A. They were all
there.

Q. Were there any papers signed at that time by
anybody else? A. I don't remember.

Q. Do you remember whether or not the \$70,000-
dollars mortgage was made at the same time? A.
That I can't remember if it was the same time.

The Court: It will speak for itself.

40

Aaron Weinberg—Direct.

Mr. Schotland: Yes, it does say the same thing.

Q. You are sure Mr. Schwartz was present? A. Positive.

Q. When that postponement was signed? A. Positive.

10 Q. Did he say anything about postponing this mortgage? A. He did—the man that bought the land—

Q. I am asking you whether Mr. Schwartz himself said anything. A. No, sir. The only thing that he said, before, he said, "The only way we can sell the land is by postponing the mortgage, and if the man gets a construction mortgage," he said, "we are positive of getting our money."

20 Q. That is what Mr. Schwartz said? A. Yes, sir. He induced me to postpone it. I never knew anything about postponements before, because I never handled any of those transactions before.

Q. Who was it that suggested it? A. Mr. Schwartz.

Q. Oh, Mr. Schwartz suggested to you to postpone? A. Positively.

30 Q. All right. And he was present when you signed the postponement? A. Positively.

Cross-examination by Mr. Ruback:

Q. What was your business in 1927? A. Real estate business.

Q. And you had been in that business how long? A. Twelve years.

Q. As a broker? A. Yes, sir.

40 Q. As a broker, you had gotten a good many mortgage loans for clients? A. Yes, sir.

Aaron Weinberg—Cross.

Q. And this was the first time you had heard of a mortgage being postponed? A. That is the first time that I had postponed a land mortgage to a construction mortgage.

Q. Was this the first time you had ever heard of a postponement of mortgage? A. I heard—the first time, yes; never heard of it before. 10

Q. Never heard of it before? A. But I did after.

Q. And when Mr. Schwartz suggested to you that this mortgage ought to be postponed, you knew what he meant? A. I did not.

Q. When you executed the postponement of mortgage, did you know what it was? A. I didn't know the difference. All I knew was that Mr. Popik's mortgage—or Mr. Reinfeld's mortgage—would come ahead of mine, but I didn't know that if he comes ahead, that I was not going to get my money; otherwise, I wouldn't ever have postponed. 20

Q. Now, this mortgage that you hold in your own name— A. Yes.

Q. —for the benefit of yourself, Schwartz and Angert— A. Yes.

Q. —was a purchase money mortgage, was it not? A. Yes.

Q. You knew what that meant? A. I knew it was a mortgage given to me by Mr. Petti. 30

Q. That mortgage had a year to run? A. Yes, sir.

Q. At about the time that you postponed it? A. Yes, sir.

Q. Isn't it a fact that you were very anxious to get the money for that mortgage? A. Was I to get the money?

Q. Yes. A. No, sir.

Q. You and Mr. Schwartz arranged for this Reinfeld loan, did you not? A. No, sir. 40

Aaron Weinberg—Cross.

Q. Where did you go, in the first place, to arrange for that loan: to Mr. Popik's office or to Reinfeld's office? A. To Mr. Popik.

Q. Do you remember where Reinfeld had his office at that time? A. I don't.

10 Q. Were you at any time at the Military Park Building, to see Reinfeld about the mortgage? A. Yes, sir.

Q. You went there with Mr. Schwartz? A. Right.

Q. Angert? A. Yes, sir.

Q. Did he go with you? A. I think so.

Q. Mr. Petti, the owner? A. Yes, sir.

20 Q. And President of the company; did he go with you? A. I don't know whether he was there at the time.

Q. And Mr. Reinfeld told you to go to see his lawyer, Mr. Popik? A. Right.

Q. So you then went to Reinfeld's office, before you went to Popik? A. I don't know exactly where I went first, but I know I spoke to Mr. Reinfeld.

Q. He sent you to Mr. Popik's office? A. Mr. Reinfeld.

30 Q. That was the first time you went to see Popik? A. I don't know exactly who I went to see first, but I went to see one of them first to get the loan.

Q. Did you know Reinfeld personally? A. I did.

Q. You knew he was a man of considerable means? A. Right.

Q. Who was loaning out his money on mortgage? A. Yes, sir.

40 Q. Didn't you suggest to Schwartz that the two of you go up to see Reinfeld? A. I said, "Mr.

Aaron Weinberg—Cross.

Reinfeld is the only one that can handle a mortgage like that."

Q. And you went to Reinfeld? A. We went to Reinfeld.

Q. And it was after you went to Reinfeld that you went to Popik's office? A. I don't know exactly who I went to see first; but I do know that I saw the two of them; I saw Mr. Popik and I also saw Mr. Reinfeld. 10

Q. And did you know Mr. Popik before this transaction? A. Yes.

Q. Had been to his office? A. Yes.

Q. Now, were you acting as brokers in getting this loan from Reinfeld to the Petti Construction Company? A. No, sir.

Q. What was your interest or purpose in getting that loan? A. By selling the man the land and making a little profit on it. 20

Q. Well, you had already sold the land, had you not? A. I had not sold it. That is the only way the land could have been sold, because Petti himself did not put in a dollar in the land, and he could not buy the land unless I would have got him a construction loan.

Q. Mr. Weinberg, I didn't ask you that; I asked you, what was your interest or your purpose in getting from Mr. Reinfeld the construction loan when you had already sold the land—(interrupted). A. I haven't already sold the land. 30

Q. —and already gotten your mortgage? A. I hadn't sold it unless the mortgage—unless I would have got the construction mortgage. The man didn't have any money to buy it with.

Q. Well, when you went to see Mr. Reinfeld, you had already made a deed for the land, had you not? A. The deed was made with Mr. Schwartz, and 40

Aaron Weinberg—Cross.

Mr. Petti—I never saw Mr. Petti in my life before, and I didn't see Mr. Schwartz before.

Q. Isn't it a fact that you had actually transferred the property in September of 1927? A. I don't remember the date.

10 Q. Isn't it a fact that you had sold the property to the Petti Construction Company a month before you went to get a loan? A. I can't remember the dates; it is impossible for me.

Q. Well, don't remember the date, but is it not a fact? A. I don't remember.

Q. Isn't it a fact before you went to Reinfeld to get a construction loan, you had already actually sold the property to the Petti Construction Company and it was already the owner of it? A. It was—(interrupted).

20 Q. Yes or no. A. I don't know exactly.

Q. Well, do you think that when you went to see Mr. Reinfeld to get a loan that you still owned that property? A. Possibly I did not, but this was understood, that I was to get him the loan; otherwise the man would never go ahead.

Q. Now, isn't it a fact that your getting or attempting to get a construction loan was intended by you as a means of getting quick payment for your mortgage? A. By getting the loan?

30 Q. Yes. A. There is no question I would benefit part of the purchase price.

Q. By having— A. By—

Q. Pardon me. A. By selling.

Q. No, I will finish my question. By having the money on the construction loan used to pay off your mortgage; is that right? A. The construction—no. The construction mortgagee was supposed to advance money for labor—that is the way I understood it—and when the building would be

40

Aaron Weinberg—Cross.

complete, then I was to get my money; I would gain part of the profits on my money.

Q. Didn't Mr. Schwartz and you both decide the only way you could get your mortgage paid off sooner than a year was to get a construction mortgage, and to be paid out of the funds of that construction mortgage? A. No, sir.

10

Q. Was that discussed between you and Schwartz? A. No, sir.

Q. Did you want your money sooner than the end of the year? A. I couldn't want my money any sooner than it was due.

Q. Did you want it? A. Did I want it? No.

Q. Were you in need of money at that time? A. No, sir.

Q. Now, at the time—or before—you executed the postponement of your \$9500-mortgage, had you told Mr. Popik that that mortgage belonged to three people—you, Schwartz and Angert? A. Positively.

20

Q. And did you sign that postponement and deliver it at the same time that the Petti Construction Company delivered its mortgage? A. I can't remember the date or the same time; it is impossible, because it is almost three years already.

30

The Court: The dates are the same.

Q. Was Mr. Petti there when you delivered the postponement of mortgage? A. I can't remember that, either.

Q. You can't remember that? A. No.

Q. I thought you said on your direct-examination that when you signed that postponement of mortgage Mr. Petti was there.

Mr. Schotland: Now, he gave the same 40

Aaron Weinberg—Cross.

answer, that he could not remember, and the Court suggested the date on the papers would show.

Mr. Ruback: We won't take time to refer to the testimony, but I am sure that is what he said.

- 10 Q. Will you tell us now whether Petti was or was not present at the time you signed that postponement? A. I cannot remember. It is impossible for me.
- Q. Was Mrs. Petti there? A. I don't remember her being there.
- Q. Did you ever see Mrs. Petti at Popik's office? A. I did—
- 20 Q. Did you ever see Mrs. Petti at Popik's office? A. I don't know exactly; if I told you "yes", I wouldn't know if it is true or not.
- Q. Do you know Mrs. Petti? A. I do.
- Q. Was Angert present when you signed this postponement? A. Yes, sir.
- Q. How many times were you, Angert and Schwartz together in Popik's office? A. A few times.
- Q. About how many times? A. About how many?
- 30 Q. Yes. A. I believe six or seven times, or maybe more.
- Q. Was Petti with you all the time? A. No.
- Q. Was he with you on any of those occasions? A. It is hard to remember it. He was there a few times.
- Q. Were you ever in Popik's office with Petti? A. Yes.
- Q. Were you ever there with Petti and Schwartz?
- 40 A. I think so. I am not positive about it.

David M. Popik—Recalled—Direct.

Q. Were you and Mr. Reinfeld jointly interested at this time in any business deals? A. No, sir.

Q. Have you been since 1927? A. No, sir.

Q. Are you very friendly with Mr. Reinfeld? A. I have not seen Mr. Reinfeld for—I don't know when.

Mr. Ruback: That is all.

10

The Court: That is all?

Mr. Schotland: That is all.

Mr. Popik, take the stand.

DAVID M. POPIK, previously sworn, recalled:

Direct-examination by Mr. Schotland:

Q. Mr. Popik, I show you Exhibit C-3, which is the postponement of the Weinberg mortgage to the Reinfeld mortgage. Will you tell me who were present when that postponement was executed and delivered to you. A. Weinberg, Angert and Schwartz. 20

Q. Was there any conversation between Weinberg, Angert and Schwartz and yourself regarding the execution of that postponement at the time?

A. At the time—

30

Mr. Ruback: Just a minute, Mr. Popik. I want to make an objection I have already made and your Honor has ruled against me. These conversations do not bind us, and may it be understood that my objection goes to the entire line of testimony?

The Court: Yes.

A. Yes, there was.

Q. And what was the conversation? A. I was 40

David M. Popik—Recalled—Direct.

hesitating considerably about placing this mortgage.

Mr. Ruback: I ask that that be stricken out.

Mr. Schotland: I consent to that.

10 Q. Give us the conversation; not the action of your mind. A. Well, during the conversation, the—up with Mr. Schwartz and Mr. Angert, in fact, Mr. Weinberger kept telling me to grant this mortgage, that my client's money would be safe; that they had \$9,000 mortgage or 9500-dollar mortgage, which would be subsequent, and that in case of foreclosure, or if Petti did not finish the property, that they would stand ready to buy the property, and therefore, my client would not lose.

20 Q. Have you any doubt whatever as to whether Schwartz was present at that conversation at the time the postponement was executed? A. No doubt whatever.

Q. Positive? A. Because they had been coming in there for weeks, trying to induce me to place it.

Cross-examination by Mr. Ruback:

30 Q. Mr. Popik, your practice is largely that of real estate mortgages and conveyances? A. That is right.

Q. And at the time of this transaction, in 1927, you had been practicing that branch of your profession for how many years? A. Ten years.

Q. And were rather active at it? A. Quite.

40 Q. Were you induced to put this loan through in behalf of your client, Joseph Reinfeld, by the statements you say were made by Schwartz, Angert and Weinberg that in the event of foreclosure they

David M. Popik—Recalled—Cross.

would take the property over and give your client the money? A. Yes, sir. I had discussed that with my client.

Q. That undertaking on their part was quite a factor in inducing you to put the loan through?

A. Yes, sir.

Q. Did you understand that such an undertaking is binding unless it is reduced to writing? A. I didn't think that Weinberg, Angert and Schwartz would be willing to lose \$9500, because I had known they had received no consideration for the conveyance of the land. 10

Q. Then you did not rely upon the enforceability of that undertaking? A. No.

Q. But rather, upon the business probability of their standing a loss? A. That is right. 20

Q. Now, these people came to you by reference from your client, Mr. Reinfeld, did they not? A. I don't recall that, Mr. Ruback, because they had been to my office so many times that I could not recall. I was trying to think of it before, while you were questioning Mr. Weinberg. I don't remember whether Mr. Reinfeld came to me first or whether Mr. Weinberg walked into my office and said that he had been sent there by Reinfeld; I don't remember that. 30

Q. Well, isn't it a fact that you were informed by one or more of these three men, Schwartz, Angert and Weinberg, that there was a ninety-five hundred and some odd dollar mortgage on this property, which was owned by the three of them? A. Yes, sir.

Q. And at the time you took that postponement from Weinberg, you knew the mortgage being postponed was not the property of Weinberg alone, it was the property of three men; is that right? 40

David M. Popik—Recalled—Cross.

A. When I took the postponement? I don't remember that.

10 Q. Well, before. A. I know I have made an examination of the title and found the record in Weinberg—or wait a minute. No, I had seen the mortgage and—that is what it was—I had seen the mortgage and I knew that Schwartz and Angert were interested in the transaction; that they had owned the property jointly, or something to that effect, and had taken that purchase money mortgage as part of their consideration—or for the consideration.

20 Q. Now, let us get this straight. Before you even examined the title, you had been informed there was a mortgage on this property of some \$9500, held by three men? A. Perhaps I was, Mr. Ruback.

Q. Are you in any doubt about whether you were or were not? A. Well, there were so many conferences and so many delays in the matter that I cannot just think clearly on that point. I might have known that they were interested with Weinberg in the mortgage.

30 Q. Well, when you had a search made and you found a \$9500 mortgage held by Weinberg, you were quite surprised, were you not? A. No, because I had seen the original instrument. They had been passing that mortgage across my desk a half a dozen times before I consented to close the matter.

Q. Do you mean to tell me that the discovery of the record that this mortgage was in the name of Weinberg did not come to you as a decided surprise? A. I don't think so.

The Court: Well, why—

40 Mr. Ruback: Let me read you an affidavit

David M. Popik—Recalled—Cross.

to show that this gentleman knew—we are going to prove this gentleman knew this mortgage belonged to three. He took a postponement from one.

Mr. Schotland: In their presence—

Mr. Ruback: How can that bind the other two? 10

The Court: Well, that is a question of law. What Mr. Schotland is endeavoring to persuade the Court is, these people were there and knew that this man assigned it, and that is purely a question of law; and the question of fact ought to be confined to whether or not they were there and actually participated in this transaction or consented to it.

Mr. Ruback: If this witness, in an earlier proceeding, by affidavit, made a statement different than he is making now, I am entitled to present it to you and you are entitled to know it. 20

The Court: All right. I think it is absolutely immaterial, but I do not want to shut you off.

Q. Do you not, in your affidavit made in this cause, state that you had been—(interrupted) 30

Mr. Schotland: Read the exact language.

Q. —that you had been informed by the three men that they held the mortgage? A. I said that was possible, before, didn't I, Mr. Ruback?

Q. And that you were surprised to find that the mortgage appeared on record in the name of Aaron Weinberg alone, page 2 of your affidavit? A. Perhaps I said that, but I also said that I probably 40

David M. Popik—Recalled—Cross.

had knowledge of the fact that the three men owned the mortgage. I did not deny that.

10 Q. Why didn't you ask the two men, Schwartz and Angert, who you knew were part owners of this mortgage, to join in the execution of the postponement? A. I did not think it was necessary when Weinberg owned the mortgage in his own name and I did not think of paying any money until I was sure nothing had been done on it, no disposition had been made of the mortgage.

Q. At the time you took the postponement, you did not intend to pay out money immediately? A. I did not, no.

20 Q. Is that why you did not record your postponement for two weeks? A. Well, that might be one of the reasons, but I still hesitated about giving the loan because I saw that Petti was not investing any money, and—well, I wanted to discourage him, as a matter of fact. Witnesses can tell you that I tried to discourage Weinberg and Petti. I did not want to give him the loan. I was afraid of it.

30 Q. If that is one of the reasons that you did not record the postponement for two weeks— A. I didn't say that was one of the reasons. You didn't ask me.

Q. —why did you not promptly record your mortgage? A. It is customary at lawyers' offices, who handle mortgage transactions, to have a mortgage executed and recorded even before they commence the examination of the title. That is my custom, at least.

40 Q. But in this particular instance, you had already examined the title, had you not? A. Yes, partly.

Q. And you knew—(interrupted). A. I ran

David M. Popik—Recalled—Cross.

down the assignment. When I said that I was examining the title, I meant that I ran down the assignment—the mortgage—to see whether there were any assignments of it.

Q. Why didn't you record the postponement which you had gotten from Weinberg? Why did you keep it in your office for two weeks? A. Well, Mr. Ruback, I cannot tell you why. It was simply a slip-up. I wish I knew now why I did not. 10

Q. Was it possibly because you hoped to get a postponement signed by the three men? A. No, sir. As a matter of fact, I never knew that that postponement was not recorded until a lawyer for the first time called me up about the matter. I looked into my file and there I discovered the postponement. I immediately put it on record.

Q. At the time that you put the postponement on record, did you continue your search to that date? A. I don't think I did, because I think at that time a loan had been granted. No, I had made my search before that, I think. I don't recall the—(interrupted). 20

Q. Well, don't you think that proper handling of your client's interests required that you should have continued that search down? A. I made the search—(interrupted). 30

Q. Pardon me.

The Court: I do not think that is essential at all. All I want to know is, what he did and said. What he thinks about his client's interests does not interest me at all.

Mr. Ruback: The purpose of this is to show that this complainant or his counsel was reckless and caused this very situation to arise by not recording the instrument and not continuing the search. 40

David M. Popik—Recalled—Cross.

Q. Let me ask you this, Mr. Popik: When you, in fact did record this withheld postponement, had you yet paid out any money under that loan? A. I don't recall that, Mr. Ruback.

Q. Have you any record that would show times of payment? A. Not with me.

10 Q. Where are they? A. At my office.

Q. Can you recall approximately when you made the first payment under that loan? A. Perhaps Mr. Petti can recall it. He is the man I gave the money to.

Q. Can you recall it? A. I cannot, Mr. Ruback.

Q. When did you hear, for the first time, that an assignment had been recorded, prior to the actual recording of the postponement of mortgage? A. Well, I don't recall whether I heard that from the
20 attorney who had called me in reference to the matter, or whether I heard it for the first time from Miss Jedell.

Q. Well, when was it; about when? A. Well, it was before I recorded the postponement. Some attorney in Newark called me and questioned me considerably about that mortgage, and he said to me something about some one trying to sell an interest in it.

30 The Court: I don't want to hear that.

The Witness: Well, that is when I think I received notice.

Q. Your payments under that mortgage covered a considerable period of time, did they not? A. Yes, sir.

Q. Many months? A. Yes, sir.

40 Q. Did you, during that period of time, on any one or more occasions, continue your County

David M. Popik—Recalled—Cross.

search down to the time of payment? A. Down to the time of the first payment?

Q. Down to the time of any payment? A. Yes, sure.

Q. As you made each payment, you ran your search down to cover that payment? A. No, I did not, not as I made each payment.

10

Q. As you made some of the payments you did that? A. No, I don't think I did that. I think I ran the search down once, and that was all.

Q. Was that before you paid out the money? A. Oh, yes.

Q. And how much money did you pay out under this loan after you learned of the assignment? A. I paid out the balance that was due on it, without hesitating, because I had procured—(interrupted).

20

The Court: No.

Q. No, no. I asked you how much. A. Well, I don't remember, Mr. Ruback. I can't remember that.

Q. It was a major portion of the loan, wasn't it? A. I wouldn't be a bit surprised if it was.

Q. Mr. Popik, isn't it a fact that you undertook to pay off this \$9500 mortgage out of the Reinfeld money after the brown coat of plaster would be on? A. No, sir.

30

Q. Did you agree to pay it off at any stage of the construction? A. That mortgage was to be paid (interrupted)

Q. Yes or no. You can answer that. A. No.

Q. Isn't it a fact that you told Mr. Petti that you had set aside a fund to pay this mortgage off? A. No, sir, not that mortgage.

Q. Did you tell that to anybody? A. Not in reference to that mortgage.

40

David M. Popik—Recalled—Cross.

Q. What mortgage? A. The Weinberg mortgage.

Q. That is the only one we are talking about. A. Not in reference to that, no, sir.

10 Q. When you learned of the fact that Schwartz' assignment was on record ahead of the postponement that you relied on, did you take any steps to correct the situation? Did you file any bill in this Court? A. No. I took other steps which I deemed were sufficient.

Q. There has been no suit instituted by your client to correct that situation? A. No, sir.

20 Q. Did you ever make any demand upon Mr. Schwartz to subordinate his one-third interest in that mortgage; I mean, you, personally? A. No, sir. When you say "Schwartz", he is the man that assigned the third, isn't he?

Q. What is that? A. Schwartz assigned his third interest? I get mixed between Schwartz and Angert. Schwartz assigned the third interest in the mortgage, didn't he?

Q. I don't follow you.

Mr. Schotland: Yes, that is right.

The Court: Yes.

30 The Witness: Yes, that is right.

The Court: Well, is that all?

Mr. Ruback: One more question.

40 Q. I will read from your affidavit on file in this case, Mr. Popik, page 1, paragraph 3: "To induce me to procure and place such a mortgage loan they, the said Weinberg, Angert and Schwartz, informed me of the fact that they were the holders of a mortgage on the land and that they would execute a postponement in favor of the mortgage that I would place." That is correct? That statement in your

Elizabeth Baker—Direct.

affidavit is correct? A. That is true in the affidavit.

Q. Then, why did you not at any time demand that these three men, who had promised you a postponement, should in fact execute a postponement?

A. Because I told them I had seen a mortgage, the record of which was in Weinberg's name, and I did not think they had any legal interest in it, or any interest in it necessary to have them to execute the instrument.

10

Mr. Ruback: That is all.

ELIZABETH BAKER, sworn for complainant.

Direct-examination by Mr. Schotland:

20

Q. Miss Baker, what is your business? A. Stenographer.

Q. And employed by whom? A. By Mr. David Popik.

Q. How long have you been in his employ? A. Four years.

Q. Do you remember a postponement of mortgage having been executed by Mr. Weinberg to the Reinfeld mortgage? A. Yes, I do.

30

Q. Do you know who were present when Mr. Weinberg executed that postponement of mortgage? A. Yes, sir. Mr. Weinberg, Mr. Angert and Mr. Schwartz were present, and Mr. Popik.

Q. All three were present? A. Yes, sir.

Cross-examination by Mr. Ruback:

Q. That is quite a busy office, Mr. Popik's office, isn't it? A. Yes, somewhat.

40

Elizabeth Baker—Cross.

Q. And do you remember now who were present at every transaction in the last several years? A. No, sir, I do not.

10 Q. What makes you recall now, after two years, who were present that October? What happened to fasten the thing in your mind? A. Well, those three gentlemen had been coming in our office several times before that mortgage was granted and there had been quite a bit of discussion about that since then, and it has been recalled to my mind.

Q. How? What recalled it to your mind since then? A. I just remembered it.

Q. You say it has been recalled to your mind since then. How or— A. I recalled it—

20 Q. —what has recalled it? A. —since then. No one recalled it but myself.

Q. Was Mr. Petti there that afternoon? A. No, sir. I don't remember seeing Mr. Petti there.

Q. I beg pardon? A. No, sir, I don't remember seeing Mr. Petti there at that time.

Q. Would you say that he was not there that day? A. I cannot positively say, but I don't remember him being there.

Q. Was Mrs. Petti there that day? A. I don't remember that, either.

30 Q. How many times did Mr. Schwartz come to that office? A. Well, I can't say just how many times, but he was in several times.

Q. You cannot give us the dates of the several visits he made, can you? A. No, sir, I cannot.

Mr. Ruback: That is all.

The Court: That is all.

Mr. Schotland: Miss Jedell.

Mayer Schwartz—Direct.

MAYER SCHWARTZ, sworn for defendant.

Direct-examination by Mr. Ruback:

Q. Mr. Schwartz, you are the gentleman who sold a one-third interest in a ninety-five hundred some odd dollar mortgage to the Atlanti Construction Company? A. Yes, sir. 10

Q. When did you make that sale? A. It was the latter part of June.

Q. Of what year? A. 1928.

Q. And with whom did you close the transaction? A. With Mr. Litwin.

Q. And were you paid anything by the Atlanti Construction Company for that assignment? A. Yes, sir.

Q. How much? A. Twenty-two hundred. 20

The Court: Twenty-two hundred.

Q. Now, that one-third interest that you sold to this company had been acquired by you from Mr. Weinberg? A. Yes, sir.

Q. At the time that Weinberg assigned that interest to you, did you know of any postponement executed by him in favor of Reinfeld's mortgage? A. No, sir.

Q. Had you ever authorized Mr. Weinberg to execute any postponement of your interest in that mortgage? A. No, sir. 30

Q. Had it ever been discussed between you and him? A. No, sir.

Q. Had it ever been discussed between you and anybody in Mr. Popik's office? A. No, sir; never brought up.

Q. Now, you are one of the parties who procured this loan from Mr. Reinfeld? A. Yes, sir.

Q. At whose request? A. At whose request? 40

Mayer Schwartz—Direct.

Q. A little louder. The Court must hear you, too. A. I don't quite understand what you mean, "at whose request."

Q. How did you come to arrange for that loan?
A. Well, Mr. Weinberg knew Mr. Reinfeld and said that he could get Mr. Reinfeld to grant the construction mortgage if he happened to have the ready cash, and we went up to Reinfeld and he said he had the money and told us to go up to see Mr. Popik, his attorney, and we went up to see him, and that is where the rest of the transaction was closed.

Q. Did either you or Weinberg ever tell Reinfeld that your mortgage would be postponed to his? A. No, sir. It was never even brought up.

Q. After you saw Mr. Reinfeld, did you go to the office of his attorney, Mr. Popik? A. Yes, that very same afternoon.

Q. Who went? A. Mr. Weinberg and myself.

Q. Did Mr. Angert go? A. No, sir.

Q. Was Mr. Angert ever present at Popik's office while you were there? A. No, sir.

Q. Was anything at any time said by Mr. Popik regarding the postponement or subordination of the \$9500 mortgage? Was there? A. No, sir.

Q. Nothing at any time said by him regarding the payment of that mortgage? A. Well, it was brought up when we were first discussing the mortgage; he came up there and asked why we were interested, and I told him that if the construction loan was granted and the building went up, we could get our money that much sooner, and that was the reason I was interested, not for any commission purposes; there was not any broker, that I was not trying to get the loan because I was trying to make any money on brokerage on the loan.

Mayer Schwartz—Direct.

Q. Did you at any time get any commission or brokerage for that loan? A. No, sir.

Q. Is it a fact that you had an understanding with Mr. Petti that you would give him a postponement of loan and that you would postpone in favor of that loan? A. No, sir.

Q. On the several occasions that you went to Mr. Popik's office was Petti with you? A. Yes, sir. 10

Q. What office did he hold in the holding company, do you know? A. What office did who hold?

Q. Did Petti have in the Petti Construction Company? A. He was president.

Q. He is a practical builder, isn't he? A. Yes, sir.

Q. Were you in Popik's office when Weinberg signed the postponement that is in evidence in this case? A. No, sir. 20

Q. Did Weinberg ever tell you that he intended to sign or had signed a postponement? A. Never mentioned anything of a postponement to me at all.

The Court: You have gone through that.

Q. When was the first time that you learned that Weinberg had, in fact, executed a postponement of that mortgage in which you had a one-third interest? A. At the time when I was trying to sell this mortgage, at the time I sold the mortgage. 30

Q. And from whom did you learn it? A. Well, I learned it from Mr. Litwin, and, indirectly, when I was up to Miss Jedell's office there.

Q. Did Mr. Litwin inquire of you as to this postponement signed by Weinberg? 40

Mayer Schwartz—Direct.

Mr. Schotland: I object to that, if the Court please, that is, in view of the witness' previous answer. It renders it objectionable. It is leading, and I object to it.

The Court: Yes, I will sustain the objection. It is leading.

10 Q. When did you learn from Miss Jedell there was some question about your assignment, just give us the time, about when? A. About the first or second week in June, 1928.

Q. Did you ever inform Mr. Litwin of any conversation that you had with Miss Jedell? A. I did not.

20 Q. I show you an affidavit of title, sworn to on June 22, 1928, purporting to bear the signature of Mr. Meyer Schwartz, and ask you whether that is your signature? A. Yes, sir.

Q. Is this the document you furnished to Mr. Litwin? A. That is right.

Mr. Ruback: I offer that in evidence.

Mr. Schotland: I object to it. I do not see how that is competent. Does he want to contradict his own witness?

30 Mr. Ruback: I cannot quite understand that objection. I am not contradicting the witness. I am showing that we made due inquiry. When the case is closed, I will show you some cases. That is all we were obliged to do, is to ask of our assignor an explanation of this record condition. We did it, and we have it in writing. What better proof could there be of the performance of our duty?

40 The Court: I will allow it.

(Affidavit of title marked Exhibit D-4.)

Mayer Schwartz—Cross.

Q. Did Mr. Popik ever tell you when he would pay your mortgage? A. Well, when the mortgage would be more progressed.

Mr. Ruback: That is all.

Cross-examination by Mr. Schotland:

- Q. Mr. Schwartz— A. Yes, sir. 10
- Q. —when did you learn from Mr. Litwin about that assignment? A. When did I learn about it?
- Q. Yes. From Mr. Litwin? A. Well, when I sold him the mortgage.
- Q. At that time when you were selling him the mortgage? A. That is right.
- Q. He told you that there was a postponement recorded, executed by Mr. Weinberg? A. That is right. 20
- Q. And he bought the mortgage after he told you that, or at the time that he told you that? A. At the same time.
- Q. The same time. He told you that, and yet you bought the mortgage at the same time; is that so? A. That is right.
- Q. Now, how did this mortgage of \$9540, in which you had a one-third interest, as you say, come into existence? A. That was a purchase money mortgage, taken back on a piece of property that had been sold to Petti Construction Company. 30
- Q. You sold that land to the Petti Construction Company without the Petti Construction Company putting in a single cent; is that true? They didn't pay you any money, they just gave you a mortgage for the purchase money; is that so? A. Yes.
- Q. And you had agreed, you and your partner, with Mr. Petti of the Petti Construction Company, that you would get the Petti Construction Com- 40

Mayer Schwartz—Cross.

pany, so that it would be able to erect an apartment house on that land, didn't you? A. No, sir.

Q. Didn't you? A. No, sir.

Q. Didn't you and Weinberg and Angert try to get a construction mortgage for the Petti Construction Company? A. Yes; so did Mr. Petti himself.

10

Q. Yes. You tried to get it? A. Yes, sir.

Q. You went to Reinfeld to try to get it? A. With Mr. Weinberg.

Q. And you went to Popik's office to try to get it? A. At the direction of Mr. Reinfeld.

Q. Yes. And you mean to say that there was no talk with Mr. Popik about the fact that there was this \$9550 mortgage in existence on the property? A. That it was in existence, certainly.

20

Q. Who talked about it? A. Who talked about it?

Q. Yes. A. Everybody there.

Q. Talked about this mortgage, before Mr. Popik agreed to put on the \$70,000 mortgage? A. No, sir, not before; that is, it was talked about at the time we were there.

Q. When you were negotiating to get him to grant the \$70,000 mortgage? A. Yes, sure.

30

Q. Yes. That is when it was talked about. And didn't you tell Mr. Popik that he would be perfectly safe in putting on a \$70,000 mortgage, because if Petti did not finish the building or there was a foreclosure, you would buy in in order to protect your mortgage? Didn't that conversation occur? A. No, sir. Never made any statement like that.

Q. And Weinberg did not, either? A. No, sir.

Q. And Angert did not, either? A. Angert was not there.

40

Mayer Schwartz—Cross.

Q. Angert was not there. Angert was never there? A. No, sir.

Q. You are sure of that? A. Absolutely.

Q. How did you get a third interest in this mortgage? A. Because the three of us were partners there.

Q. You were partners in what? A. In the ownership of the property. 10

Q. Was the deed in the names of you three? A. No, sir.

Q. In whose name? A. Mr. Weinberg.

Q. Mr. Weinberg. Have you put any money in it?

Mr. Ruback: I object. There is no inquiry into the consideration of our mortgage. That has not been attacked by the pleadings. There are an indefinite number of defenses that might have been interposed, but they were not. 20

Mr. Schotland: I am obliged to you for the criticism that there were other defenses, but to get at the equitable situation—(interrupted).

The Court: I will permit the question. What was it? 30

Q. Had you put any money in it? A. I did, yes.

Q. You did put money in. How much?

Mr. Ruback: I object.

The Court: I will sustain the objection.

Q. Well, how did it happen that the mortgage was put in Mr. Weinberg's name alone? A. Because when we purchased the property I acted as a broker, and therefore could not be one of the owners, in order to participate in getting a com- 40

Mayer Schwartz—Cross.

mission on the sale of the property to Mr. Weinberg and ourselves.

Q. So you put the title to the property, when you bought it, in Weinberg's name alone? A. That is right.

10 Q. And when you arranged to sell it to Petti Construction Company, you had Weinberg alone give the deed? A. That is right.

Q. And you had Weinberg alone take back the mortgage? A. That is right.

Q. And after that construction mortgage was granted by Reinfeld through Mr. Popik, you then got a couple of weeks later an assignment of the one-third interest in that mortgage from Mr. Weinberg? A. That was because every time I asked Mr. Popik—(interrupted).

20 Q. No. I just want to know the fact, not the reason. A. Well—

The Court: Did you?

The Witness: Yes.

Q. Did you get it? A. Yes.

Q. Several weeks after the 70,000 dollar construction loan had been granted? A. I don't know just how many weeks after.

30 Q. But it was after that? A. Yes.

Q. Were you present when Petti signed the mortgage for \$70,000? A. Yes.

Q. You were present? A. Yes.

Q. I show you Exhibit C-2—was Mrs. Petti there at the same time when Mr. Petti was there? A. She was not there. We picked her up at the house and brought her down.

40 Q. Didn't she come the next day? A. It might have been the next day. I don't remember whether it was that same day or the next day.

Mayer Schwartz—Cross.

Q. You brought her there the next day? A. Something like that.

Q. Yes. Now, I show you Exhibit C-2, which is the mortgage signed by Edward Petti, as President of the Petti Construction Company, dated October 10, 1927. You now recall that you were present when he signed that? A. Yes, sure. This is the mortgage to whom? 10

Q. To Reinfeld. A. Yes. And—

Q. You were present? A. Yes.

Q. And you brought Mrs. Petti there the next morning and she signed as secretary? A. That is right. Either the next morning or that same day, I don't recall.

Q. I see. All right. Now, I show you Exhibit C-3, which is the postponement of mortgage in which you claim an interest, signed by Mr. Weinberg and bearing the same date as the mortgage you saw Petti sign. Do you still say that you were not present when that postponement was signed, and that you never saw it? A. Absolutely. 20

Q. All right. A. Can I see the other mortgage?

The Court: I guess that is enough. That is all.

Redirect-examination by Mr. Ruback: 30

Q. Just a minute. When you were there on the 10th of October, when Petti signed the mortgage, was Weinberg there on that occasion? A. Yes.

Q. Weinberg was there? A. Yes.

Q. Did Popik present anything to Weinberg for his signature? A. Not that I saw.

Mr. Ruback: That is all.

The Court: Anything further? 40

Mr. Ruback: Yes, sir. Mr. Petti.

Edward Petti—Direct.

EDWARD PETTI, sworn for defendant.

Direct-examination by Mr. Ruback:

Q. Mr. Petti, you were the president of the Petti Construction Company that owned this property involved in this foreclosure? A. Yes, sir.

10 Q. And you know Mr. Popik? A. Yes, sir.

Q. Have you ever been to his office? A. Yes, sir.

The Court: Speak up. Speak up.

Q. A little louder. A. Yes.

Q. Were you there at the time—how many times were you there at about the time you made a mortgage to Reinfeld? A. Well, I was there sometimes two or three times a week.

20 Q. Do you know Mr. Schwartz? A. Yes, sir.

Q. Was he ever there with you? A. Yes, sir.

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

Q. Did Mr. Angert ever go to Popik's office with Schwartz and you? A. Well, they were together, but most of the time he never come up.

Q. Who? A. Angert.

Q. Angert. Were you in Popik's office on October 10? A. Yes, sir.

30 Q. Did you see Weinberg sign any postponement of a mortgage for \$9500? A. No, I don't know nothing about it.

Q. Didn't Weinberg ever tell you about it? A. No.

Q. Now, did Mr. Popik ever talk to you about that or in your presence about that \$9500 mortgage? A. Yes, sir.

40 Q. What? What did Mr. Popik say about it? A. Well, he told me that mortgage have to be paid, and I said, "Yes."

Edward Petti—Direct.

Q. Did Mr. Popik say when that mortgage would have to be paid? A. Well, the only thing I know, once he asked me and says, "When that mortgage have to be paid?" I said, "I won't care, as long as it will be paid."

The Court: That is all I want to know.

Q. Well, did Popik tell you when, at what stage of the building, it would be paid? A. Well, I was understood when the job could have been on the roof.

Q. Did Popik say so? A. Yes. He told me a couple of times.

Mr. Ruback: Cross-examine.

Cross-examination by Mr. Schotland:

Q. Mr. Petti, don't you know that the \$70,000 mortgage for Reinfeld was to be a first mortgage?
A. The construction mortgage, yes.

Q. That was the arrangement? A. Yes.

Q. That was held in your presence? A. Yes.

Q. And that arrangement was had when Schwartz was present and Weinberg was present?
A. Well, I—no, not when they were there; we never talked about it. Mr. Popik used to tell me them things when I was alone with him.

Q. Just answer my question. You say that the \$70,000 mortgage, the construction loan which Mr. Popik was giving for Mr. Reinfeld— A. Yes.

Q. —was to be a first mortgage on this property?
A. Yes.

Q. Now, when Mr. Popik said that that was to be a first mortgage on the property, wasn't Mr. Schwartz and Mr. Weinberg there with you? A. No.

Edward Petti—Cross.

Q. They were not there? A. No, sir. I never saw them then.

Q. When did you see them there? A. Well, I saw them before the loan was granted.

Q. Yes. A. Because we went there four or five times.

10 Q. All right. Now, when you saw them there before the loan was granted, did any one mention the \$9500 mortgage on the land? A. Well, the only one mentioned that was Weinberg all the time.

Q. Weinberg mentioned it? A. Yes, sir.

Q. And wasn't there any talk at that time that if the \$70,000 mortgage is granted by Reinfeld, it was to be a first mortgage? A. No, I don't remember that.

20 Q. You don't remember? A. No.

Q. Well, when was the first time that there was talk that if the \$70,000 mortgage is granted by Reinfeld, it is to be a first mortgage? A. Well, Mr. Popik told me, that is all.

Q. When did he tell you that? A. Well, he told me—

Q. Was that before you signed? A. —several times.

30 Q. Was that before you signed it? A. When I signed it.

Q. At the same time when you signed it? A. Yes.

Q. Now, at the time when you signed that mortgage and Mr. Popik told you that is to be a first mortgage, wasn't Mr. Weinberg there? A. I don't remember if he was there, but I know I signed and my wife, she signed either the same night—

40 Q. Or the next morning? A. —the evening or the next morning.

Edward Petti—Cross.

Q. Or the next morning. A. See? I don't remember.

Q. I know that the paper shows it was the next morning, but I want to know who was there when you signed, who was in Mr. Popik's office with you when you signed? A. I think it was Weinberg.

Q. Weinberg. Wasn't Schwartz there? A. I don't see Schwartz. 10

Q. Wasn't Angert there? A. No.

Q. You don't remember whether Schwartz was there or not? A. No.

Q. When you signed the mortgage? A. I saw Schwartz. He came around—I mean Angert. He came with them, but he always used to live—to wait downstairs.

Q. But Schwartz used to go upstairs? A. Yes, sometimes. 20

Q. Now, will you say whether Schwartz was there or was not there when you signed the mortgage. A. I remember Weinberg.

Q. But you are not sure about Schwartz? A. No.

Mr. Schotland: That is all.

The Court: That is all.

Mr. Ruback: That is all. I want to call Mr. Popik's stenographer. 30

Mr. Schotland: Miss Baker.

Mr. Ruback: Whatever her name is.

Elizabeth Baker—Direct.

ELIZABETH BAKER, recalled.

Examined by Mr. Ruback:

Q. Were you the only stenographer employed by Mr. Popik on October 10, 1927? A. Yes, sir, I believe I was.

10 Q. And you operated one machine, one typewriting machine, or more? A. One.

Q. And you prepared the bond and mortgage that day to Mr. Reinfeld for—(interrupted) A. If I recall correctly, I prepared the bond and mortgage, yes. I cannot say on what date.

Q. I show you these two exhibits, complainant's bond and mortgage, and ask you whether you are the person who typed those two documents? A. Yes, sir, I think I did.

20 Q. And I show you this postponement, Exhibit C-3, and I ask you whether you typed that document that day? A. Yes, sir, I think I did.

Q. You used the same machine to type the three documents? A. I think I did.

Q. You only had one machine in the office? A. I only had one.

Examined by Mr. Schotland:

30 Q. Did you ever use Mr. Seeley's machine?

Mr. Ruback: I object.

The Court: I will allow it. What is the matter with that cross-examination? I cannot see anything the matter with it.

Mr. Ruback: Cannot see anything what?

The Court: I cannot see anything the matter with it. I see your purpose and so does Mr. Schotland and he is trying to combat it. I will allow the question.

40

Elizabeth Baker—Cross.
Elizabeth Baker—Redirect.

Q. Did you ever use Mr. Seeley's machine? A. Yes, I did. I recall that now, that Mr. Seeley was connected with us at that time, and I was in the habit of using his machine, if mine had a paper in, or something.

Examined by Mr. Ruback:

10

Q. Did you use Mr. Seeley's machine that day?

A. That I can't say. I did at various times use Mr. Seeley's machine.

Q. When you typed the bond and mortgage your machine was in good working order? A. I guess it was. I don't remember.

Q. And did you type the postponement at the same time, part of the same work? A. I don't remember.

20

Q. The same hour or so? A. I don't remember.

Mr. Ruback: That is all.

Examined by Mr. Schotland:

Q. You say that you might have used Seeley's machine, if there was a paper in your machine?

A. It is very possible that I did, yes. I was in the habit of doing that.

30

DAVID M. LITWIN, sworn for defendant.

Direct-examination by Mr. Ruback:

Q. Mr. Litwin, you are the attorney for the Atlanta Construction Company? A. I am.

Q. You are Mr. Krasners' son-in-law? A. I am.

Q. And you had charge of the purchase of

40

David M. Litwin—Direct.

Schwartz' one-third interest in the mortgages here in dispute? A. I did.

Q. And do you recall when you closed that piece of business? A. Some time the latter part of June, 1928.

10 Q. And when you were instructed by Mr. Krasner to take care of that item, did you or did you not examine the records? A. I did.

Q. Did he ask you to? A. He did not.

Q. And did your search disclose, of record, the assignment to Schwartz and the postponement by Weinberg, which are the subject of this controversy? A. It did.

20 Mr. Schotland: I object to that. I object to what his search disclosed. I do not object to him testifying to what the record disclosed.

The Court: Well, all right; turn it around and say, "Did the record disclose."

Q. Before you closed the transaction, did you, representing Mr. Krasner's company, know of the fact of the assignment to Schwartz and the subsequently recorded postponement by Weinberg of the assigned mortgage? A. I did.

30 Mr. Schotland: What was the answer?

The Witness: I did.

Mr. Ruback: He did. Yes, he did. We do not say we did not.

Mr. Schotland: All right.

Q. How did you know of that fact? A. My search disclosed the fact.

40 Q. And when that was known by you, did you make any inquiry of any one? A. I did.

David M. Litwin—Direct.

Q. Of whom? A. Mr. Schwartz.

Q. And the result of that inquiry is evidenced in writing? A. It is.

Q. Is that the so-called title affidavit, D— A. It is over on your desk.

Q. We will call it D-blank, for the present.

The Court: All right. I know what it is. 10

Q. D-3. A. That is right.

Q. Except as disclosure came to you from the records and from statements contained in the title affidavit, D-3, did you, at the time you closed that transaction and paid Mr. Krasner's money, or that of the Atlanti Construction Company, know anything concerning the transaction of the postponement of mortgage? A. I did not.

Q. Did Schartz tell you, at the time you closed the deal, of any conversation he had had with Miss Jedell? 20

Mr. Schotland: I object. How can we be bound by a private conversation between the assignor and the assignee, not in our presence?

The Court: You cannot. I will sustain the objection.

Mr. Ruback: Well, you did not hear me, but all right. 30

Q. Did you, in fact, foreclose that mortgage? A. I filed a bill to foreclose.

Q. Which has since been superseded by your participation in this suit? A. That is right.

Cross-examination by Mr. Schotland:

Q. Was there an answer filed to your bill? A. I don't recall. 40

David M. Litwin—Cross.

Mr. Schotland: That is all.

The Court: Now, I will decide the question of fact as to whether Schwartz was present when these papers were signed?

Mr. Schotland: Yes.

10 The Court: That I will decide now and say that he was present; and I will also say that I do not believe a word he said on the witness stand. His testimony was absolutely contradictory, to my mind, absolutely untruthful; and I might also say that I am entirely satisfied with Miss Baker's testimony; I think she is telling the truth exactly.

20 Now, as to the law, you gentlemen submit briefs. The law now will be, he being present and knowing of this assignment, that is the first thing.

Mr. Schotland: And his assignee knew of it before he purchased.

Mr. Ruback: You mean, my assignor?

The Court: Yes. That is Schwartz.

Mr. Schotland: Schwartz knew of it. That is your Honor's finding of fact.

The Court: Yes.

30 Mr. Schotland: And Mr. Litwin admits that, on behalf of the assignee defendant, he knew of it before he purchased, also from the records.

40 Mr. Ruback: That is not the fact. Mr. Schotland is running in something that Mr. Litwin did not admit. Mr. Litwin testified that, but for such effect as the record charges him with in this title affidavit, he knew nothing about the transaction. That is quite a different story. It is quite twisted.

Mr. Schotland: As I understand the

David M. Litwin—Cross.

English language, Mr. Ruback himself asked Mr. Litwin if he knew of the existence of the postponement of loan executed by Mr. Weinberg.

The Court: He said, "Yes."

Mr. Schotland: And he said, "Yes." And he said, "How do you know?" And he said, "My search disclosed it." 10

The Witness Litwin: That is correct.

Mr. Ruback: That is correct.

Mr. Schotland: I don't think there is any question of law left, then, because it doesn't make any difference what the law is, because actual notice, under the statute, is proven here. Your Honor finds as a fact that Schwartz had actual notice, and Schwartz' assignee had notice— 20

The Court: Well, Mr. Schotland—

Mr. Ruback: Do you want to argue the case now?

Mr. Schotland: No.

The Court: I am not going to preclude you from filing briefs, if you want to, and I think perhaps it is a wise thing for both of you to do.

Mr. Ruback: You would rather have us do that, and then argue the matter? 30

The Court: Yes.

Mr. Ruback: Then your Honor will have to give us—I guess that speaks for Mr. Schotland, too—a little time, as we are running into the Supreme Court next week.

Mr. Schotland: We will have to get the

David M. Litwin—Cross.

testimony written out, because by the time you have the briefs, you will have so many briefs before you that you will need the testimony.

The Court: All right.

Mr. Schotland: Get out the testimony?

10

Mr. Ruback: I guess so.

Mr. Schotland: All right. A copy for each of us.

20

30

40

Exhibit C-1.

Know All Men by these Presents That we, Petti Construction Company, a N. J. Corporation, and Edward Petti, are held and firmly bound unto the Joseph Reinfeld, obligee, in the penal sum of One Hundred and Forty Thousand (\$140,000.) Dollars, in gold coin of the present standard of weight and fineness, lawful money of the United States of America, to be paid to the said Joseph Reinfeld, his heirs, executors, administrators or assigns: For Which Payment well and truly made, we bind ourselves our heirs, executors, administrators, successors and assigns, jointly and severally firmly by these presents. Sealed with our seal, signed and dated the 10th day of October, One Thousand, Nine Hundred and Twenty-Seven. 10

The Condition of the above obligation is such that if the above bounden Petti Construction Company, its successors and assigns, and/or Edward Petti, his heirs, executors, administrators or assigns shall well and truly pay, or cause to be paid, unto the above named Joseph Reinfeld, his heirs executors, administrators or assigns, the just and full sum of Seventy Thousand (\$70,000.) Dollars in gold coin of the present standard of weight and fineness, lawful money as aforesaid on the 10th day of April, which will be in the year One Thousand Nine Hundred and Twenty-Eight and the interest thereon to be computed from the date hereof at and after the rate of six per cent per annum, and to be paid at maturity, the said principal sum to be paid as follows: on April 10th, 1928 without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force and virtue. And It is Hereby Expressly Agreed that if the said obligor shall 20 30 40

1. Make default in the payment of said inter-

Exhibit C-1.

est, or of any installment of principal, or any part of either on any day whereon the same is made payable, as above and said default continue for the space of thirty days.

10 2. Fail to pay any tax, assessment, water rent or other governmental rate, charge, imposition or lien hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, on or before the last day upon which the same is payable without interest and such default continue for a period of sixty days.

20 3. Fail, within sixty days after notice and demand by the obligee to pay all or any part of any assessment for local improvements heretofore or hereafter laid which is or may become payable in installments and which has affected, now affects or hereafter may affect said mortgaged premises notwithstanding that the same be not due and payable at the time of such notice and demand.

30 4. Fail to keep the buildings erected upon the said mortgaged premises insured against loss by fire and such other hazard as may be specified by the obligee, for the benefit of the obligee, through such broker or brokers as may be selected or approved by the obligee from time to time, and in an amount and in insurers satisfactory to it, or fail to assign such insurance to it, the obligor hereby expressly granting the option to the obligee to apply all payments on any such policies made to the repair or rebuilding of the premises damaged or destroyed, or to the principal or interest due on this bond.

40 5. Fail to maintain the buildings on said mortgaged premises in reasonably good repair, or remove or demolish any building erected or which may hereafter be erected on said mortgaged pre-

Exhibit C-1.

mises or permit the same to be removed or demolished.

6. Fail to furnish a statement of the amount due and owing for principal and interest upon this bond within thirty days after request or demand by said obligee therefor.

7. Fail to comply with any requirement of any department or officer of the State of New Jersey, or of the municipality wherein such mortgaged premises are situate having jurisdiction over such mortgaged premises, within three months after an order making such requirement has been issued by any such department or officer. 10

8. Fail to procure and assign policy or policies of insurance covering the rent and occupation of the building or buildings on said mortgaged premises, and assign the same to the said obligee, if required by said obligee. 20

9. Use or permit the use of said mortgaged premises or any building erected thereon or any part thereof for any purpose forbidden by law, or should any proceeding be instituted in any State or Federal Court looking to the padlocking or abatement of the use of the premises or any part thereof described in the mortgage accompanying this bond.

10. Be adjudicated a bankrupt or insolvent, or should the owner of such mortgaged premises be so adjudicated, or should a petition in bankruptcy or insolvency be filed against the obligor or the owner of said mortgaged premises. 30

11. Be proceeded against in foreclosure proceedings on any prior or subsequent mortgage affecting the premises covered by the mortgage accompanying this bond, or should such a proceeding be instituted against the owner of the mortgaged premises. 40

Then and in any of the said events above men-

Exhibit C-1.

tioned, the aforesaid principal sum of Seventy Thousand (\$70,000.) Dollars or the balance due thereon, with all arrearage of interest, and all advancements shall, at the option of the party of the second part, his heirs, executors, administrators or assigns, become and be due immediately there-
10 after, although the period first above limited for the payment thereof may not then have expired, anything herein contained to the contrary thereof in anywise notwithstanding.

And as some or all of the sum of money mentioned in the condition of this bond is to be advanced in connection with a building or buildings to be erected on the premises covered by the mortgage given to secure the payment of said sum,
20 it is further expressly agreed between the parties hereto, that if said obligor shall

(1) Fail within ten days after demand made to present to the obligee at its Home Office in Newark satisfactory evidence that all who have performed labor or furnished material in connection with the erection of any such building or buildings have been paid in full, or within said period fail to present postponements or releases of mechanic's liens and claims of liens from all such
30 persons, firms or corporations.

(2) Fail to procure a cancellation or discharge in manner and form provided by law of any mechanic's lien filed against said mortgaged premises or any part thereof or any building or structure thereon within thirty days after the same is filed.

(3) Abandon for a period of ten days the work of construction of any building upon the construction of which this loan is based, or fail to prosecute such construction in a diligent and effective
40 manner for a period of ten days, except during the

Exhibit C-1.

progress of a strike by workmen employed on said building.

Then said principal sum of Seventy Thousand (\$70,000.) Dollars, or the amount thereof that shall have been theretofore advanced, with all arrearage of interest thereon, and any advancements, shall, at the option of said obligee, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything herein contained to the contrary thereof in any-wise notwithstanding. 10

And it is Hereby Further Expressly Agreed

(1) In case of any default in the performance of any of the covenants, conditions or agreements of this bond, or of the mortgage accompanying the same, said obligee may enter upon and take possession of said mortgaged premises, collect the rentals, let the said premises or any part thereof, in its own name or otherwise, and receive the rents, issues and profits from said mortgaged premises and apply the same, after the payment of any necessary charges and expenses, on account of the amount hereby secured advancements and interest thereon, and the said rents and profits in the event of such default, as aforesaid, are hereby assigned to said obligee, or the said obligee, its successors or assigns in the event it institutes foreclosure proceedings based upon such default or violation may apply for the appointment of a receiver to collect the rents, issues and profits of the mortgaged premises, the obligor for itself its successors and assigns, hereby waiving any and all defenses to such an application and consenting to such appointment without notice, the signature 20 3.) 40

Exhibit C-1.

of the obligor hereto to be conclusive proof of such waiver and consent, but nothing herein contained to be construed to deprive the obligee, its successors or assigns of any other right, remedy or privilege it may have under the law to have a receiver appointed.

10 (2) If said obligor shall abandon the work upon said building or buildings for a period of ten days where the sum of money secured by this bond and the mortgage accompanying the same is being advanced on a construction loan, or cease to diligently prosecute for a period of ten days, said obligee may enter said premises and building, take possession thereof, proceed with the work of constructing said building or buildings, continue all
20 outstanding contracts for the erection or completion of said building or buildings, make and enter into new contracts and obligations where ever necessary, make such alterations and changes in said construction as it may deem advisable, pay and discharge all debts, obligations and liabilities incurred thereby, and do anything necessary or desirable to protect its interests, said obligee hereby being invested with full, complete and irrevocable authority in the premises and all moneys expended
30 in excess of the principal moneys mentioned in the condition of this bond, shall be a lien upon the said mortgaged premises in addition to the amount of said principal sum and secured by said mortgage payable on demand with interest at the rate of six per cent per annum from the date expended.

40 (3) Said obligor shall not nor will claim or demand or be entitled to any credit on the interest payable on the principal sum mentioned in the condition of this bond or any addition thereto un-

Exhibit C-1.

der the terms hereof for the taxes which may be levied on the premises covered by said mortgage or for any part of said taxes or because of the payment thereof, nor will such obligor deduct such taxes from such principal or interest.

(4) If at any time before this bond is paid any law of the State of New Jersey be enacted, deducting from the value of the land, for the purpose of taxation any lien thereon, or providing or changing in any way the laws now in force for the taxation of mortgages, deeds of trust, or debts secured thereby, for state or local purposes, or the manner of the collection of such taxes, so as to affect the mortgage securing this bond, or the debt evidenced hereby, or the owner or holder thereof, in respect thereto, then this bond and such mortgage shall, at the option of the obligee become immediately due and payable anything herein contained to the contrary notwithstanding. 10
20

(5) If the obligor fails to insure the mortgaged premises as hereinbefore provided or to pay taxes, water rents, assessments or any other governmental rate when due, the obligee may effect such insurance or pay such tax, water rent, assessment or governmental rate and the premiums on said insurance and the amount of such tax, water rent, assessment or governmental rate so paid shall be added to the amount due under the terms of this bond and the amount or amounts so paid shall be immediately due and payable with interest at the rate of six per cent per annum from the time of the payment or payments of such charges or premiums. 30

(6) That the obligor shall, within sixty days 40

Exhibit C-1.

after any tax, assessment or other municipal or governmental rate affecting said mortgaged premises has become due and payable, exhibit to the said obligee, at his Home Office in Newark, N. J. a receipt in full for such tax, assessment or rate and should said obligor fail to present such receipt, the obligee may order a tax search on said mortgaged premises and the cost of said tax search shall be added to the amount due under the terms of this bond and payable on demand with interest at the rate of six per cent per annum from the time of payment, and such failure shall also, at the option of the obligee, make the principal sum and all arrears of interest and all advances immediately due and payable.

10
20 (7) That all notices and demands or requests herein provided for may be in writing and may be served in person or by mail to the last known address of the party to be served.

(8) That any waiver by the obligee of any violation of any of the conditions and covenants mentioned in said bond shall not constitute a waiver of any other terms and conditions in this bond, nor shall it constitute a waiver of a further violation of the condition waived.

30 (9) That where there are one or two remedies provided in said bond, the obligee shall be the sole judge of which remedy it may pursue.

(10) All the covenants and conditions herein contained shall apply to and bind and inure to the benefit of the heirs, executors, administrators

Exhibit C-1.

and assigns of the obligor and the successors and assigns of the obligee.

PETTI CONSTRUCTION COMPANY,

By Edward Petti,

President.

Attest:

Mary Petti,

Secretary.

[SEAL]

Edward Petti (L.S.)

Signed, sealed and delivered

in the presence of

David N. Popik.

10

Exhibit C-2.

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This Mortgage, made the 10th day of October,
One Thousand, Nine Hundred and Twenty-Seven

Between Petti Construction Company, a N. J.
Corporation with its principal office in the City of
Newark in the County of Essex and State of New
Jersey party of the First Part, hereinafter known
as the Mortgagor,

And Joseph Reinfeld the City of Newark in the
County of Essex and State of New Jersey party
of the Second Part, hereinafter known as the
Mortgagee,

Witnesseth, that the said mortgagor, for and in
consideration of the sum of Seventy Thousand
(\$70,000.) Dollars, lawful money of the United
States of America, to it in hand well and truly
paid by the mortgagee at or before the sealing and
delivery of these presents, the receipt whereof is

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Exhibit C-2.

hereby acknowledged, and the said mortgagor therewith fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, enfeoffed, conveyed and confirmed, and by these presents does give, grant, bargain, sell, alien, enfeoff, convey and confirm to the said mortgagee and to his heirs, ex-
 10 ecutors, administrators and assigns, all that tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Newark in the County of Essex and State of New Jersey,

Beginning at a point in the southerly line of Irving Street distant westerly 260.55 feet from the southwesterly corner of Washington Avenue and Irving Street; thence (1) north 49 degrees 30
 20 minutes west along Irving Street 75 feet; thence (2) south 40 degrees 30 minutes west 150 feet; thence (3) south forty-eight degrees 13 minutes east 75 feet; thence (4) north 40 degrees 30 minutes east 150 feet to the place of beginning.

The said sum of Seventy Thousand Dollars (\$70,000.) to be advanced in connection with the erection of a three story brick building upon the premises hereinabove described, is to be advanced as follows:

30	1. When foundation is complete and has received the first tier of beams	\$1500.00
	2. When the house has been raised and received the second tier of beams	1000.00
	3. When the house has been fully raised and roof complete	2500.00
40	4. When rough plumbing and rough steam heating work has been completed and the brown coat of plaster finished throughout	5000.00

Exhibit C-2.

The balance of the consideration named in the within mortgage shall be paid in such installments and at such times as the mortgagee shall deem proper.

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

1. Upon failure to present to the mortgagee or successors and assigns, postponements of mechanic's liens from all material men or contractors who have furnished material or labor upon the premises in question, or upon failure to furnish evidence that all such persons, firms or corporations who have performed labor or furnished material have been paid in full. 20

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

3. Upon the abandonment of the work for 10 days or upon the failure of the said party of the first part or its successors or assigns, to prosecute the work in a diligent and effective manner for a similar period; cessation of work on account of strikes not to be deemed abandonment. 30

4. Upon failure for 30 days to comply with any authority having jurisdiction over work similar in type herein contemplated to be erected or upon refusal for a period of 30 days to remove any 40

Exhibit C-2.

work condemned by any of the said authorities or inhibited by law.

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

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

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

20 It is agreed that upon the default of the owners of said premises in the performance of the terms and covenants herein contained, or their failure to complete with dispatch construction of the said buildings in the manner above set forth, or upon the absconding of said owners from the State of New Jersey, or their absence from said work for ten days, or should any event occur which entitles the holder of this mortgage to demand the principal thereof or to refuse any further advancements on account of said principal, the holder of this mortgage shall be fully and completely entitled, empowered and authorized and is hereby empowered and authorized, irrevocably, by the said owners, without any further consent or authorization, to expend all sums of money which in their judgment and discretion shall be reasonably
30 necessary, for the following purposes:
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Exhibit C-2.

(a) To protect and preserve the mortgaged premises; (b) To complete the said building and to pay and satisfy all liabilities incurred for materials and labor employed in such construction; (c) To pay for all work and materials already provided and furnished to owners, the mortgagee being authorized either to continue the construction under outstanding contracts of the owners or to create independent contracts for such completion. 10

It is further agreed that if the mortgagee is obliged to expend, for the purposes aforesaid, sums of money which will exceed the amount of the principal agreed to be advanced hereunder, such excess, with interest at six per cent per annum from the time of each advancement, shall be added to the principal due hereunder, and the mortgagee shall have all the remedies for the collection thereof which are herein specified regarding the principal hereof. 20

To induce the mortgagee to advance the principal sum secured hereby or any part thereof, and as a prime and essential consideration to the mortgagee, the said owners do, for themselves, their heirs and executors, administrators, successors and assigns, hereby constitute and appoint the mortgagee, irrevocably, as their agent for the purpose of making the expenditures aforesaid and for the purpose of carrying out in every respect the authorities herein granted and, upon the completion of the said building, to enter into written or oral contracts, in the name of and on behalf of the said owners, for the renting or hiring of the said premises or any part thereof, under such terms and conditions as may seem advisable to the 30 40

Exhibit C-2.

mortgagee and to use the rents, issues and profits for the upkeep and maintenance of the said premises and for the payment of prior liens and the liquidation of all interest due on mortgages as well to the mortgagee as to others, and for taxes, insurance, water charges, etc., and to apply any surplus to the amount due for principal on the within
10 mortgage.

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

Together with all and singular the profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining.
20 Also all the estate, right, title, interest, property, claim and demand whatsoever of the mortgagor of, in and to the same, and of, in and to every part and parcel thereof,

To Have and to Hold all and singular the above described tract or lot of land and premises with the appurtenances, unto the said mortgagee, his heirs, executors, administrators and assigns, to the only proper use, benefit and behoof of the said mortgagee, his heirs, executors administrators and
30 assigns forever. Provided, always, and it is agreed by and between the parties to these presents that if the said mortgagor, its successors and assigns does and shall well and truly pay or cause to be paid, to the said mortgagee, his heirs, executors, administrators and assigns the sum of Seventy Thousand Dollars (\$70,000.) as follows: On April 10th, 1928 with lawful interest for the same from the 10th day of October 1927, at the rate of six
40 per cent. per annum, payable at maturity, accord-

Exhibit C-2.

ing to the conditions of a certain bond, which is also made a part of this mortgage, bearing even date herewith, in the penal sum of One Hundred and Forty Thousand (\$140,000.) Dollars, made by said Petti Construction Company without any deduction or defalcation for taxes, assessments, or any other imposition whatsoever, thence and from thenceforth these presents and said obligation shall cease and be void, anything herein and therein contained to the contrary in anywise notwithstanding. 10

And the said Mortgagor, for itself its successors or assigns does covenant and grant to and with the said mortgagee, his heirs, executors administrators and assigns that it shall not nor will claim or demand or be entitled to receive any credit or credits on the interest payable hereon, or on the moneys to secure payment of which this mortgage is made, for so much of the taxes assessed against said lands as is equal to the tax rate applied to the amount due on this mortgage or any part thereof. 20

And the Mortgagor hereby warrants and defends the title to the said lands and premises.

The mortgagor shall and will keep the buildings erected and to be erected upon the lands above conveyed insured against loss or damage by fire by insurers, through such broker or brokers selected and in an amount approved by the mortgagee, his heirs, executors, administrators and assigns, and assign the policy or policies and certificate or certificates thereof to the mortgagee, his heirs, executors administrators and assigns, as collateral security for the payment of the principal and interest aforesaid; and it is agreed that if the mortgag- 30 40

Exhibit C-2.

or, its successors and assigns, shall neglect to pay all or any tax, assessment or other municipal or governmental rate, charge, imposition, or any premium for insurance on any day whereon the same shall become due and payable, after the period of default aforesaid, then it shall be lawful for the

10 mortgagee his heirs, executors, administrators and assigns, to pay such charges, and the sum or sums so paid shall be a lien on the said mortgaged premises added to the amount secured hereby, with interest at six per cent per annum, and, in the event of such payment, at the option of the mortgagee, his heirs, executors, administrators or assigns, the principal sum secured hereunder shall become due and payable, and agrees that if default

20 be made in the payment of any installment of principal or of the said interest, or any part thereof, on any day whereon the same is made payable as hereinbefore expressed, and should the same remain unpaid and in arrears for the space of thirty days, or if default be made in the payment of any of said taxes, water rents or other municipal or governmental rate, charge, imposition, on any day whereon the same become due and payable, and should the same remain unpaid and in arrears

30 for the space of sixty days, or in the event that any building shall be demolished or removed from the mortgaged premises (or if the removal or demolition thereof is threatened) without the consent in writing of the mortgagee or holder of this mortgage, or in the event that the owner of the mortgaged premises shall fail, within ten days after written request therefor, to furnish a statement of the amount due and owing for principal and interest hereunder, or evidence of the payment

40 of taxes, water rents, or any carrying charges, or

Exhibit C-2.

in the event that default shall be made in any of the terms, covenants and conditions herein contained or should the owner of the mortgaged premises fail, after a period of thirty days, to begin compliance with any requirements, recommendation or recommendations of any of the departments or authority of the State of New Jersey, or the municipality where such mortgaged premises are situate, such municipality or State Department or authority having jurisdiction over the mortgaged premises, or in the event the owner of the mortgaged premises shall fail to maintain the buildings on said mortgaged premises in reasonably good repair, or use or permit the use of said mortgaged premises or any building erected thereon or any part thereof for any purpose forbidden by law, or in the event of the passage of any law by the Legislature of New Jersey affecting the security of the mortgage debt or changing in any manner the legal relationship between the parties created hereunder, the principal sum hereby secured shall become due and payable, or in the event of the adjudication in bankruptcy or insolvency of the mortgagor or the owner of the mortgaged premises, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of money, with all arrearages of interest thereon, and any other charges paid by the holder of this mortgage, shall, at the option of the mortgagee and assigns, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

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Exhibit C-2.

And agrees that the said mortgagee, his heirs, executors, administrators or assigns shall and may, from time to time, and at all times after default shall be made in the performance of the proviso or condition herein contained, peaceably and quietly enter into, have, hold, use, occupy, possess and
10 enjoy all and singular the above granted and bargained premises, with the appurtenances, without the let, suit, trouble, hindrance or denial of the said mortgagor, its successors or assigns, or of any other person or persons whatsoever.

And agrees that if default shall be made, as aforesaid, the mortgagee, his heirs, executors administrators and assigns, shall have the right forthwith after such default, to enter upon and
20 take possession of the said mortgaged premises, and to let the said premises, and receive the rents, issues and profits thereof, and to apply the same, after payment of all necessary charges and expenses, on account of the amount hereby secured, and said rents and profits are, in the event of any such default, hereby assigned to the mortgagee, his heirs, executors, administrators and assigns and the mortgagee, his heirs, executors, administrators and assigns shall also be at liberty immediately
30 after any such default, upon proceedings being commenced for the foreclosure of this mortgage, to apply for the appointment of a receiver of the rents and profits of the said premises, and be entitled to the appointment of such receiver as a matter of right, as security for the amounts due the mortgagee, his heirs, executors, administrators and assigns without consideration of the value of the mortgaged premises or solvency of any person
40 or persons liable for the payment of such amounts.

Exhibit C-2.

It is further agreed that granting any extension or extensions of time of payment of said bond either to the maker or to any other person, or taking of other or additional security for payment thereof, or waiver of or failure to exercise any right to mature the whole debt under any covenant or stipulation herein contained shall not in anywise affect this Mortgage nor the rights of the Mortgagee hereunder nor operate as a release from any personal liability upon said bond nor under any covenant or stipulation herein contained. 10

It is further agreed that full power is hereby conferred on the Mortgagee to settle or compromise claims under all policies and to demand, receive and receipt for all moneys becoming payable hereunder, and to assign all policies to any surety of said bond or to the purchaser of the premises at any foreclosure or execution sale. In case of loss any insurance money paid shall be applied either on the debt or other sums hereby secured or in rebuilding or restoring the damaged buildings or improvements as the Mortgagee may elect. 20

In Witness Whereof, the said party of the first part has caused these presents to be signed by its president and attested to by its secretary and its corporate seal to be hereunto affixed, the day and year first above written. 30

PETTI CONSTRUCTION COMPANY,

By: Edward Petti,

President.

Attest:

Mary Petti,
Secretary.

[Corporate Seal]

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Exhibit C-2.

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

10 Be it Remembered that on this 11th day of October, in the year of our Lord One Thousand Nine Hundred and Twenty-Seven before me, the subscriber, an Attorney at Law of New Jersey, personally appeared Mary Petti known to me to be the Secretary of the Petti Construction Company a Corporation, the Mortgagor within named, who, being by me duly sworn on her oath, said and made proof to my satisfaction that she is such Secretary and that she well knows the Common Seal of said Corporation, and that the Seal affixed to the within Mortgage is such Common Seal and was thereto affixed by Edward Petti the President of said Corporation, and that the said Mortgage was by the said President also signed and delivered as and for the voluntary act and deed of said Corporation in the presence of said Deponent, who thereupon subscribed his name thereto as attesting witness.

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MARY PETTI.

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

30 David N. Popik,
 An Attorney at Law
 of N. J.

Endorsed: Received in the Register's Office of the County of Essex N. J., on the 14th day of October A. D., 1927, at 11:08 o'clock in the forenoon, and recorded in Book G 62 of Mortgages for said County, on pages 300-303.

40 Howard S. Dodd,
 Register.

Exhibit C-3.

Agreement made the 10th day of October one thousand nine hundred and Twenty-Seven, between Aaron Weinberg, of the City of Newark, County of Essex and State of New Jersey, hereinafter described as the party of the first part and Joseph Reinfeld, of the City of Newark, County of Essex and State of New Jersey hereinafter described as the party of the second part. 10

Witnesseth, That whereas the said party of the first part is now the owner and holder of a certain mortgage, and the bond in said mortgage mentioned, made by Petti Construction Company to Aaron Weinberg to secure the principal sum of Ninety five hundred and forty (\$9540.) Dollars, and interest, and dated September 21st, 1927, which said mortgage was recorded in the office of the Register of the County of Essex on the 5th day of October, 1927, as instrument #90 of Mortgages, and covers the premises hereinafter mentioned. 20

And Whereas, Petti Construction Co. the present owner of the premises hereinafter mentioned is about to execute and deliver to said party of the second part, a bond and mortgage to secure the principal sum of Seventy Thousand (\$70,000.) Dollars, and interest, at the rate of six per cent., dated October 10th, 1927, and covering premises commonly known and designated as #22-26 Irving Street in the City of Newark, and more fully described in said last-mentioned mortgage: 30

Beginning at a point in the southerly line of Irving Street distant westerly 260.55 feet from the southwesterly corner of Washington Avenue and Irving Street; thence (1) north 49 degrees 30 minutes west along Irving Street 75 feet; thence (2) south 40 degrees 30 minutes west 150 feet; thence (3) south 48 degrees 13 minutes east 75 feet; 40

Exhibit C-3.

thence (4) north 40 degrees 30 minutes east 150 feet to the place of Beginning.

And Whereas, The said party of the second part has refused to make said loan of Seventy Thousand (\$70,000.) Dollars and accept said Bond and Mortgage unless said first-mentioned mortgage is
10 made a subsequent and subordinate lien to the lien of said mortgage about to be executed to the party of the second part:

Now, Therefore, In consideration of the premises and to induce the said party of the second part to make said loan and accept said Bond and Mortgage and of One Dollar paid to said party of the first part by said party of the second part, the receipt whereof is hereby acknowledged, the said
20 party of the first part hereby covenant and agree with said party of the second part that said mortgage held by said party of the first part is and shall continue to be subject and subordinate in lien to the lien of said mortgage for Seventy Thousand (\$70,000.) Dollars, about to be executed to the party of the second part hereto, as to any and all sums advanced or hereafter to be advanced on said last-mentioned mortgage, it being the intention of the parties hereto that the aforesaid mortgage of the party of the first part shall be a lien
30 subsequent in every particular to the aforementioned mortgage of Seventy Thousand (\$70,000.) Dollars, about to be executed to the said party of the second part hereto.

This agreement shall be binding on, and enure to the benefit of the respective heirs, personal representatives, successors and assigns of the parties hereto.

40 In Witness Whereof, The said party of the first

Exhibit C-3.

part has signed and sealed these presents the day and year first above written.

AARON WEINBERG (LS)

In the presence of:

Elizabeth A. Baker.

State of New Jersey, }
County of Essex, } ss.: 10

Be it Remembered, That on this 10th day of October in the year of our Lord One Thousand Nine Hundred and Twenty-Seven, before me, the subscriber, a Notary Public of New Jersey, personally appeared Aaron Weinberg, who, I am satisfied, is the grantor mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed. 20

ELIZABETH A. BAKER,
A Notary Public of New Jersey.

Endorsed: Received in the Register's Office of the County of Essex, N. J. on the 12th day of November, A. D. 1927 at 9:33 o'clock in the forenoon and Recorded in Book 96 of Releases of Mortgages for said County, on pages 444-445. 30

Howard S. Dodd,
Register.

Exhibit D-1.*Marginal Endorsements:*

10/26/27 #17—Assg't Rec'd—Bk 194 Page 29.

10/26/27 #18—Assg't Rec'd—Bk 194 Page 29.

11/12/27 #3—Postpt. Rec'd. in Releases—Book
96 Page 444.

12/15/27 #49—See Re Record Book B 63
Page 378.

6/22/28 #18 See Re Record Book A 65 Page
60.

6/23/28 #25 Assg't Rec'd—Bk 200 Page 50.

10/4/28 #7232—See Lis Pendens Bk L Pg. 108.

10/2/28 #7215—See Lis Pendens Bk L Pg. 98.

Petti Construction Co.

To \$9,540.

Aaron Weinberg

20 This Indenture, Made the twenty-first day of
September, in the year of our Lord One Thousand
Nine Hundred and Twenty-seven, Between Petti
Construction Co., a corporation of the State of
New Jersey, party of the first part; with its prin-
cipal office in the City of Newark, in the County
of Essex and State of New Jersey, And Aaron
Weinberg of the Town of Irvington, in the County
of Essex and State of New Jersey, party of the
second part; Whereas, the said Petti Construction
30 Co. is justly indebted to the said party of the sec-
ond part, in the sum of Nine Thousand Five Hun-
dred and Forty (\$9,540) Dollars, lawful money of
the United States of America, secured to be paid
by a certain bond or obligation, bearing even date
with these presents, in the penal sum of Nineteen
Thousand and Eighty (\$19,080.) Dollars, lawful
money as aforesaid conditioned for the payment of
40 the said first mentioned sum of Nine Thousand
Five Hundred and Forty (\$9,540.) Dollars, law-

Exhibit D-1.

ful money as aforesaid, to the said party of the second part, their heirs, executors, administrators or assigns on the twenty-first day of September, which will be in the year One Thousand Nine Hundred and Twenty-eight and interest thereon, to be computed from September twenty-first, Nineteen Hundred Twenty-seven, at and after the rate of six per cent. per annum and to be paid semi-annually. This mortgage is to run for one year from the date hereinabove mentioned. And It Is Thereby Expressly agreed that should any default be made in the payment of the said interest or of any part thereof, on any day wherein the same is made payable, as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage, and become due and payable, and should the said interest or any part thereof remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrear for the space of sixty days, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum of Nine Thousand Five Hundred and Forty (\$9,540.) Dollars, with all arrearage of interest thereon, shall, at the option of the said party of the second part, their heirs, executors, administrators or assigns, become and be due and payable immediately thereafter although the period above limited for the payment thereof may not then have expired, anything therein before contained to the contrary

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Exhibit D-1.

thereof in anywise notwithstanding; and the said Mortgagee may at its option, pay such tax, assessment or water rent in arrear, and the amount so paid shall be added to and become part of the principal sum secured by the said bond and this mortgage, and shall be payable on demand with interest at six per cent. per annum, as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear. Now This Indenture Witnesseth, That the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to it in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged has granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part, and to its executors, administrators and assigns forever, All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey:

Beginning at a point in the southerly line of Irving Street distant westerly two hundred sixty feet and fifty-five one hundredths of a foot from the southwesterly corner of Washington Avenue and Irving Street; thence north forty-nine degrees thirty minutes west along Irving Street seventy-five feet; thence south forty degrees thirty minutes west one hundred fifty feet; thence south forty-

Exhibit D-1.

eight degrees thirteen minutes east seventy-five feet; thence south forty degrees thirty minutes east one hundred fifty feet to the place of Beginning. Being known as lots 11, 12 and 13, Block 821 on map of property of Peter Weiler, E. Adams, Surveyor, 1877. This mortgage is made with the understanding that mortgagor, Petti Construction Co., named in this indenture will begin the construction or erection of an apartment house as per plans and specifications submitted by the mortgagees named in this indenture, on or before November fourteenth, Nineteen Hundred and Twenty-seven. In the event that mortgagor does not commence construction as hereinbefore stated, mortgagee shall have right to immediately call in the mortgage, which mortgage shall thereupon become due and payable. Being the same premises conveyed to the party of the first part herein by the party of the second part herein by deed of even date herewith and about to be recorded. This mortgage is a purchase money mortgage given to secure part of the purchase price of the said conveyance.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, and remainder and remainders, rents, issues and profits thereof. And also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances: To Have and to Hold the above granted and described premises, with the appurtenances, unto the said party of the second part, his executors, adminis-

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Exhibit D-1.

trators or assigns, to his own proper use, benefit and behoof forever. Provided Always, and these presents are upon this express condition, that if the said party of the first part, or its successors shall well and truly pay unto the said party of the second part, their heirs or assigns, the said sum of money mentioned in the condition of said bond or obligation, and the interest thereon, at the time and times, and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine and be void. And the said party of the first part for itself and its successors does covenant and agree to pay unto the said party of the second part, their heirs or assigns, the said sum of money and interest, as mentioned above and expressed in the conditions of the said bond. And It Is Also Agreed, by and between the parties to these presents, that the said party of the first part, its successors and assigns, shall and will keep the buildings erected, and to be erected, upon the lands above conveyed, insured against loss or damage by fire, by insurers, and in an amount approved by the said party of the second part, his heirs, executors, administrators or assigns, and assign the policy and certificates thereof to the said party of the second part; and in default thereof, it shall be lawful for the said party of the second part to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, payable on demand, with interest at the rate of six per cent. per annum, from the time of payment of such premium or premiums.

Exhibit D-1.

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

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

by EDWARD PETTI,
President.
(Corporate Seal)

Signed, Sealed and Delivered
in the presence of
Alexander Bassin.

Attest:

Mary Petti,
Secretary.

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Exhibit D-1.

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

10 Be It Remembered, That on this twenty-first day
 of September in the year of our Lord One Thousand
 and Nine Hundred and Twenty-seven, before me,
 the subscriber, an Attorney at Law, personally ap-
 20 peared May Petti, who, being by me duly sworn on
 his oath, says that she is the Secretary of the Pet-
 ti Construction Co. the mortgagors named in the
 within instrument; that Edward Petti is the
 President of said corporation; that deponent well
 knows the corporate seal of said corporation; and
 the seal affixed to said Instrument is such corpor-
 ate seal and was thereto affixed, and said Instru-
 ment signed and delivered by said President, as
 20 and for his voluntary act and deed and as and for
 the voluntary act and deed of said corporation, in
 presence of deponent, who thereupon subscribed
 his name thereto as witness.

Secretary.

Sworn and subscribed before me
 at the date aforesaid.
 Alexander Bassin,
 An Attorney at Law
 of New Jersey.

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Received in the office October 5th, A. D., 1927
 at 2:43 P. M. No. 90.

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Exhibit D-1.

Office of

REGISTER OF DEEDS AND MORTGAGES

Essex County, New Jersey.

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

I, Howard S. Dodd, Register of Deeds and Mortgages of the County of Essex, State of New Jersey, do hereby certify that the foregoing is a true and correct copy of the record of a certain mortgage made by Petti Construction Co. to Aaron Weinberg and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book I-62 of Mortgages for said County on pages 350-352. 10

In Testimony Whereof, I have hereunto set my hand and official seal this 10th day of July, A. D., 1929. 20
 (Seal)

HOWARD S. DODD,

Register of Deeds and Mortgages.

Endorsed: Recorded October 5th, 1927 in Book I-62 of Mortgages, Pages 350-352.

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Exhibit D-2.

Know all Men by these Presents That I, Aaron Weinberg and Sarah Weinberg, his wife, of the Town of Irvington, parties of the first part; in consideration of the sum of One Dollar and other good and lawful money of the United States of America, to them in hand paid by Meyer Schwartz, of the City of Newark, party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over and by these presents do grant, bargain, sell, assign, transfer and set over unto the said party of the second part, his Executors, Administrators or Assigns a one-third interest in a certain Indenture of Mortgage bearing date the twenty-first day of September, One Thousand and Nine Hundred Twenty-seven, made by Petti Construction Co., a corporation of the State of New Jersey, on lands in the City of Newark, to secure the payment of the sum of Nine Thousand Five Hundred and Forty Dollars (\$9540.) which mortgage is recorded on the 5th day of October 1927 in the Essex County Registers Office number 90.

It is intended by this assignment to convey a one-third interest in said mortgage only.

Together with the bond or obligation therein described, and the money due and to grow due thereon, with interest. To Have and to Hold the same unto the said party of the second part his executors, administrators or assigns forever subject only to the proviso in the said Indenture of Mortgage mentioned: And do hereby make, constitute, and appoint the said party of the second part; their true and lawful

Exhibit D-2.

attorney, irrevocable, in their name, or otherwise, but at his proper costs and charges, to have, use and take all lawful ways and means for the recovery of all the said money and interest; and in case of payment, to discharge the same as fully as they might or could do if these presents were not made: do hereby covenant, promise and agree, to and with the said party of the second part, that there is now due and owing upon the said Bond and Mortgage the sum of Nine Thousand Five Hundred and Forty Dollars (\$9540.) 10

In Witness Whereof, have hereunto set our hands and seals the 24th day of October, in the year of our Lord one thousand nine hundred and twenty-seven.

AARON WEINBERG (LS) 20
SARAH WEINBERG (LS)

Signed, Sealed and Delivered
in the presence of
Alexander Bassin.

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Exhibit D-2.

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

10 Be it Remembered that on this 24th day of October in the year of our Lord One Thousand Nine Hundred and Twenty-seven, before me, the subscriber, an attorney-at-law of the State of New Jersey, personally appeared Aaron Weinberg and Sarah Weinberg, his wife, who, I am satisfied, are the assignors mentioned in the within Instrument to whom I first made known the contents thereof, and thereupon they acknowledged that, they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

20 And the said Sarah Weinberg, being by me privately examined separate and apart from her said husband, further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, freely, without any fear, threats or compulsion of said husband.

ALEXANDER BASSIN,
 An Attorney at Law of New Jersey.

30 Endorsed: Received in the Register's Office of the County of Essex, N. J. on the 26th day of October A. D. 1927, at 11:39 o'clock, in the forenoon and Recorded in Book 194 of Assignments of Mortgages for said County, on page 29.

Howard S. Dodd,
 Register.

Exhibit D-3.

Know all Men by these Presents, That I, Meyer Schwartz, of the City of Newark, in the County of Essex and State of New Jersey, party of the first part, in consideration of the sum of One Dollar and other good and valuable considerations lawful money of the United States of America, to me in hand paid by Atlantic Construction Company, a corporation of the State of New Jersey, having its principal office in the City of Newark, in the County of Essex and State of New Jersey, party of the Second Part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer, and set over unto the said party of the second part, its successors and assigns, an undivided one-third interest in a certain Indenture of Mortgage bearing date the twenty-first day of September One Thousand Nine Hundred and Twenty-seven made by Petti Construction Co. a corporation, on lands in the City of Newark, Essex County, New Jersey, to secure the payment of the sum of Ninety Five Hundred and Forty (\$9540.00) Dollars which mortgage is recorded in the Register's office of the County of Essex in Book I-62 of Mortgages, page 350, which mortgage was recorded in said Register's Office in Book B 63 of Mortgages aforesaid, on page 378, and re-recorded in said Register's Office on June 22, 1928. said mortgage having been made to Aaron Weinberg, and a one-third interest in said mortgage having been assigned to me by said Aaron Weinberg, by assignment of mortgage dated October 24, 1927, and recorded in said Register's Office in Book 194

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Exhibit D-3.

of Assignments of Mortgages for said County, on page 29.

10 Together with the bond or obligation therein described, and the money due and to grow due thereon, with the interest. To Have and to Hold the same unto the said party of the second part, its successors or assigns for its and their own use and benefit forever, subject only to the proviso in the said Indenture of Mortgage mentioned: And I do hereby make, constitute, and appoint the said party of the second part my true and lawful attorney, in my name, or otherwise, but at its proper costs and charges, to have, use and take all lawful ways and means for the recovery of all the said money and interest; and in case of payment, to discharge
20 the same as fully as I might or could do if these presents were not made: And I do hereby covenant, promise and agree, to and with the said party of the second part, that there is now due and owing upon the said Bond and Mortgage the sum of Ninety-five Hundred and Forty (\$9540.00) Dollars, and on said one-third interest the sum of Thirty-one Hundred and Eighty (\$3180.00) Dollars besides interest at the rate of six per cent per annum from September 21, 1927.

30 In Witness Whereof, I have hereunto set my Hand and Seal the twenty-second day of June in the year of Our Lord One Thousand Nine Hundred and Twenty-eight.

MEYER SCHWARTZ (L.S.)

Signed, Sealed and Delivered
in the presence of
Antoinette E. Jock.

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Exhibit D-3.

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

Be it Remembered, That on this 22nd day of June in the year of Our Lord One Thousand Nine Hundred and Twenty-eight before me the subscriber, a Notary Public of New Jersey, personally appeared Meyer Schwartz who, I am satisfied is the assignor in the within Deed of Assignment named; and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed: 10

ANTOINETTE E. JOCK,
 Notary Public of N. J.

Endorsed: Received in the Register's Office of the County of Essex, N. J. on the 23rd day of June A. D., 1928, at 11:47 o'clock, in the forenoon, and recorded in Book 200 of Assignments of Mortgages for said County, on pages 50-51. 20

Howard S. Dodd,
 Register.

Exhibit D-4.

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

Meyer Schwartz being duly sworn according to law on his oath deposes and says:

That he is the holder of a one-third interest in a certain mortgage made by the Petti Construction Co. a corporation, to Aaron Weinberg, dated September 21, 1927, covering premises in the City of Newark, County of Essex and State of New 40

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Exhibit D-4.

Jersey, to secure the payment of the sum of Ninety-five Hundred and Forty (\$9540.00) Dollars, which mortgage was recorded in the Essex County Register's Office in Book I 62 of Mortgages for said County, on page 350, which mortgage was re-recorded in said Register's Office in Book B 63 of Mortgages aforesaid, on page 378, and re-recorded in said Register's Office on June 22, 1928, a one-third interest in said mortgage having been assigned by Aaron Weinberg to deponent by assignment of mortgage dated October 24, 1927, and recorded in the Essex County Register's Office in Book 194 of Assignments of Mortgages for said County, on page 29, which one-third interest in said mortgage, and the bond accompanying, deponent is about to assign to the Atlantic Construction Company, a corporation.

Deponent further says that he is the sole and unconditional holder of said one-third interest in said mortgage, and that he has not heretofore sold, assigned, transferred, hypothecated or disposed of any interest therein, and that he has the sole and absolute right to make the aforesaid assignment; that the full sum of \$9540.00 is due on said mortgage, and the sum of \$3180.00 on the one-third interest in said mortgage, besides interest thereon at the rate of six percent per annum, from September 21, 1927, and that there is no plea, counterclaim, set-off or defense to the payment of the same.

Deponent further says that at the time that he took an assignment of said one-third interest in said mortgage from Aaron Weinberg on October 24, 1927, he had no notice of knowledge whatso-

Exhibit D-4.

ever, either directly or indirectly, or express or implied, as to the execution of a postponement of lien of said mortgage by Aaron Weinberg to Joseph Reinfeld dated October 10, 1927, and which was not recorded until November 12, 1927 in Book 96 of Releases of Mortgages page 446.

Deponent further says that he makes this affidavit of his own personal knowledge, and for the purpose of inducing the said Atlantic Construction Company to accept an assignment of said one-third interest in said mortgage, and advance the consideration therefor, well knowing that the Atlantic Construction Company relies on the statements herein contained. 10

MEYER SCHWARTZ

Sworn and subscribed to before me 20
this 22nd day of June, 1928.

Antoinette E. Jock,
A Notary Public of N. J.

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Conclusions of Vice-Chancellor.

Filed Jan. 14, 1931.

IN CHANCERY OF NEW JERSEY.

10	Between JOSEPH REINFELD, Complainant,	}	Memorandum (Not for Print).
20	and PETTI CONSTRUCTION COMPANY, a corporation, and Atlantic Construction Company, a cor- poration, Defendants.		

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

MR. PHILIP J. SCHOTLAND, for complainant.

MESSRS. LEBER & RUBACK and MR. DAVID LITWIN, for Atlantic Construction Company.

30 CHURCH, V. C.

The facts in this case are as follows:

40 Complainant in this case seeks to foreclose a mortgage which was executed on October 10, 1927, by defendant, Petti Construction Company, to him, to secure a loan of \$70,000. This mortgage was a construction mortgage, the money all going toward the erection of an apartment house on the mortgaged premises. The Petti Construction Com-

Conclusions of Vice-Chancellor.

pany did not defend this suit, and no one disputes the validity of complainant's mortgage nor the amount due on it. The dispute in this case arises between complainant and an assignee of a one-third interest in a \$9,500. purchase money mortgage which was executed by the Petti Construction Company and recorded prior to the execution of complainant's mortgage. The mortgagee of record of this mortgage was one Aaron Weinberg. There is no dispute, however, that he only had a one-third beneficial interest in this mortgage, and that Louis Angert and Meyer Schwartz each had a one-third beneficial interest also. This \$9,500. mortgage was postponed to the lien of the \$70,000 mortgage on the same day that the latter mortgage was executed. Aaron Weinberg, as record holder, alone signed the postponement. However, Louis Angert and Mayer Schwartz were both present at the execution of this postponement. On October 25, 1927, fifteen days after the execution of the postponement, Aaron Weinberg executed an assignment to Mayer Schwartz of the one-third interest in the mortgage of which the said Mayer Schwartz was the beneficial owner. This assignment was recorded on October 26, 1927. The postponement of mortgage which Weinberg executed on October 10, 1927, was not recorded until November 12, 1927. This delay occurred due to the fact that the paper was mixed in with other papers in the file. Complainant's attorney thought it had been put on record until some one informed him it was not. He then found it in his file and immediately recorded it. On June 22, 1928, Mayer Schwartz assigned his one-third interest in this \$9,500. mortgage to the defendant, Atlantic Construction Company, which assignment was record-

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Conclusions of Vice-Chancellor.

ed the same day. The attorney who acted for the Atlantic Construction Company in this matter made a search before he took the assignment, and admitted on the witness stand that he discovered the postponement of October 10, 1927, executed by Aaron Weinberg.

10 On these facts the Atlantic Construction Company claims a priority over complainant's mortgage to the extent of its one-third interest in the \$9,500. mortgage.

The fact at issue is whether Schwartz, the assignor of the Atlantic Construction Company, knew of the execution and delivery of the postponement by Weinberg when he took his assignment; also whether the Atlantic Construction Company had actual knowledge of the postponement. Schwartz, the assignor to defendant and witness for it, testified that he was not present when the postponement was signed by Weinberg. However, Weinberg and others all testified that Schwartz was present when Weinberg signed the postponement. I shall, therefore, find, as a matter of fact, that he was present. Notice to him was notice to the defendant. See *Losey v. Simpson*, 11 N. J. Eq. 246, at page 251, where Chancellor Williamson held that notice to an agent, attorney, or counsel of a purchaser, is constructive notice to their principal. Also, *Willink v. The Morris Canal and Banking Company*, 4 N. J. Eq. 377, at page 404.

30 The assignee, Atlantic Construction Company, also had actual notice of the postponement signed by Weinberg, this fact being testified to by its solicitor, Mr. Litwin, who stated that he made a search of the records before accepting the assign-

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Final Decree.

ment on behalf of his client and found on record the postponement of the lien of the assigned mortgage to the lien of the complainant's mortgage.

I have, therefore, advised a decree that the complainant's mortgage is a prior lien to the rights of the defendant, Atlantic Construction Company.

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Final Decree.

Filed Nov. 5, 1930.

IN CHANCERY OF NEW JERSEY.

Between

JOSEPH REINFELD,
Complainant,

and

PETTI CONSTRUCTION COMPANY,
a corporation, *et als.*,
Defendants.

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On Bill, &c.

Final Decree.

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This cause coming to be heard in the presence of Philip J. Schotland, solicitor of the complainant, and David M. Litwin, Esquire, and Messrs. Leber and Ruback, solicitors for and of counsel with defendant, Atlantic Construction Company, a New Jersey corporation, and the Court having examined the pleadings, and having taken proofs orally, in open court, and heard and considered the arguments of counsel thereon; and it appear-

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Final Decree.

ing to the satisfaction of the Court that the mortgage made by the Petti Construction Company, a corporation, on October 10th, 1927, in the sum of \$70,000.00, is superior to the lien of a mortgage made by the Petti Construction Company, a New Jersey corporation, to Aaron Weinberg, on September 21st 1927, in the sum of \$9,540.00, in which
 10 a one-third interest was assigned by mesne assignments to the Atlantic Construction Company, a New Jersey corporation, by assignment dated June 22nd, 1928, recorded June 23rd, 1928, in Book 200 of Assignments of Mortgages for Essex County, on page 50, which said mortgage was postponed to the lien of complainant's mortgage by postponement dated October 10th, 1927, and recorded November 12th, 1927, in Book 96 of Postponements of
 20 Mortgages for Essex County, on page 444, as prayed for by him in his Bill of Complaint filed herein.

It is, on this 5th day of November, Nineteen Hundred and Thirty, ORDERED, ADJUDGED AND DECREED, that the mortgage of the complainant Joseph Reinfeld, made by the Petti Construction Company, a corporation of New Jersey, on October 10th, 1927, in the sum of \$70,000.00, is superior to the lien of the
 30 one-third interest of the Atlantic Construction Company in the mortgage made by the Petti Construction Company to Aaron Weinberg on September 21st, 1927, in the sum of \$9,540.00, which said mortgage was recorded on October 5th, 1927, in Book I-62 of mortgages for Essex County, on page 350, and

It is further ORDERED that the sum of \$4,000.00 heretofore deposited by complainant by a consent

Final Decree.

order of this Court, made September 25th, 1929, with Philip J. Schotland, one of the Special Masters of this Court, which said deposit was made to secure payment unto the defendant, Atlantic Construction Company, of its said interest or its said share, therein, be turned over to the complainant in the above-entitled cause after fifteen days from the date hereof. 10

E. R. WALKER,
C.

Respectfully Advised,
ALONZO CHURCH,
V. C.

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Notice of Appeal.

Filed Nov. 15, 1930.

IN CHANCERY OF NEW JERSEY.

10	Between	}	On Bill, etc. Notice of Appeal.
	JOSEPH REINFELD, Complainant,		
	and		
	PETTI CONSTRUCTION COMPANY, a corporation, <i>et als.</i> , Defendants.		

20 To: JOSEPH REINFELD, the above named Complainant, and PHILIP J. SCHOTLAND, ESQ., his Solicitor.

The defendant Atlantic Construction Company, a corporation, hereby appeals from the final decree made in the above entitled cause on November 5, 1930 and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Said decree was made by the Chancellor on the advice of Vice Chancellor Alonzo Church.

30 Dated: November 14, 1930.

DAVID M. LITWIN,
Solicitor for and of Counsel with
the defendant Atlantic Construction
Company, a corporation.

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

40 DAVID M. LITWIN,
Of Counsel with defendant Atlantic
Construction Company, a corporation.

Petition of Appeal.

complainant Joseph Reinfeld made by the Petti Construction Company, a corporation of New Jersey on October 10, 1927, in the sum of \$70,000.00 is superior to the lien of the one-third interest of the defendant-appellant, Atlantic Construction Company, in the mortgage made by the Petti Construction Company to Aaron Weinberg on September 21, 1927 in the sum of \$9540.00, which said mortgage was recorded on October 5, 1927 in Book I-62 of Mortgages for Essex County on page 350; and further adjudges and decrees that the sum of \$4000.00 heretofore deposited by the complainant by consent order of said Court of Chancery made on September 25, 1929, with Philip J. Schotland, one of the Special Masters of said Court of Chancery, which said deposit was made to secure payment unto the defendant-appellant Atlantic Construction Company of its said interest or its said share therein, be turned over to the complainant in the above entitled cause after fifteen days from the date of said decree.

And your petitioner appeals from the said final decree of the Chancellor which adjudges and decrees as aforesaid upon the ground that it is erroneous in that:

30 A. It adjudges that the mortgage of the complainant Joseph Reinfeld made by the Petti Construction Company, a corporation of New Jersey on October 10, 1927 in the sum of \$70,000.00 is superior to the lien of the one-third interest of the defendant-appellant Atlantic Construction Company in the mortgage made by the Petti Construction Company to Aaron Weinberg on September 21, 1927, in the sum of \$9540.00, recorded on October 5, 1927 in Book I-62 of Mortgages for Essex County on page 350, when in fact said one-third

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Petition of Appeal.

interest of the defendant-appellant Atlantic Construction Company in the aforesaid mortgage of \$9540.00 was prior and superior to the lien of the complainant's mortgage mentioned in the sum of \$70,000.00.

B. It decrees that the sum of \$4,000.00 deposited by complainant with Philip J. Schotland, one of the Special Masters of said Court of Chancery should be turned over to the complainant in the above entitled cause when said decree should have adjudged that so much of said deposit of \$4,000.00 should be paid to the defendant-appellant Atlantic Construction Company as is necessary to satisfy the amount due upon its one-third interest in the aforesaid mortgage. 10

C. The complainant's bill of complaint should have been dismissed insofar as this defendant-appellant is concerned and the defendant-appellant should have prevailed upon its answer and counterclaim and a decree should have been entered in its favor in accordance with the prayer of its counterclaim. 20

Petitioner therefore prays that the said final decree of the said Chancellor may be in all things reversed, set aside and for nothing holden and that your petitioner may have such other relief in the premises as to this court may seem proper. 30

DAVID M. LITWIN,
LEBER & RUBACK,
Solicitors for and of Counsel
with Appellant Atlantic
Construction Company.

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

New Jersey Court of Errors and Appeals

Between

JOSEPH REINFELD,
Complainant-Respondent,

and

PETTI CONSTRUCTION COM-
PANY, a corporation, *et als.,*
Defendants.

On Appeal of ATLANTIC CON-
STRUCTION COMPANY,
Defendant-Appellant.

On Bill, &c.

*On Appeal
from Court
of Chancery.*

BRIEF OF COMPLAINANT-RESPONDENT.

Facts.

On October 10, 1927 defendant Petti Construction Company made and executed a bond and mortgage (Exhibits C. 1 and C. 2, State of Case, pp. 93-112) to Joseph Reinfeld, complainant-respondent to secure a loan of \$70,000.00 made by Reinfeld to the Petti Company. This mortgage was a construction mortgage, and all the money advanced under it went towards the erection of an apartment house on the mortgaged premises. These facts were not disputed and the Petti Company did not defend this suit, nor is it a party to this appeal, nor does anyone dispute the validity of or the amount due to complainant on his mortgage.

The dispute in this case arises between complainant and defendant-appellant, Atlantic Construction Company, which is an assignee of a one-third interest in a \$9,540.00 purchase money mortgage (Exhibit D. 1, State of Case, pp. 116-

123) which was also a lien on the mortgaged premises. The date of this \$9,540.00 mortgage is September 21, 1927 and it was recorded October 5, 1927. It was made by the Petti Company to Aaron Weinberg. Weinberg and two other men, Louis Angert and Meyer Schwartz had previously owned the property covered by these mortgages as partners, but the title had been in Weinberg's name only. Meyer Schwartz explains the reason for this:

“Q Well, how did it happen that the mortgage was put in Mr. Weinberg's name alone? A Because when we purchased the property I acted as a broker, and therefore could not be one of the owners, in order to participate in getting a commission on the sale of the property to Mr. Weinberg and ourselves.

Q So you put the title to the property, when you bought it, in Weinberg's name alone? A That is right.

Q And when you arranged to sell it to Petti Construction Company, you had Weinberg alone give the deed? A That is right?

Q And you had Weinberg alone take back the mortgage? A That is right” (State of Case, p. 79, l. 37 to p. 80, l. 13).

It is not disputed that Weinberg only held the legal title to the whole mortgage, and that Weinberg, Angert and Schwartz each had an equal one-third beneficial interest in the mortgage. The Petti Construction Company did not invest any cash in the purchase of the land and the purchase money mortgage was for the full amount of the purchase price. In order to create a value for their mortgage, Weinberg, Angert and Schwartz negotiated for the \$70,000 construction loan and promised to postpone their mortgage to that mortgage. On October 10, 1927, when the Petti Company executed and delivered the \$70,000.00 mortgage to Reinfeld, Weinberg

as holder of record of the \$9,540.00 mortgage executed and delivered the postponement of the lien of the \$9,540.00 mortgage to the lien of the \$70,000.00 (Exhibit C. 3, State of Case, pp. 113-115) with the consent of his beneficial partners and in the presence of Meyer Schwartz. Fifteen days later, on October 25, 1927 Weinberg executed respectively to Schwartz and Angert assignments of a one-third interest in the mortgage. These assignments were recorded on October 26, 1927 (Exhibit D. 2, State of Case, pp. 124-126). The postponement which Weinberg had executed on October 10, 1927 in favor of Reinfeld was not recorded until November 12, 1927. The delay was due to the fact that the paper became mixed with other papers in the file. Complainant's attorney thought it had been recorded, until someone informed him it had not been. He then looked into the file, discovered the postponement, and immediately recorded it (State of Case, p. 67, ll. 7-19). On June 22, 1928 Schwartz assigned his one-third interest in this \$9,540.00 mortgage to the defendant-appellant the Atlantic Construction Company, which assignment was recorded the next day (Exhibit D. 3, State of Case, pp. 127-129). The attorney who acted for the Atlantic Construction Company in this matter made a search before he took the assignment, and discovered the postponement of October 10, 1927 executed by Aaron Weinberg (State of Case, p. 88, ll. 25-38). He thereupon procured from Schwartz an affidavit:

“Deponent further says that at the time that he took an assignment of said one-third interest in said mortgage from Aaron Weinberg on October 24, 1927, he had no notice of knowledge whatsoever, either directly or indirectly, or express or implied, as to the execution of a postponement of lien of said mortgage by Aaron Weinberg to Joseph

Reinfeld dated October 10, 1927, and which was not recorded until November 12, 1927 in Book 96 of Releases of Mortgages, page 446.

Deponent further says that he makes this affidavit of his own personal knowledge, and for the purpose of inducing the said Atlantic Construction Company to accept an assignment of said one-third interest in said mortgage, and advance the consideration therefor, well knowing that the Atlantic Construction Company relies on the statements herein contained.

MEYER SCHWARTZ

Sworn and subscribed to before
me this 22nd day of June,
1928.

ANTOINETTE E. JOCK,
A Notary Public of N. J."

(Exhibit D. 4, State of Case, p. 130, l. 35;
p. 131, l. 24.)

This is a suit whereby complainant Reinfeld is foreclosing his mortgage which he claims is a first lien. The Atlantic Construction Company disputed this to the extent of its one-third interest in the \$9,540.00 mortgage which it claimed was a superior lien to complainant's mortgage; and sought by counter-claim to foreclose its one-third interest as if it were a first mortgage (State of Case, pp. 10-21). A motion was made to strike out the answer and counter-claim and was denied on February 19, 1929 (State of Case, pp. 36-37). The cause went to final hearing and a final decree for complainant adjudging his mortgage to be prior to defendant's one-third interest was entered, from which this appeal has been taken.

ARGUMENT.**I.**

Appellant's assignor knew of and was bound by the postponement executed by Weinberg.

The single disputed factual question in this case is whether Meyer Schwartz knew of the postponement of the whole \$9,540.00 mortgage which Weinberg executed on October 10, 1927. The learned Vice-Chancellor who heard the testimony and saw the witnesses, and their demeanor on the stand, stated orally at the conclusion of the hearing:

“The Court: Now, I will decide the question of fact as to whether Schwartz was present when these papers were signed?

Mr. Schotland: Yes.

The Court: That I will decide now and say that he was present; and I will also say that I do not believe a word he said on the witness stand. His testimony was absolutely contradictory, to my mind, absolutely untruthful; and I might also say that I am entirely satisfied with Miss Baker's testimony; I think she is telling the truth exactly” (State of Case, p. 90, ll. 2-16).

It is submitted that such a finding was justified.

Every bit of evidence in the case pointed to Schwartz' presence when the postponement was executed and his knowledge of and consent to it. Mr. Popik, the attorney, who handled the transaction for complainant, testified he was there.

“Q Have you any doubt whatever as to whether Schwartz was present at that conversation at the time the postponement was executed? A No doubt whatever” (State of Case, p. 62, ll. 21-24).

Mr. Weinberg testified to the same effect:

“Q You are sure Mr. Schwartz was present? A Positive.

Q When that postponement was signed?

A Positive” (State of Case, p. 54, ll. 7-10).

Miss Elizabeth A. Baker, the Notary, who witnessed the signature and took Weinberg’s acknowledgment testified:

“Q Do you know who were present when Mr. Weinberg executed that postponement of mortgage? A Yes, sir, Mr. Weinberg, Mr. Angert and Mr. Schwartz were present, and Mr. Popik.

Q All three were present? A Yes, sir” (State of Case, p. 71, ll. 31-35).

Edward Petti, president of the mortgagor corporation testified that when he signed the bond and mortgage on October 10, 1927 Mr. Popik told him the \$70,000.00 mortgage was to be a first lien on the premises.

“Q Well, when was the first time that there was talk that if the \$70,000 mortgage is granted by Reinfeld, it is to be a first mortgage? A Well, Mr. Popik told me, that is all.

Q When did he tell you that? A Well, he told me—

Q Was that before you signed? A —several times.

Q Was that before you signed it? A When I signed it.

Q At the same time when you signed it? A Yes” (State of Case, p. 84, ll. 21-33).

Schwartz himself admitted being present on the occasion of Petti’s signing the \$70,000.00 mortgage.

“Q Were you present when Petti signed the mortgage for \$70,000.00? A Yes” (State of Case, p. 80, ll. 31-32).

The instruments were dated and executed the same day; the transactions were closed at one

time; the nature of the deal was such that there can be no question of the fact that it was always understood and intended by all the parties, including Schwartz, that the lien of the \$9,540.00 mortgage should be postponed to the \$70,000.00 mortgage and that that was done on October 10, 1927 in the presence and with the consent of everybody.

In the face of all this testimony Schwartz' unsupported denial was, it is submitted, properly disregarded by the learned Vice-Chancellor. It is to be especially noted in this connection on the question of credibility and weight of the evidence that Schwartz had by his own testimony indicated to the Court his lack of reliability. He had testified that he had originally acted as a broker for the sale of this land and earned and collected a commission for that sale from the original owner by concealing from him that he, Schwartz was in fact one of the buyers and that the deed had been taken in Weinberg's name to conceal his true position in the sale (State of Case, p. 79, l. 36 and p. 80, l. 14).

It is submitted that the finding of the learned Vice-Chancellor that Schwartz knew of and consented to the postponement is correct.

II.

The Atlantic Construction Company knew of this postponement prior to its purchase of the one-third interest in the mortgage.

On this fact there is no dispute. Mr. Litwin, attorney for the company, testified he made a search and discovered the postponement (State of Case, p. 88, ll. 25-38). He saw its date October 10, 1927; he saw that when it was executed Weinberg was the sole record owner of

the mortgage, and that after the postponement was executed the assignment to Schwartz was made. His clear understanding of the factual situation is proven by the affidavit which he had Schwartz sign when he closed the assignment transaction as attorney for the Atlantic Construction Company.

“Deponent further says that at the time that he took an assignment of said one-third interest in said mortgage from Aaron Weinberg on October 24, 1927, he had no notice of knowledge whatsoever, either directly or indirectly, or express or implied, as to the execution of a postponement of lien of said mortgage by Aaron Weinberg to Joseph Reinfeld dated October 10, 1927, and which was not recorded until November 12, 1927 in Book 96 of Releases of Mortgages, page 446.

Deponent further says that he makes this affidavit of his own personal knowledge, and for the purpose of inducing the said Atlantic Construction to accept an assignment of said one-third interest in said mortgage, and advance the consideration therefor, well knowing that the Atlantic Construction Company relies on the statements herein contained.

MEYER SCHWARTZ

Sworn and subscribed to before
me this 22nd day of June,
1928.

ANTOINETTE E. JOCK,
A Notary Public of N. J.”

(State of Case, p. 130, l. 36; p. 131, l. 23.)

Notice to him as agent was notice to the defendant Atlantic Construction Company on whose behalf he made the search and procured the affidavit which set forth the true facts. This was decided by Chancellor Williamson in *Losey v. Simpson*, 11 N. J. Eq. 246 at 251:

“Notice to an agent, attorney, or counsel of a purchaser is constructive notice to their principal.”

by Chancellor Pennington in *Willink v. The Morris Canal and Banking Co.*, 4 N. J. Eq. 377 at 404:

“With the information (the existence of a prior mortgage) given to this agent, the defendant cannot set up, with any fair pretence, a want of notice of complainant’s mortgage.”

and by Chancellor Green in *Smallwood v. Lewin*, 15 N. J. Eq. 60 at 63:

“Notice to an agent is notice to his principal.”

All these statements were made in cases such as this involving priorities of instruments which were within the scope of the recording acts. The cases cited by defendant-appellant do not apply to this situation as they all deal with a waiver by an attorney of substantial rights of his client. In the instant case no such thing is involved, nothing was waived; nothing surrendered. There is here no attempt to rely on any representation or promise made by the attorney or to bind his principal thereon; but merely an application of the rule that the knowledge of the agent who acts for the principal is the knowledge of the principal.

In this case there is therefore the fact proven by the existence of the affidavit (Exhibit D. 4) and the admission of Schwartz (State of Case, p. 75, ll. 27-37) that Mr. Litwin asked him about the postponement; namely, before the assignment there was full disclosure to everybody of the exact state of affairs.

It is submitted that the Atlantic Construction Company had actual notice that the Weinberg postponement was executed prior to the assignment to Schwartz.

III.

An assignee of a partial interest in a mortgage is subject to equities known both to him and his assignor.

The fact of actual notice to Schwartz the assignor and the defendant assignee of this equity of complainant to priority over the \$9,540.00 mortgage being established the question of law is: Can an assignee of a partial interest in a mortgage who actually knew the mortgage was postponed to one subsequently executed, and whose assignor actually knew the same fact, be prior to that mortgage to which its mortgage was postponed?

The answer to this question is found in the recording acts:

“All deeds or instruments of the nature or description following, * * * may be acknowledged or proved and then recorded * * * releases or postponements in which the intention to operate as a postponement or waiver of priority of lien of a * * * recorded mortgage or mortgages to the lien and operation of a mortgage or mortgages recorded, or to be recorded subsequent thereto, is plainly manifested” (Compiled Statutes of 1911 Ed. Sec. 21, p. 627).

“Every deed or instrument of the nature or description set forth in the twenty-first section of this act, shall, until duly recorded or lodged for record in said clerk’s office, be void and of no effect against subsequent judgment and creditors *without notice*, and against all subsequent bona fide purchasers and mortgages for valuable consideration, *not having notice thereof*, whose deed or mortgage shall have been first duly recorded; *provided, that such deeds or instruments shall be valid and operative, although not recorded, except as against such subsequent judgment creditors, purchasers and mort-*

gagees" (Compiled Statutes 1910 Ed. Sec 54, page 1553).

The effect of this legislation on this case is that the postponement was "valid and operative" against Schwartz, defendant's assignor, because he knew of it. Therefore the defendant cannot overcome the effect of the assignment by any reliance on the position of Schwartz. So also the postponement is "valid and operative" against this defendant because it too had notice thereof.

The decisions of this State are in accord with this interpretation put upon the statute that actual notice validates an instrument as to all persons with such notice as effectually as recording. Chancellor Pennington in *Willink v. The Morris Canal and Banking Co.*, 4 N. J. Eq. 377 at 403 refused to go into the question of proper recording after proof of actual notice:

"I deem it unnecessary to examine whether the mortgage was acknowledged or recorded according to law. That can only be important on the question of notice, and from the evidence the State of Indiana had sufficient notice in fact and independent of the record."

Chancellor Green in *Smallwood v. Lewin*, 15 N. J. Eq. 60 at 63 decided:

"The object of the laws requiring conveyances to be recorded is to prevent imposition on subsequent purchasers and mortgagees in good faith without notice of the prior conveyance, but not to protect them when they have such notice."

In the headnote to *Essex County National Bank v. Harrison*, 57 N. J. Eq. 91, a decision by Vice-Chancellor Pitney, the rule is laid down thus:

"the failure to so record simply deprives the holder of any benefit from the registry as a

matter of notice, and does not make the mortgage void as to purchasers or incumbrances with actual notice thereof."

In *Goldenstein v. Marlboro Construction Co. Inc.* (not yet officially reported), 145 Atl. 2, Vice-Chancellor Backes applies the same rule to judgment creditors:

"Our recording acts invalidate unrecorded, and, of course improperly recorded mortgages, only as to subsequent judgment creditors without actual notice of the mortgage. 2 Compiled Statutes 1910, p. 1553; and 3 Compiled Statutes 1910, p. 3414; *Brinton v. Scull*, 55 N. J. Eq. 747, 35 Atl. 843; *Majewski v. Greenberg* (N. J. Ch.) 136 Atl. 749."

In *Vredenburgh v. Burnet*, 31 N. J. Eq. 229 Vice-Chancellor Van Fleet held that a postponement which had never been recorded was valid against an assignee who had actual notice of such facts as to put him on inquiry as to the existence of the postponement. At page 233 he says:

"Notice of any part of the arrangement was sufficient, in my judgment, to put upon him the duty of seeking full information of the holder of the other mortgage, and, if he failed to perform it, and loss ensued, he must bear it as the consequences of his own fault. Whatever puts a party upon inquiry, amounts, in judgment of law, to notice, provided the inquiry became a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding. *Hoy v. Bramhall*, 4 C. E. Gr. 572."

The instant case is far stronger for the defendant assignee had actual notice not merely notice of facts sufficient to put it on inquiry.

There are decisions of the Court of Chancery and of this Court to the effect that an assignee

of a mortgage even without notice is bound by the notice of his assignor. *Conover v. Van Mater*, 18 N. J. Eq. 481 at 484, Chancellor Zabriskie:

“It is the established rule, that the assignee of a bond or mortgage takes them subject to all equities between the assignor and other parties, whether these equities be latent or not. Bonds and mortgages have never been placed upon the footing of commercial paper, and purchasers deal in them at their own risk.”

and *Hoagland v. Shampanore*, 37 N. J. Eq. 488 at 592 by Justice Reed for the Court of Errors and Appeals:

“The general rule is, that such an assignee, even if a bona fide taker stands in the steps of his assignor.”

Complainant, however, is not seeking to have this Court go so far, but merely to follow the rule that an assignee with notice is subject to those equities of which he has notice. The cases which were decided for the assignee and against the mortgagee in whose favor the postponement ran, all turn on the question of notice and are based on the fact that no notice actual or constructive was given to the assignee. The *New York Chemical Manufacturing Company v. Peck*, 6 N. J. Eq. 37, at 44, Chancellor Halsted says:

“On this question, I am strongly inclined to the opinion that the bona fide assignee of the mortgage first in execution and registry, *without notice of the agreement between the mortgagees*, has the better equity.”

Losey v. Simpson, 11 N. J. Eq. 246 at 254 Chancellor Williamson in speaking of the effect on an assignee of equities of third persons in a mortgage, which is the problem of the instant case says:

“To subject him to such an equity he must have express or constructive *notice* of it at the time of the assignment.”

In *New Jersey Discount Co. v. Telesca*, 101 N. J. Eq. 426, Vice-Chancellor Backes decided the assignee whose assignor had executed a postponement was not bound by it, because he found as a fact:

“Pietriela agreed in writing with the complainant to postpone his mortgage and then sold and assigned it to Bernz *who purchased without notice of the postponement. The agreement to postpone was not recorded.*”

In the cases cited by defendant-appellant the assignees who cut off equities had no notice of the existence of the equity. This is particularly apparent in *McMurtry v. Bowers*, 91 N. J. Eq. 317, 109 Atl. 361. In that case the Court of Chancery had declared all the assignees of a mortgage free from equities existing in the complainant. This Court reversed this decision as to two of the assignees on the ground that they knew of the existence of the equity.

“(1) Our examination of the case leads us to the conclusion that the decree so far as it relates to the Newark Trust Company was right, and should be affirmed. We do not agree, as will presently appear, with the result reached below as touching Rose and Prout. Notwithstanding this, however, the trust company is entitled to enforce its security under the rule that a bona fide purchaser for valuable consideration of a mortgage is protected against any latent equities in favor of third persons against the mortgagor. *Danbury v. Robinson*, 14 N. J. Eq. 213, 82 Am. Dec. 244.

(2) With respect to the defendants Rose and Prout, we reach a different result, for it is, of course, clear that Prout was fully aware of the complainant's claim, and we find that Rose was aware of it also; * * * Consequently, as Rose was not protected by the doctrine of bona fide purchaser, the mortgage in his hands was invalid as to

complainant. This being so, Prout was no better off as assignee, because he knew all that Rose did, and probably more."

This case is especially strong for complainant in that the notice to defendant was actual and not constructive. Defendant did not hear rumors of this postponement, no mere warning of the possibility of danger was given to it; its attorney searched the records and found the postponement. He saw when it was executed, who the parties were and what effect they sought to achieve. He knew he was buying a lawsuit, and that if he cut off complainant's priority he would be helping Schwartz, who knew all about the postponement, to work a fraud on complainant. In these circumstances, he took a course least calculated to clarify any doubts in his mind, if such existed, as to the real situation. He did not inquire of either of the parties to this postponement who could have and would have told him the truth, nor of the mortgagor, nor of the attesting witness and notary who took the acknowledgment, Miss Baker; but he confined himself to inquiry from Schwartz his assignor, the one person who would have a reason to mislead him, and who did in fact mislead him when he denied that he knew of the postponement. If this were a suit by defendant against its assignor Schwartz his misrepresentation would be the vital point; but the complainant cannot be bound by Schwartz' misrepresentations. To protect this defendant at the expense of the complainant is to protect Schwartz from having to make good for his misrepresentation to defendant and to force complainant to pay a claim to which defendant actually knew complainant was not subject.

It is submitted that even if defendant be regarded as an innocent party, his conduct in buy-

ing himself into the litigation, fully cognizant of all the facts, makes him the one upon whom the loss, if any, should properly fall.

IV.

The matter was not made *res judicata* by the decision on the motion to strike out the answer.

Defendant-appellant contends that the decision of Vice-Chancellor Berry refusing to strike the answer and counter-claim as sham and frivolous (State of Case, pp. 36-37) concluded the question and that at the final hearing the validity and correctness of the allegations and claims of the answer were settled in favor of the defendant under the doctrine of *res judicata*. That decision had the effect of letting the case go to final hearing. It was not a final determination of the matter and therefore no appeal could be taken from it. *Lully v. National Surety Co.* (not yet officially reported) 148 Atl. 762.

If that decision settled the case there was no use of any final hearing. The law has been well settled that denial of a motion to strike an answer does not act as *res judicata* of the validity of the answer at the trial.

In *Maurer v. Hahn* (not yet officially reported) 153 Atl. 482, this Court held that even though a decision striking the answer therein filed had been reversed on appeal and it had been held that the answer stated a sufficient defense, if proven; nevertheless if at the trial the proof was inadequate the trial court could properly direct a verdict for the plaintiff. The very same argument of *stare decisis* and *res judicata* as argued here was argued in that case, and it is submitted that case disposes of appellant's contention adversely to appellant.

CONCLUSION.

It is respectfully submitted therefore that for the reasons stated above the decree appealed from should be affirmed.

Respectfully submitted,

PHILIP J. SCHOTLAND,
Solicitor for and of Counsel with
Complainant-Respondent.

17
COROLLARY
The following are the consequences of the
theorem just proved. Let α and β be
any two angles which together with a
third angle form a triangle. Then
the sum of the two angles α and β
is less than two right angles.
THEOREM 17
If two lines are cut by a transversal
so that the alternate exterior angles
are equal, then the two lines are
parallel.

94 MAY. 7 1931

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

New Jersey Court of Errors and Appeals

Between

JOSEPH REINFELD,
Complainant,

and

PETTI CONSTRUCTION COM-
PANY, a corporation, *et als.,*
Defendants.

On Bill, &c.

BRIEF IN BEHALF OF DEFENDANT-APPELLANT, ATLANTIC CONSTRUCTION COMPANY.

The only issue of law in this case is as to the priority between complainant's mortgage and the defendant's one-third interest in a certain other mortgage executed and recorded prior to the execution and registry of complainant's mortgage. That priority which, under the Registry Acts, the defendant's mortgage, because of earlier registry, possessed and enjoyed over complainant's mortgage, was disturbed and denied by the Court below by giving certain force to an instrument or agreement of subordination. The legal soundness of such action is challenged by this appeal.

The question arises upon the complainant's bill to foreclose in which he asserted priority over the defendant's mortgage interest, the defendant's answer denying such asserted priority and its counter-claim of foreclosure, in which counter-claim the defendant, Atlantic Construction Company, asserted priority of its mortgage interest over complainant's mortgage. Vice-Chancellor Church, who sat below, adjudged by Final Decree that complainant's mortgage made

by Petti Construction Company on *October 10, 1927*, in the sum of \$70,000, is superior to the lien of the one-third interest of the defendant, Atlantic Construction Company, in the mortgage made by the Petti Construction Company to Aaron Weinberg on September 21, 1927, in the sum of \$9,540 and recorded on *October 5, 1927* (Final Decree p. 135). That Final Decree is the direct subject of this appeal.

All italics in this brief are our own unless otherwise stated.

The mortgage in which defendant, Atlantic Construction Company, has a one-third interest was made by Petti Construction Company to Aaron Weinberg for \$9,540 on September 21, 1927, and was recorded on October 5, 1927 (Exhibit D. 1, pp. 116-123). The same mortgagor executed to complainant a mortgage for \$70,000, encumbering the same premises, which mortgage was recorded on October 14, 1927 (Exhibit C. 2, pp. 101-112). Aaron Weinberg, the mortgagee named in the earlier of said two mortgages, held such earlier mortgage for the equal benefit of himself, Louis Angert and Meyer Schwartz. Complainant knew this when he agreed to lend to the Petti Construction Company \$70,000 on the security of the mortgage, Exhibit C. 2. The transaction including the placing of the complainant's mortgage and the disbursement of the complainant's funds was handled by complainant's attorney, a Mr. David Popik (p. 44). He knew before he took complainant's mortgage that the earlier Weinberg mortgage was the property of the three men, Weinberg, Angert and Schwartz (pp. 63, 64, 65, 66). See also the affidavit of said David M. Popik used by complainant on a motion to strike the answer of the

Atlantic Construction Company (p. 24). In that affidavit the witness Popik said:

“To induce me to procure and place such a mortgage loan they, the said Weinberg, Angert and Schwartz informed me of the fact that they were the holders of a mortgage on the land and that they would execute a postponement in favor of the mortgage that I would place. I hesitated considerably about placing the mortgage and they stated that their mortgage would be subsequent to the mortgage I would place, which was mentioned as the Reinfeld mortgage (I having mentioned the fact that I had a client by the name of Joseph Reinfeld who had money on hand and whose money I could invest in such a mortgage), and that they did not want to lose their money, and in the event of a foreclosure they would purchase the property and my client would be fully protected. After two or three interviews, at each of which all of three gentlemen were present, I agreed to place the mortgage for Joseph Reinfeld, the complainant, and upon examination of the title I was surprised to find that the mortgage appeared on the record in the name of Aaron Weinberg alone.” (See cross examination of Popik with respect to this affidavit pp. 65-66.)

Aaron Weinberg executed a postponement of mortgage (Exhibit C. 3, p. 113). That postponement bears date October 10, 1927, was acknowledged the same day before Popik's stenographer who was a notary and was kept off record by Popik until *November 12, 1927*.

Popik testified that although he knew that Schwartz and Angert were part owners of the Weinberg mortgage he didn't ask them to join in the execution of the postponement because he didn't think it was necessary, the mortgage being in Weinberg's own name, and because *“I did not think of paying any money until I was sure noth-*

ing had been done on it, no disposition had been made of the mortgage" (p. 66).

Popik quite promptly recorded complainant's mortgage but kept the postponement off record from October 10, 1927 until November 12, 1927, a period of thirty-three days. The question put to Popik (p. 67) erroneously states the period as two weeks but an actual comparison of dates shows that the period during which Popik kept the postponement unrecorded was a month and two days. He was asked why he hadn't recorded this mortgage and his answer was: "Well, Mr. Ruback, I cannot tell you why. It was simply a slip up. I wish I knew now why I did not" (p. 67, l. 10). A moment later when he was asked whether his delay was possibly due to his hope of securing a postponement signed by the three owners of the mortgage, his answer was in the negative, coupled with an explanation that he never knew the postponement had not been recorded until a lawyer called him up about the matter, that he then looked into his file and there discovered the postponement and immediately thereafter put it on record (p. 67, ll. 13-20).

On October 24, 1927 (nineteen days before the postponement of mortgage was recorded) Aaron Weinberg executed an assignment to Meyer Schwartz for the latter's one-third interest in and to the ninety-five-hundred-dollar mortgage. The assignment recites: "It is intended by this assignment to convey a one-third interest in said mortgage only" (Exhibit D. 2, p. 124). This assignment was acknowledged on October 24, 1927 and was recorded on October 26, 1927, seventeen days before the postponement of mortgage was recorded (p. 126). Thereafter the said Meyer Schwartz, on June 22, 1928, sold his one-third interest in said mortgage to the defendant,

Atlantic Construction Company and assigned that interest to said defendant by an assignment dated June 22, 1928, acknowledged that day and recorded on June 23, 1928 (Exhibit D. 3, pp. 127-129).

The president of the Atlantic Construction Company testified that it had no attorney in the transaction except that he had instructed Mr. David M. Litwin to draw an assignment of the mortgage (p. 50, l. 40). When asked on cross examination whether he had made a search his answer was in the negative. Mr. Litwin testified that he took care of the assignment upon instructions of Mr. Krasner and that he examined the records although he had not been asked so to do (p. 88, l. 10). Mr. Litwin's search disclosed the marginal endorsements appearing on Exhibit D. 1, p. 116. From those marginal endorsements there was disclosed to him, of record, the assignment from Weinberg to Schwartz and the *subsequently recorded postponement* by Weinberg in favor of complainant's mortgage. When Mr. Litwin observed that the subsequently recorded postponement bore a date earlier than the recording date of the assignment from Weinberg to Schwartz he made inquiry of Schwartz concerning those dates and took Mr. Schwartz' affidavit (Exhibit D. 4, p. 129). By that affidavit Schwartz avers that when he took his assignment from Aaron Weinberg he had no notice or knowledge whatever, either directly or indirectly, or expressed or implied, as to the execution of the postponement which bears the date October 10, 1927. *Litwin testified that all that the search disclosed to him was the fact of the assignment and the subsequently recorded postponement (p. 88) and that except as disclosure came to him from the county records and from the affidavit,*

Exhibit D. 4 (erroneously referred to in the record as Exhibit D. 3) he did not, at the time he took the assignment and paid the consideration therefor, know anything concerning the transaction of the postponement of the mortgage (p. 89, ll. 10-20).

Complainant's case consisted of the putting in of complainant's bond and mortgage, Exhibits C. 1 and C. 2, and the postponement, marked Exhibit C. 3. By complainant's own bill (paragraph 4 on p. 2 of State of Case) it affirmatively appeared that the assignment from Weinberg to Schwartz was recorded *before* the postponement from Weinberg in favor of complainant's mortgage. Complainant's counsel in his opening also stated the respective recording dates of the assignment and postponement (ll. 20-30, p. 41), and also stated that the legal issue involved was whether or not the record in the Register's office did not give actual as well as constructive notice to the Atlantic Construction Company because on the record book of the mortgage there was noted the "date that assignments were recorded and the date that a postponement was recorded, postponement of its lien" (l. 30, p. 42). Objection was made that complainant could not raise that question of law at final hearing because it had already been litigated before Vice-Chancellor Berry on a motion to strike the answer and counter-claim of the defendant, Atlantic Construction Company, and that such motion had been denied, the Court below holding that the answer and counter-claim, both of which set up the record situation, were sufficient in point of law, the one as a defense and the other as a cause of action (see order denying motion to strike, p. 36).

After Mr. Krasner had testified that he had not authorized Mr. Litwin to make any search, complainant called as his witness Aaron Weinberg, who, over objection (p. 53) was permitted to testify to conversations had with complainant and complainant's attorney, Popik, *not in the presence of anyone acting for the defendant, Atlantic Construction Company*, but in the alleged presence of its assignor Meyer Schwartz. Weinberg testified that he postponed the mortgage in Mr. Popik's office and that the defendant's assignor, Meyer Schwartz, was present and that it was Schwartz who had suggested the making of the postponement. On cross examination he was asked what was his interest or purpose in getting complainant to make his loan and he answered that by selling the land he would make a little profit on it (p. 57, l. 20). He at first denied that he had already sold the property (p. 57), then professed to have neither recollection nor knowledge (see Exhibit D. 1, p. 119, the \$9,500 mortgage. It recites that it is a purchase money mortgage and that the premises encumbered are the same as were conveyed to Petti Construction Company by Aaron Weinberg by deed of even date with said mortgage.)

Complainant's attorney Popik then testified that Schwartz was present when the postponement was signed by Weinberg (p. 61). Over objection (p. 61) he was permitted to testify to a conversation had by him with Messrs. Weinberg, Angert and Schwartz, *in the absence of anyone representing the Atlantic Construction Company*, in the course of which conversation Weinberg, Schwartz and Angert told him that they had a nine-thousand-dollar or a ninety-five-hundred-dollar mortgage which would be subsequent and that they said that they stood ready to

buy the property in case of foreclosure. Popik said that this assurance was quite a factor in inducing him to put the loan through but that he did not rely upon the enforceability of such an undertaking (p. 63). He also testified that he had been informed by one or more of the three men, Schwartz, Angert and Weinberg, "that there was a ninety-five-hundred and some odd dollar mortgage on this property which was owned by the three of them" (l. 30, p. 63); that he had examined the title and found the record title to the mortgage in Weinberg; that he had seen the original ninety-five-hundred-dollar mortgage half a dozen times (p. 64) but that he had knowledge of the fact that the three men owned the mortgage (l. 1, p. 66).

Popik was asked whether, when he placed his postponement on record, he had continued his search to that time. He answered that he didn't think he had, and that he didn't recall (l. 20, p. 67). He testified that the payments under the \$70,000 mortgage covered a considerable period of time extending over many months and that he had continued his county search down to a time before he paid out the money (l. 10, p. 69). Upon being asked how much money he paid out under complainant's loan after he learned of the assignment from Weinberg to Schwartz he said he paid out the balance "without hesitating, because I had procured—" (l. 16, p. 69). He paid out the major portion of complainant's loan after he knew of the assignment to Schwartz (l. 24, p. 69). Defendant's assignor, Meyer Schwartz, testified that at the time Weinberg assigned to him his one-third interest in the \$9,540 mortgage he did not know of any postponement executed by Weinberg in favor of complainant's mortgage; that he had never author-

ized Weinberg to execute any postponement of his interest in that mortgage; that it had never been discussed between him and Weinberg; that it had never been discussed or brought up in Popik's office; that neither he nor Weinberg in his presence ever told Reinfeld that their mortgage would be postponed to Reinfeld's mortgage, that it was never even brought up; that at Popik's office the subject of the postponement of the \$9,500 mortgage was not mentioned by Popik; that he never had any understanding with the mortgagor, Petti, that the \$9,500 mortgage was to be postponed, *and that he was never present in Popik's office when Weinberg signed the postponement* (pp. 73-74). Schwartz further testified that Weinberg had never mentioned anything about a postponement to him and that the first time he learned of the postponement was when it was mentioned to him by Mr. Litwin and that upon such inquiry from Litwin he furnished to Litwin the affidavit, Exhibit D. 4. Schwartz said that Angert was never in Popik's office with him. Angert was not produced by complainant as a witness nor his absence accounted for although Popik incorporated in his affidavit the affidavit of Louis Angert as Schedule B (p. 28). Nowhere in that affidavit does there appear any statement by Angert that he was present with Schwartz when the postponement was signed.

Edward Petti testified that Popik talked to him about the ninety-five-hundred-dollar mortgage and told him that the mortgage would have to be paid when construction would reach the roof (pp. 82-83). On cross examination Petti testified that although his arrangement with Popik was that complainant was to have a first mortgage, that was never discussed in the presence

of Schwartz and Weinberg (p. 83) and that the only one who mentioned the ninety-five-hundred-dollar mortgage in Popik's office was Weinberg (p. 84).

Vice-Chancellor's Finding of Fact.

Before the cause was quite finished Vice-Chancellor Church announced that he would decide the question of fact as to whether Schwartz was present "when these papers were signed" (p. 90). The Vice-Chancellor said:

"The Court: That I will decide now and say that he was present; and I will also say that I do not believe a word he said on the witness stand. His testimony was absolutely contradictory, to my mind, absolutely untruthful; and I might also say that I am entirely satisfied with Miss Baker's testimony; I think she is telling the truth exactly.

"Now, as to the law, you gentlemen submit briefs. The law now will be, he being present and knowing of this assignment, that is the first thing."

ARGUMENT.

Inasmuch as this case depends, in our judgment, mainly upon the effect of the Registry Acts, it is important to bear in mind only five recording dates, viz.:

1. OCTOBER 5, 1927— Recording mortgage from Petti Const. Co. to Aaron Weinberg (p. 122).
2. OCTOBER 14, 1927— Recording mortgage from Petti Const. Co. to complainant (p. 112).

3. OCTOBER 26, 1927— Recording assignment from Weinberg to Schwartz (p. 126).
4. NOVEMBER 12, 1927—Recording postponement from Weinberg to complainant (p. 115).
5. JUNE 23, 1928— Recording assignment from Schwartz to Atlantic Construction Co. (p. 129).

The controlling question in this case is whether the defendant Atlantic Construction Company at the time it took its assignment from Schwartz had notice, actual or constructive, that Schwartz' assignor had given a postponement of mortgage with the knowledge or assent of Schwartz. Such knowledge or assent on the part of our assignor, Schwartz, becomes wholly immaterial if in turn the Atlantic Construction Company had no notice when it took its assignment of the facts now found against its assignor, Schwartz. It is rather difficult for us to understand why the Vice-Chancellor rejected the testimony of Schwartz and characterized it as "absolutely contradictory." A reading of that testimony, both on direct and cross, exhibits all the earmarks of a lucid and highly probable narration. Nowhere in it do we find the slightest contradiction. Is it at all likely that that witness' testimony should be "absolutely contradictory" without leaving some traces of such contradictory character? A comparison between Schwartz' testimony and that of the

adverse witnesses, Popik and Weinberg, will very readily disclose where lie the contradictions and evasions. Weinberg's interest in the result of the suit is very manifest. He had undertaken to execute a postponement of mortgage without the consent of Schwartz who had a one-third interest therein. It was to Weinberg's advantage by his testimony to bind Schwartz to such postponement. Popik had negligently withheld the postponement from record for thirty-three days, becoming liable to his client for the resulting damage and it was therefore to his pecuniary advantage to avoid that liability and to accomplish by the result of the Chancery litigation that which he could have accomplished by the prompt recording of his postponement.

Assuming the Vice-Chancellor's aforementioned finding of fact to be correct, that finding does not aid the complainant, for the record is utterly barren of any notice to or knowledge on the part of the Atlantic Construction Company of those facts which bind its assignor (Schwartz) to the postponement of mortgage. The only evidence of notice of any kind is to be found in the testimony of our witness Litwin and it is upon Litwin's testimony alone that counsel for the complainant in the court below predicated his claim to a decree. That testimony resolves itself into this: Litwin, upon being instructed to draw an assignment for Schwartz' one-third interest, examines the county records and finds some marginal notations which refer him to the record of the *subsequently recorded* postponement. To make certain that by the postponement Weinberg intended only to postpone his own interest in the mortgage and not to bind the interest of Schwartz Litwin makes inquiry from Schwartz and secures from him the response evidenced by the affidavit, Exhibit D. 4.

If from this there can be spelled neither actual nor constructive notice complainant must fail in his attempt to impose his junior mortgage over the defendant's senior mortgage, for the defendant then stands in the position of a bona fide purchaser.

Upon the foregoing facts we advance the following contentions:

POINT I.

The recording of the postponement more than 17 days after the recording of the assignment did not and could not constitute constructive notice against subsequent purchasers from the assignee who paid value and had no *actual* knowledge.

POINT II.

A disclosure by Mr. Litwin's search of the fact of such postponement did not constitute *actual* notice.

POINT III.

Such knowledge as Mr. Litwin acquired by his title examination was not imputable to his principal, this defendant.

POINT IV.

If Mr. Litwin's knowledge, gained solely from his search, was imputable to his client, that was knowledge only of the existence of the postponement and not of any facts *dehors* the record. If it was then incumbent upon the defendant to make inquiry, such reasonable inquiry was made when the title affidavit (Exhibit D. 4) was secured.

POINT V.

Complainant's mortgage was taken with knowledge of the existence of the prior equity outstanding in Schwartz, which prior equity must now prevail as against any equity existing in favor of complainant.

POINT VI.

Complainant paid the consideration of his mortgage after learning of the assignment to Schwartz and the recording of the instrument of assignment. To the extent of the money so paid, complainant's equity, if any, must yield to that of this defendant.

POINT VII.

The present clash in equities between complainant and this defendant is due to the gross negligence of complainant's agent. Complainant having thusly caused the situation to arise must in equity bear the resulting loss, this defendant having been no party to such negligent conduct.

POINT VIII.

The legal questions involved have been heretofore adjudicated against the complainant and in favor of this defendant, which adjudication constitutes *res adjudicata* on the present issue of law.

POINT IX.

Complainant is guilty of laches.

POINT I.**Constructive Notice.**

It is perhaps wholly unnecessary to dilate on this point. Counsel for complainant has predicated his entire case upon the basis of actual notice. Surely there can be no constructive notice. The instruments enumerated in Section 21 of the Conveyance Act (Vol. 1, Cum. Supp. 1924 p. 627) furnish constructive notice only from the time they are *duly recorded or lodged for that purpose* with the register of the county, and then only with respect to *subsequent purchasers*. (See Section 53 of the Conveyance Act.) As between the assignment recorded first and the postponement recorded thereafter, the statute makes the assignment notice to the taker of the postponement but does not make the postponement notice to the earlier taker of the assignment. The entire structure of title examination in this State is grounded in the theory and practice of searching the records down to the point where some disposition is made of the subject of the search. Mr. Litwin might well have stopped his search at the point where the assignment from Weinberg to Schwartz was recorded. The fact that his searcher picked up the subsequent postponement (and this because of the marginal notes which the statute does not make notice) does not give rise to a condition of constructive notice, any more than the finding of record of an improperly recorded chattel mortgage constitutes constructive notice. It may or may not constitute actual notice but it cannot be that notice contemplated by the Registry Acts.

Unless the Court can find actual notice in this case the postponement of mortgage is utterly void against the Atlantic Construction Company

because under Section 54 of the Conveyance Act that instrument was void until it was recorded, and even if there were existing some equity which would make it enforceable against Schwartz it could not be enforceable against Schwartz' assignee. That assignee is obliged to look only to the records and does not take the instrument subject to latent equities. We refer to the case of *New Jersey Discount Co. v. Telesca*, 101 N. J. Eq. 426, decided in 1927 by Vice-Chancellor Backes. *There the rule was laid down that the assignee of a mortgage does not take the assignment subject to the rights flowing from an unrecorded postponement of mortgage, even though as against the assignor the postponement was enforceable.* See also:

- Vredenburg v. Burnet*, 31 N. J. Eq. 229;
Davis v. Piggott, 56 N. J. Eq. 634 (reversed in *David v. Cressman*, 57 N. J. Eq. 619, but not on the point for which cited);
Sprague v. Drew, 6 At. Rep. p. 307 at 311. (Not in State reports);
N. Y. Chemical Mfg. Co. v. Peck, 6 N. J. Eq. 37;
Tate v. Security Trust Co., 63 N. J. Eq. 559.

In the case of *Holloway v. Hendrick*, 98 N. J. Eq. 713, this Court affirmed a decree of foreclosure for the reasons stated in the opinion of Vice-Chancellor Fielder, one of which reasons was that an assignee of a mortgage, as a stranger to transactions between the mortgagor and mortgagee and between the mortgagor and his grantee and subsequent grantees, is bound only by such notice as the record gives.

This Court held in the case of *Montclair Building & Loan Association v. Miller*, 93 N. J. Eq. 653, that where the holder of a second mort-

gage had notice that his mortgagor had held the mortgage title as dummy for another, so as not to be authorized to mortgage it, a subsequent assignee of the mortgage, who had no notice of this want of authority in the mortgagor, has a valid lien and that such assignee does not take his assignment subject to the latent equity existing in favor of the true owner for whom the dummy held title.

This Court recognized and gave effect, in the case of *McMurtry v. Bowers*, 91 N. J. Eq. 317 (at p. 320), to the rule that a bona fide purchaser of a mortgage is entitled to be protected against any latent equities in favor of third persons against the mortgagor.

POINT II.

Actual Notice.

Mr. Litwin's search disclosed that the assignment from Weinberg to Schwartz of a one-third interest in the mortgage was recorded on October 26, 1927, and that the postponement from Weinberg to Reinfeld was recorded on November 12, 1927, sixteen or seventeen days later. The search indicated to him that at the time the postponement was recorded, Weinberg had only a one-third legal interest in the mortgage, the other two-thirds having been actually transferred to Schwartz and Angert and their respective assignments recorded. Surely Mr. Litwin was not obliged to assume that Weinberg undertook to postpone a greater interest than he, Weinberg, then had. Litwin was not obliged to imagine the existence of equities flowing from the postponement of mortgage. He had a right to rely upon the Registry Acts and upon those alone.

As was well said by Vice-Chancellor Backes in the Telesca case:

“As to equities in favor of the mortgagor, an assignee may protect himself by obtaining a declaration of no defenses; as to others he may abide by the registry. The statutes provide for the recording of postponements (1 Comp. St. Supp. 1924, p. 627) and the complainant must suffer for its failure to avail itself of the privilege.”

Litwin's discovery informed him only of the fact of such agreement of postponement and the contents thereof. There is nothing in the instrument itself that is suggestive of any authority on the part of Weinberg to act for the other two parties in interest in the mortgage therein postponed or of any arrangement that such postponement should be made by Weinberg alone but should bind them or of any assent by Schwartz to the making of such agreement of postponement. There was nothing in the instrument to put Litwin upon inquiry unless it be the mere fact that the postponement antedated the date of the Schwartz assignment. If that fact alone puts the purchaser upon notice, nothing is left of the rule that the purchaser “may abide by the registry.” The marginal notation which the Register of Deeds makes under the authority of Chapter 168 of the Laws of 1913 (Vol. 1, Cum. Supp. 1924, p. 634) is no part of the registry within the meaning of that rule, for it is not made notice by the statute. We take it that nothing is constructive notice except as it is made so by statute. It will be observed that to such marginal notations the Legislature has not yet given that effect which Section 53 of the Conveyance Act gives to the recording of instruments enumerated in Section 21 of the Conveyance Act. The 1913 Supplement merely fixes the duty of

the Register even as other sections provide for the mechanical details of keeping the records. It in no way attempts to affect the substantive rights of the parties to the instrument. Its purpose is obvious; it is a mechanical aid to those engaged in the craft of title searching. The notations can accomplish no more than the instruments themselves whose recording is thusly noted, so that if an instrument be void under Section 54 of the Conveyance Act as against subsequent purchasers, it can acquire no validity or potency because of any marginal notation.

POINT III.

Litwin's knowledge is not imputable to this defendant.

Litwin was instructed to draw an assignment of mortgage. The president of the Atlantic Construction Company and Mr. Litwin both testified that he was not instructed to make any search. There is no other evidence in the record on this point. Litwin's agency was, therefore, a very narrow and special one and did not involve any discretionary power on his part. In going beyond his instruction in examining the title he acted purely as a volunteer, and while it may be contended that his conduct was designed for the benefit of his client, the fact nevertheless remains that in the absence of a general authority, actual or implied, the acts of the agent, even where intended to be beneficial, do not bind his principal. A somewhat broader rule obtains in matters of litigation, but as has been pointed out in the long line of cases, outside of litigation the powers of an attorney are limited *strictly* to the performance of his client's instructions. Vice-Chancellor Bentley held so in the case of *Strauss v. Rabe*, 97 N. J. Eq. 208;

127 Atl. 188. There an attorney to whom was committed the closing of a real estate deal granted a postponement of the time fixed for performance. The Court said:

“Neither in the bill of complaint nor any of the proofs is it pretended that there was any express authority conferred upon the attorney for the defendants to grant such a postponement, and, therefore, if the power existed, it must be by implication of law. The authority of an attorney at law, in matters not immediately connected with litigation, is much more circumscribed than in the conduct of litigated causes. 4 Cyc. 943 *et seq.* In effect, the attorney represents the seller in such transactions as the latter’s agent, and his authority must be delineated by an application of the elementary rules of agency. A principal is bound by the acts of his agent, both within the authority expressly given to the latter, and also by all acts performed within the apparent scope of his authority. *Borcherling v. Katz*, 37 N. J. Eq. 150. The acts of a special agent do not bind his principal unless the former’s authority is strictly pursued, and those who deal with such an agent are charged with notice of the extent of such authority.

Cooley v. Perrine, 41 N. J. Law 322, 32 Am. Rep. 210, affirmed in 42 N. J. Law 623;

Milne v. Kleb, 44 N. J. Eq. 378, 14 A. 646;

Dowden v. Cryder, 55 N. J. Law 329, 26 A. 941.”

It may well be that Mr. Krasner was willing to trust to the integrity of his assignor and was persuaded by that attitude to take only an assignment, without first examining the records. It was not within the power of Litwin to enlarge his own agency. The virtue of this rule of law is best seen in the fact that if in this case Krasner’s company is permitted to suffer by any knowledge that came to Litwin from the making of an unauthorized search, it so suffers although

it never knew of the results of the search and never ratified the making of it. The record is utterly barren of any proof of knowledge on the part of Krasner or ratification by him.

The Vice-Chancellor who sat in this case has in other instances adopted and followed the principle and language of Vice-Chancellor Bentley's opinion in the *Strauss v. Rabe* case. In *Texas v. Adams*, 101 N. J. Eq. p. 500 (at p. 505) Vice-Chancellor Church quoted the language of Vice-Chancellor Bentley and the cases relied on by Vice-Chancellor Bentley and arrived at the conclusion that solicitors, without the knowledge or consent of their principal, could not waive any defense and could not by their attempted waiver bind their principal. This view of Vice-Chancellor Church was adopted in an instance of litigation in which the rule is much more liberal in favor of the attorney's authority than in instances of commercial transactions.

In the case of *Hartman v. Church Construction Co.*, 101 N. J. Eq. 512, Vice-Chancellor Church declined to hold a client answerable for the attorney's unauthorized consent to a postponement of the time for the passing of a title. In this case again Vice-Chancellor Church relies upon and quotes with approval the opinion of Vice-Chancellor Bentley in *Strauss v. Rabe*.

While the several cases mentioned by us under this point are distinguishable in their facts from the instant case we believe they are indistinguishable in principle and that they demonstrate how restricted indeed is the agency of an attorney who is retained to do a specific thing and in whom there is vested no general authority or discretion. A contrary rule would dangerously expose clients to the harmful results flowing from the activities

of their counsel, where such activities were neither sought nor anticipated.

POINT IV.

Litwin made due inquiry.

If Litwin's knowledge is imputable to this client that can mean only that the client was obliged to make reasonable inquiry concerning the postponement. Litwin made such inquiry of Schwartz and took from Schwartz the title affidavit, which is in evidence, in which Schwartz indicated that he had never authorized Weinberg to sign the postponement for him, Schwartz. At this point it will be borne in mind, that there is nothing on the face of the assignment from Weinberg to Schwartz to indicate that it was subject to any outstanding rights flowing from any postponement of mortgage. If, in fact, Weinberg had intended to postpone the entire mortgage and had in fact done so, he would have qualified the two assignments delivered by him to indicate that the interests being assigned were subject to the complainant's mortgage, such priority in favor of complainant resulting from the postponement theretofore made. The fact that his real interest was only one-third, the further fact that his assignments were recorded before the postponement and the fact that the assignments made no reference to the postponement, all justified Litwin in making inquiry only of Schwartz. When Schwartz' response, given under oath, disclosed no latent equity outstanding in favor of any person whomsoever, Litwin had completed all that could be reasonably expected of him. If, however, it is suggested that his inquiry should have been of a broader scope and that in failing to make such broader inquiry he was guilty of negligence, let that negligence be compared to the

earlier negligence of complainant's attorney, *Popik, in failing to record his postponement for over four weeks and after recording it and learning of the earlier assignment, paying out the full consideration.* More of this under Point VII.

POINT V.

Complainant's equity is inferior to defendant's legal title.

When complainant took his mortgage he had *constructive* and *actual* notice of the mortgage in which Schwartz had a one-third interest. Constructive notice he got from the record. Actual notice was testified to by Popik. Thereafter and before he paid out any money he learned that the assignment from Weinberg to Schwartz had been placed on record. The most that can be said for the complainant is that he was entitled to be protected against Schwartz' equity to the extent of moneys already paid out by him (complainant). As testified to by Mr. Popik, he "unhesitatingly" paid out the major part of the consideration of the mortgage. *This means he paid out over \$35,000 after he knew that Schwartz' assignment was on record ahead of his postponement.* This payment was made by means of installments covering many months. All of this complainant did with his eyes open. He could well have refused to pay out any moneys under his mortgage until the conflict on the record was definitely corrected to his protection.

Popik was asked whether, when he learned of the fact that Schwartz' assignment was on record ahead of the postponement that he was relying on, he took any steps to correct the situation and whether he filed any bill in the Court of Chancery. He answered that he hadn't filed any

but that he took other steps which he deemed sufficient (p. 70). He further testified that he instituted no such suit to correct the situation nor did he make any demand upon Schwartz to subordinate his one-third interest in the mortgage to the lien of complainant's mortgage. The other steps referred to by Popik are revealed by him in his affidavit (paragraph 7, p. 25). He says that sometime in the spring of 1928 he heard remarks to the effect that because he hadn't recorded his postponement before the recording of the assignments of the respective one-third interests to Angert and Schwartz, a claim would be made by them that their interests are prior to complainant's mortgage. He thereupon sent for Weinberg and secured from him on May 7, 1928 the affidavit marked Schedule A (p. 26). From Angert he secured on June 6, 1928 the affidavit marked Schedule B (p. 28). Nowhere does he say that he sent for Schwartz or attempted in any way to bind Schwartz to the postponement. Why send for Weinberg whose executed postponement he had and not for Schwartz whose postponement he lacked? Why send for Angert whose postponement he didn't have and not for Schwartz who was in the same position as Angert? Is not the answer somewhat to be found in the fact that neither Weinberg nor Angert states in his affidavit that Schwartz was present when the postponement was signed? This omission in Angert's affidavit and complainant's failure to produce Angert at the trial indicate to us very clearly that had Angert been produced his testimony would have corroborated Schwartz and would have helped establish the fact that Schwartz was not present when the postponement was signed. But why all these activities on the part of Popik, drawing one affidavit in May and another in June, both

taken apparently in anticipation of some trouble with Schwarz, when by the simply expedient of a bill in Chancery with an appropriate *lis pendens* filed in the Register's office effective notice could have been given to anyone thereafter purchasing either from Angert or Schwartz his respective share in the mortgage? By such bill and *lis pendens* Popik could have effectively locked the door against any bona fide purchaser and have prevented the present situation from arising. In any event he could have adequately protected himself by withholding further disbursement under the complainant's mortgage after learning of the intervening assignment.

So far as the Atlantic Construction Company is concerned, Schwartz' equity was the first to have annexed unto itself on the record a legal title, and under the ancient and familiar rule that is dispositive as to which equity should prevail.

POINT VI.

Complainant, having paid out the mortgage moneys after notice of the assignment to Schwartz does not occupy the position of a bona fide purchaser.

If any rule is well settled it is that to be a bona fide purchaser without notice it is necessary that the consideration involved should be paid *in its entirety* without notice of adverse claims, rights or equities. It is elementary in the law of trusts that one purchasing from a trustee in breach of the latter's trust and learning of such breach is protected only to the extent of the moneys paid before knowledge of such breach, and that such protection ceases with respect to payments made subsequent to such knowledge.

Vice-Chancellor Backes held in the case of *Bridgewater Co. v. Ocean City Ass'n*, 85 N. J. Eq. 379 (affirmed in 88 N. J. Eq. 351), that actual payment is, in general, necessary to the protection of a subsequent bona fide purchaser for value and that even giving a security or executing a bond or other obligation for payment is not sufficient. Citing *Losey v. Simpson*, 11 N. J. Eq. 246; *Leonard v. Leonia Heights Land Co.*, 81 N. J. Eq. 489; *Kitteridge v. Chapman*, 36 Iowa 348; *Rush v. Mitchell*, 71 Iowa 333; *Baldwin v. Sager*, 70 Ill. 503.

Vice-Chancellor Church was mindful of the principle of the *Bridgewater* case when he decided the case of *Goldberg v. Levy*, 99 N. J. Eq. 634 (affirmed 101 N. J. Eq. 293), but in the instant case the Vice-Chancellor apparently attached no significance to the fact that complainant's attorney, Popik, paid out the major portion of the mortgage moneys, more than \$35,000, with knowledge of the earlier assignments to Angert and Schwartz and with knowledge that an adverse claim was being asserted under those assignments. Popik said that he "unhesitatingly" paid out the money. We can well understand that after having secured Weinberg's and Angert's affidavits in May and June of 1928 he would proceed to pay out *as against them*, but why against Schwartz, from whom Popik secured neither affidavit nor postponement? Before Popik paid out his first dollar he had constructive notice that Schwartz' assignment was recorded before the postponement and he had actual notice of Schwartz' one-third interest. Why did he pay out that first dollar and why did he continue thereafter to disburse \$70,000, more than \$35,000 of which he paid after he had *actual* notice of the recording of the Schwartz assignment? Is not

this conduct strange and unbelievable in the face of his testimony that "I did not think of paying any money until I was sure nothing had been done on it, no disposition had been made of the mortgage" (p. 66, l. 10)? Popik said that when he took the postponement he did not intend to pay out the money immediately (p. 66) and that he later ran down his search to see whether there were any assignments on the mortgage (the mortgage postponed). See p. 67.

Justice Depue, speaking for this Court in the case of *Haughwout et al. v. Murphy*, 22 N. J. Eq. 531 (at p. 548) stated the rule that proof of the payment of the whole purchase money is essential to constitute one a bona fide purchaser and that if the purchaser has paid only part before notice, he will be protected only *pro tanto*.

The *Haughwout* case was approved and followed by this Court in the case of *Schwarz v. Munson*, 94 N. J. Eq. 754, Justice Kalisch saying that the rule has received uniform approval by this Court.

The most that the complainant was entitled to in this case, under the most favorable interpretation of the facts, was to have priority to the extent of so much money as he paid out under his mortgage before he received actual notice of the earlier assignment. That means that his mortgage should have enjoyed priority for no more than \$35,000. On the theory of the constructive notice flowing from the earlier recording of the assignment, the whole of his mortgage should have been decreed to be subordinate to the interest of the Atlantic Construction Company.

POINT VII.

As between complainant and defendant complainant should suffer, he having caused the present situation to arise.

If it should be assumed that Litwin failed to make appropriate inquiry and was, therefore, negligent, it must also be conceded that Popik was previously guilty of the following acts of negligence:

(a) Having drawn the mortgage and the postponement and attended to the execution of both the same day, he should have recorded both contemporaneously. He promptly records the mortgage but keeps the unrecorded postponement in his file for thirty-three days. Had he promptly recorded the postponement the present situation would not and could not have arisen.

(b) He withholds the recording of the postponement because he is not certain that he will pay out any money under the mortgage. Upon finding the unrecorded postponement, he forthwith records it, continues his search and finds the assignment which is the basis of our claim. Whether he in fact found it or not is unimportant. It was on record and constructively he knew of it. With such knowledge in his possession he, nevertheless, does not hesitate to disburse his client's money when he might have, upon good cause, withheld any disbursement.

(c) He takes no action of any kind, files no bill with respect to Schwartz' assignment and lies supinely back until long after the rights of the Atlantic Construction Company have arisen. A bill by him against Schwartz, accompanied with an appropriate *lis pendens* on the record, would have given to Krasner's company notice of the controversy. Instead of inaugurating the

appropriate proceeding which would have protected him against subsequent purchasers and which would have protected subsequent purchasers against his latent equity, his activities consist solely of getting affidavits from Weinberg and Angert to protect himself in the event Schwartz should dispose of his one-third interest, and after securing such affidavits he proceeds to pay out over \$35,000 of his client's money.

(d) Popik took a postponement signed by one of three persons *knowing at the time* that the mortgage being postponed was the joint and equal property of all three. Theretofore he had exacted from all three a promise that they would jointly execute and deliver the postponement but when the time came for performance he wittingly and in utter disregard of the information at hand took the postponement from only one of the three. He thereby deliberately shut his eyes to the equities outstanding in favor of Angert and Schwartz.

Who caused this situation to arise, Popik or Litwin? Manifestly there is but one answer. As between the principals represented by these attorneys, respectively, he must suffer who caused the situation to arise. Complainant should bear the burden of loss, particularly since his attorney was not only negligent but a defiant chance-taker. His conduct is most kindly described when it is referred to as both careless and indifferent.

If it were at all possible to regard complainant as an innocent party, that view could not aid him. As between himself, regarded as an innocent party, and this appellant, against whom nothing was proved except a marginal notation, complainant must bear the loss as having primarily brought about the necessity of loss. This principle found expression by Vice-Chancellor

Leaming in the case of *Cartun v. Myers* (82 At. Rep. 14 at p. 19 not reported officially), in which he said:

“And, while the facts of this case cannot perhaps be brought within the field of an estoppel *in pais* operative against the complainants, yet it does seem to me that the case must fall within what appeals to me as a most equitable and just principle that where, in the event of one of two innocent parties suffering, the one must suffer whose conduct or fault has primarily brought about the necessity of loss.”

The *Cartun* case was unanimously affirmed by this Court for the reasons stated in the opinion of Vice-Chancellor Leaming (see 78 N. J. Eq. 303).

POINT VIII.

The issue of law has heretofore been determined against the complainant and is *res adjudicata*.

Our answer in this cause was demurred to. Complainant's solicitor moved to strike, raising the question as to the legal sufficiency of the answer. Argument was heard by Vice-Chancellor Berry before whom the Conveyance Act and the cases applicable thereto were argued. The Chancellor's order, advised by Vice-Chancellor Berry (p. 36), sustains our answer. We submit that that order is *res adjudicata* as to the legal sufficiency of our defence. For this position we rely upon the opinion of Justice Garrison in the case of *Van Horn v. Van Horn* (53 N. J. L. 514). In that case the defendant's demurrer was overruled. He then pleaded the Statute of Limitations, which statute was involved in his previous demurrer. To this plea there was a demurrer on the ground that the earlier adjudication having settled the legal question, the same question of

law could not again be litigated on the record. Our Supreme Court so held.

Applying the Van Horn case we say that complainant cannot and should not be permitted to relitigate such legal questions as were raised by his motion to strike our answer, which motion was essentially a demurrer. If complainant was aggrieved by the adverse decision of the Chancellor, his only remedy was by direct appeal to the Court of Errors and Appeals. Having failed to do so the law of the instant case is the law as settled by Vice-Chancellor Berry and complainant is precluded from challenging at final hearing the legal soundness of the law as so settled. Evidently Vice-Chancellor Church, to whom the cause was referred for final hearing, did not concur in the legal conclusions reached by Vice-Chancellor Berry on the motion to strike. Whether he concurred in such conclusions or not, we respectfully insist he was not free in the instant case to depart from them, for as between the parties they raised an estoppel on the record.

POINT IX.

Complainant is guilty of laches.

Complainant's bill seeks to cut off the appellant's mortgage rights, which rights, according to the county records, are superior to complainant's mortgage. This can be accomplished only by facts dehors the record. Those facts, if true, were actually known by complainant on May 7, 1928 when he secured the affidavit of Aaron Weinberg (Schedule A, pp. 26-27). Complainant's bill was filed on December 12, 1928, more than seven months later. For seven months complainant refrained from instituting a suit in

the Court of Chancery to declare his mortgage superior to the interest of Schwartz. That he expected trouble in the shape of an adverse claim by Schwartz appears in the affidavit of Popik (paragraph 7, p. 25). To meet that claim he made haste to secure the affidavits of Weinberg and Angert (pp. 26-28). If instead of doing that or if in addition to doing that complainant had promptly filed a bill in the Court of Chancery and given notice to the world by an appropriate *lis pendens*, appellant would have been advised of the controversy between complainant and Schwartz and would not have parted with its money. It was during the seven months that complainant slept on his rights that appellant's rights arose. The situation, it seems to us, is a very simple example of laches and because of such laches complainant should have been denied relief in the Court below as against this appellant.

CONCLUSION.

To permit the complainant to prevail on this issue is to undermine the security furnished by our Registry Acts. It opens the door to untold fraud and enables persons of dishonest purpose to antedate instruments, place them on record and then by oral testimony accomplish for those instruments the same effect as though they had been recorded on the dates they bear. Public policy and the stability of our title-searching structure both demand that where one negligently or otherwise fails to avail himself of the opportunity of recording a recordable instrument all the consequences flowing from such failure shall be borne by him guilty of such failure and shall not be laid at the door of another, except in the clearest case of fraud or other inequitable conduct on the part of that other.

For all the reasons advanced by us herein we respectfully submit that the conclusions of Vice-Chancellor Church are erroneous and that the Chancellor's final decree here under review, being the product of such conclusions, is erroneous and should be reversed insofar as it adjudges complainant's mortgage to be superior in lien to the mortgage of appellant and insofar as it decrees that the moneys deposited to secure the appellant's mortgage should be turned over to complainant, and that the cause should be remitted to the Court of Chancery for the entry of a decree therein adjudging the appellant's mortgage (but only to the extent of the appellant's one-third interest therein) to be superior to the lien of complainant's mortgage and directing the payment to appellant of the sum of \$4,000 deposited with Philip J. Schotland, Special Master, or so much thereof as is necessary to satisfy the amount due appellant on its said mortgage.

Respectfully submitted,

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LEBER & RUBACK,
Of Counsel with Appellant.





