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**Bill of Complaint.**

Filed Jan. 26, 1929.

**In Chancery of New Jersey.**

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

The Complainant, Solomon and Samuel Berla,  
of the City of Newark, County of Essex and State  
of New Jersey, respectfully shows: 10

1. On October 23rd, 1928, M. and L. Holding  
Company, a corporation duly organized and ex-  
isting under the laws of the State of New Jersey,  
and having and maintaining its principal office in  
the City of Newark, County of Essex and State of  
New Jersey, Maurice Levine and George Levine,  
of the City of Newark, County of Essex and State  
of New Jersey, being indebted to Solomon and  
Samuel Berla in the sum of \$15,000. executed a 20  
bond of that date in the penal sum of \$30,000. to  
secure that sum, payable October 23, 1930, with  
interest at the rate of six per cent payable semi-  
annually from the date of the bond.

2. To secure payment of the said bond, M. &  
L. Holding Company, a corporation as aforesaid  
executed to the said Solomon and Samuel Berla,  
a mortgage of even date with the bond, and there-  
by conveyed to them in fee, the land hereinafter 30  
described, on the express condition that such con-  
veyance should be void if payment should be made  
according to the terms of the bond, which mort-  
gage, having been first duly acknowledged and the  
certificate of acknowledgment duly endorsed  
thereon was recorded in the Register's Office of  
Essex County in Book X-65 of Mortgages for Es-  
sex County, pages 354-356.

3. The mortgaged premises are described as 40  
follows:

*Bill of Complaint.*

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

10 BEGINNING at a point formed by the intersection of the southeasterly line of Rutgers Street with southwesterly line of Chancellor Avenue, running thence along southeasterly line of Rutgers Street south 44 degrees 17 minutes west a distance of 100.06 feet to a point; thence south 47 degrees 43 minutes 20 seconds east a distance of 100.06 feet to a point; thence north 44 degrees 17 minutes east a distance of 100.06 feet to a point on southwesterly line of Chancellor Avenue; thence along southwesterly line of Chancellor Avenue north 47 degrees 43 minutes 20 seconds west  
20 a distance of 100.06 feet to southeasterly line of Rutgers Street at place of BEGINNING.

The above description being in accordance with a survey made by John B. Acocella, Civil Engineer, dated July 23, 1928.

30 Together with all and singular the profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining. Also all the estate, right, title, interest, property, claim and demand whatsoever of the mortgagor of, in and to the same, and of, in 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, their heirs, executors, administrators and assigns, to the only proper use, benefit, and behoof of the said mortgagee therein, their heirs, executors, administrators and assigns forever.

40 Provided Always, and it is agreed therein that

*Bill of Complaint.*

if the said mortgagors therein, their heirs, executors, administrators, successors or assigns do and shall well and truly pay or cause to be paid, to the said mortgagee therein, their heirs, executors, administrators or assigns the said sum of Fifteen Thousand Dollars at the time and times and in the manner mentioned therein according to the true intent and meaning thereof that then said presents and the estate thereby granted shall cease, determine and be void. 10

4. Said bond and mortgage contained a clause that in the event default is made in the payment of two monthly payments of principal and interest of the Richmond Building and Loan Association mortgage, which is a first lien on the said premises, then and in that event the principal sum of complainant's mortgage shall become due and payable immediately thereafter notwithstanding anything therein to the contrary; on January 22nd, 1928, M. and L. Holding Company, a corporation as aforesaid was in arrears for December and January dues and interest of the Richmond Building and Loan Association mortgage, now a first lien on the said premises, and in accordance with the terms of complainants' bond and mortgage, complainants have elected that the entire principal sum of complainants' mortgage is now due and payable together with interest thereon. 20 30

5. On November 1, 1928 M. and L. Holding Company, a corporation of New Jersey, executed and delivered a mortgage to Samuel Litwin, which said mortgage was recorded November 7, 1928, in Book M-65 of Mortgages for Essex County, on page 460, and is in the sum of \$8,000. payable 40

*Bill of Complaint.*

\$500 per month with interest at the rate of 6 per cent per annum.

Any interest which the said Samuel Litwin may have in said premises by virtue of said mortgage is subsequent and subject to the lien of complainants' mortgage.

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6. The said lands and premises are owned by M. and L. Holding Company, a corporation as aforesaid, who have been and still are in possession of the said premises.

There is due on account of the principal sum of complainants' said bond and mortgage the sum of \$15,000. with interest thereon from October 23rd, 1928.

20

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

1. That M. and L. Holding Company, a corporation of New Jersey, Maurice Levine and George Levine and Samuel Litwin, who are the defendants to this suit, may answer this bill of complaint without oath and each statement therein made.

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

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

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*Bill of Complaint.*

4. That a decree may be made for the sale of the mortgaged premises to raise and pay to the complainants the amount so found due on their 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. 10

PHILIP J. SCHOTLAND,  
Solicitor and Counsel with Complainants.

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**Answer and Counterclaim.**

Filed March 13, 1929.

IN CHANCERY OF NEW JERSEY.

10	Between SOLOMON BERLA and SAMUEL BERLA, Complainants, and M. AND L. HOLDING COMPANY, a corporation, <i>et als.</i> , Defendants.	}	On Bill, Etc. Answer and Counterclaim of Defendants M. and L. Holding Com- pany, Maurice Levine and George Levine.
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20 The defendants M. and L. Holding Company, a corporation of the State of New Jersey, with its principal office in the City of Newark, in the County of Essex and State of New Jersey, and Maurice Levine and George Levine, of the City of Newark, in the County of Essex and State of New Jersey, answering the Bill of Complaint filed herein say that:

30 1. As to paragraph 1, they deny that they were indebted to the complainants in the sum of Fifteen Thousand (\$15,000.00) Dollars on October 23, 1928, but admit the execution of the bond therein mentioned.

2. They admit paragraphs 2 and 3.

40 3. As to paragraph 4 they admit that the bond and mortgage mentioned therein contained the default clause as set forth therein, but deny that the said M. and L. Holding Company became in arrears for December and January dues and inter-

*Answer and Counterclaim.*

est upon the Richmond Building and Loan mortgage mentioned therein, and deny that complainants' bond and mortgage are now due and payable.

4. They admit paragraphs 5 and 6.

5. The paragraph following paragraph 6, and which is not numbered, and which sets forth that there is due on account of the principal sum of complainants' bond and mortgage the sum of Fifteen Thousand (\$15,000.00) Dollars and interest thereon from October 23, 1928, is denied.

6. Further answering said Bill of Complaint these defendants say that on April 27, 1928, the complainants and the defendants M. and L. Holding Company, and Maurice Levine, entered into a written contract wherein and whereby the said complainants agreed, for the consideration of Twenty Thousand (\$20,000.00) Dollars, to well and sufficiently erect and finish the plumbing and heating work in the building which was then being erected upon the mortgaged premises mentioned in the Bill of Complaint herein; that the said work was to be done agreeable to drawings and specifications signed by the said parties, the specifications being attached to said agreement, and which work was to be done in a good, workmanlike and substantial manner. The complainants were also to provide such proper and sufficient materials of all kinds whatsoever as shall be proper and sufficient for the completing and finishing of the aforesaid work, as will more fully appear upon reference being had to said agreement, plans and specifications, the originals of which will be

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*Answer and Counterclaim.*

produced at the final hearing herein; that said specifications, in addition to describing the materials to be furnished and work to be done under said contract, provided that the heating system was guaranteed to heat the several rooms to seventy degrees Fahrenheit in zero weather.

10 7. Further answering said Bill of Complaint these defendants say that said complainants did not complete all of the work or furnish all of the materials required to be performed and furnished by them under the aforesaid contract, in that the materials furnished thereunder were defective, deficient and of a grade inferior to that required to be furnished under said contract, and that the labor performed thereunder was performed in an  
20 unworkmanlike manner so that it is impossible to heat the several rooms in said building to seventy degrees Fahrenheit in zero weather; that it would cost the sum of Six Thousand (\$6,000.00) Dollars to have the said plumbing and heating work comply with the terms of said contract.

30 8. Further answering said Bill of Complaint these defendants say that the principal sum of the bond and mortgage mentioned therein, represents a loan of Four Thousand (\$4000.00) Dollars in cash made by the complainants to the M. and L. Holding Company at the time of the execution of said bond and mortgage, and the balance of  
40 Eleven Thousand (\$11,000.00) Dollars represents the amount that would have been due the said complainants under their said contract dated April 27, 1928, if the complainants had fully performed and carried out the terms, conditions and covenants of their said contract.

*Answer and Counterclaim.*

9. Further answering said Bill of Complaint these defendants say that the M. and L. Holding Company and said Maurice Levine have repeatedly requested the said complainants to remedy said defective, deficient and inferior work so that the same would comply with the terms of said contract, but that the said complainants have not complied with such requests.

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10. Further answering said Bill of Complaint these defendants say that they are entitled to a credit upon the said bond and mortgage to the extent of the aforesaid sum of Six Thousand (\$6,000.00) Dollars, due for said defective, deficient and inferior work and materials performed and furnished by complainants under their said agreement.

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Wherefore, these defendants pray that the Bill of Complaint herein be dismissed and that the complainants be decreed to pay the costs of these defendants most wrongfully incurred herein.

By way of counter-claim against the complainants, these defendants say:

1. On April 27, 1928, the complainants and the defendants M. and L. Holding Company, and Maurice Levine, entered into a written contract wherein and whereby the said complainants agreed for the consideration of Twenty Thousand (\$20,000.00) Dollars, to well and sufficiently erect and finish the plumbing and heating work in the building which was then being erected upon the mortgaged premises mentioned in the Bill of Complaint herein; that the said work was to be done agreeable to drawings and specifications signed

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*Answer and Counterclaim.*

by the said parties, the specifications being attached to said agreement, and which work was to be done in a good, workmanlike and substantial manner. The complainants were also to provide such proper and sufficient materials of all kinds whatsoever as shall be proper and sufficient for the completing and finishing of the aforesaid work, as will more fully appear upon reference being had to said agreement, plans and specifications, the original of which will be produced at the final hearing herein; that said specifications, in addition to describing the materials to be furnished and work to be done under said contract, provided that the heating system was guaranteed to heat the several rooms to seventy degrees Fahrenheit in zero weather.

20        2. Said complainants did not complete all of the work or furnish all of the materials required to be performed and furnished by them under the aforesaid contract, in that the materials furnished thereunder were defective, deficient and of a grade inferior to that required to be furnished under said contract, and that the labor performed thereunder was performed in an unworkmanlike manner so that it is impossible to heat the several  
30        rooms in said building to seventy degrees Fahrenheit in zero weather; that it would cost the sum of Six Thousand (\$6,000.00) Dollars to have the said plumbing and heating work comply with the terms of said contract.

40        3. The principal sum of the bond and mortgage mentioned in the Bill of Complaint herein represents a loan of Four Hundred (\$400.00) Dollars in cash made by the complainants to the M. and L. Holding Company at the time of the execution

*Answer and Counterclaim.*

of said bond and mortgage, and the balance of Eleven Thousand (\$11,000.00) Dollars represents the amount that would have been due the said complainants under their said contract dated April 27, 1928, if the complainants had fully performed and carried out the terms, conditions and covenants of their said contract.

4. The defendants M. and L. Holding Company and Maurice Levine have repeatedly requested the said complainants to remedy said defective, deficient and inferior work so that the same would comply with the terms of said contract, but the said complainants have not complied with such requests.

5. These defendants are entitled to a credit upon the said bond and mortgage to the extent of the aforesaid sum of Six Thousand (\$6,000.00) Dollars, due for said defective, deficient and inferior work and materials performed and furnished by complainants under their said agreement.

These defendants are without adequate remedy in the courts of law and therefore pray:

1. That the said Solomon Berla and Samuel Berla may answer this counter-claim and each statement therein made.

2. That an account may be taken of the defective, deficient and inferior materials furnished and work performed under the contract entered into between the complainants and the defendants M. and L. Holding Company and Maurice Levine, as above stated, and that the complainants may be decreed to pay to said defendants the value of said defective, deficient and inferior materials and work, or

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*Answer and Counterclaim.*

3. That a decree may be entered herein requiring the complainants to give credit to the defendants M. and L. Holding Company, Maurice Levine and George Levine, upon the bond and mortgage mentioned in the Bill of Complaint herein, for the value of said defective, deficient and inferior materials and work.

10

DAVID M. LITWIN,  
Solicitor for and of Counsel with  
Defendants M. and L. Holding Company,  
Maurice Levine and George  
Levine.

**Notice of Motion to Strike out Answer and  
Counterclaim, and Affidavits.**

20

Filed April 13, 1929.

IN CHANCERY OF NEW JERSEY.

30

Between  
SOLOMON BERLA and SAMUEL  
BERLA,  
Complainants,  
and  
M. AND L. HOLDING COMPANY,  
a corporation, *et als.*,  
Defendants.

On Bill, Etc.  
Notice and  
Affidavits.

To DAVID M. LITWIN, ESQ.,  
Solicitor for Defendants, Maurice Levine,  
George Levine, and M. and L. Holding  
Company, a corporation.

40 Sir:

Please Take Notice that on Tuesday, April 2nd,

*Notice.*

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 the answer filed by you in the above entitled cause on the ground that the same is sham and does not constitute a defense to the bill of complaint filed on behalf of complainant. 10

Please Take Further Notice that at the same time and place I shall apply for an order striking out the counterclaim on the ground that it does not set forth the subject matter of a proper counterclaim to be filed in this cause and on the further ground that it sets forth a cause of action, if true, for which there is an adequate and complete remedy at law and not the character of an action which can conveniently be tried in the Court of Chancery. 20

Please Take Further Notice that in support of said motions, I shall read and file the affidavits, copies of which are hereto annexed.

Dated March 14th, 1929.

Yours respectfully,

PHILIP J. SCHOTLAND, 30  
Solicitor for Complainants.

## IN CHANCERY OF NEW JERSEY.

	Between	}	On Bill, Etc.
	SOLOMON BERLA and SAMUEL		
	BERLA,		
	Complainants,		
	and	}	Affidavit.
10	M. AND L. HOLDING COMPANY,		
	a corporation, <i>et als.</i> ,		
	Defendants.		

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

Solomon Berla, of full age, being duly sworn according to law, on his oath deposes and says:

20 1. I am one of the complainants in the above entitled cause and the other complainant is my brother and partner; I am the member of the firm who had personal charge of all of the transactions with the defendants in this cause and the member of the firm who has personal knowledge of the facts connected with all of these transactions.

30 2. My firm did have a contract with the M. and L. Holding Company for installing the plumbing and heating in a building erected by the M. and L. Holding Company, which contract we fully complied with and our work was accepted by the M. and L. Holding Company and fully paid for by check dated November 5, 1928 in the sum of \$10,870.35, which was the exact balance due and owing to us at said time. We also furnished to the M. and L. Holding Company before receiving the said payment a final certificate from the Department of Health of the Town of Irvington. Said payment was made to us out of the

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*Affidavit of Solomon Berla.*

proceeds of a mortgage loan granted to the M. and L. Holding Company, a corporation, by the Richmond Building and Loan Association in the sum of \$135,000, and was in the form of a check drawn by Philip J. Schotland, the solicitor for the Richmond Building and Loan Association to the order of the M. and L. Holding Company, which check was endorsed by the M. and L. Holding Company, directing payment to be made to the order of my firm and was delivered to me by the said M. and L. Holding Company through George Levine, its president and Maurice Levine, its secretary. This closed the transaction completely so far as my contract for plumbing and heating in said building was concerned. 10

3. As an entirely separate matter, Maurice Levine and George Levine, on behalf of the M. and L. Holding Company applied to me for a loan of \$15,000 to be secured by a mortgage which was to be a second lien on the premises described in the Bill of Complaint to the lien of the Richmond Building and Loan Association mortgage. After considerable urging I agreed to make said loan on behalf of my brother and myself and on October 30th, 1928, when I was informed that interest on my mortgage would run from said date, I issued the check No. 14,860, drawn by my brother and myself on our account in the National Newark & Essex Banking Company of Newark, to the order of the M. and L. Holding Company in the sum of \$15,000, bearing said date and delivered same to the M. and L. Holding Company, which check was paid out of our funds in said bank, and I have it in my possession ready to produce in open court, and which check bears the endorsements of the M. and L. Holding Company, George Levine, pres- 20 30 40

*Affidavit of Solomon Berla.*

ident, Maurice Levine, Secretary and the punch marks put through it by the bank showing it was paid. Said check represents the consideration and the only consideration for the \$15,000 mortgage which I am seeking to foreclose in this suit.

10 4. I am one of the directors in the Richmond Building and Loan Association and was present at the meeting of said Association on January 22nd, 1929 and heard the report of the Secretary of said Association to the Board that the M. and L. Holding Company had failed to pay the dues and interest on the \$135,000 mortgage which the Richmond Building and Loan Association holds, and which is a first lien against the same premises covered by my mortgage for the months of December, 1928 and January, 1929, and that they  
20 were then two months in arrears for their dues and interest. Said meeting took place after the payment for the month of January, 1929 had become due and said payment was then past due.

30 5. I instructed my attorney, Mr. Philip J. Schotland to notify the M. and L. Holding Company that unless the arrears for dues and interest to the Building and Loan Association were paid in full by noon of the following day, January 23, 1929 that I elected, in accordance with the terms of the mortgage to declare the whole amount of my mortgage due and that he should institute foreclosure proceedings for the collection of the principal and interest; I am informed that my attorney or somebody in his behalf notified the M. and L. Holding Company of my instructions, and I know as a fact from investigating the records of the Richmond Building and Loan Association that said two months arrears of dues and interest

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*Affidavit of Solomon Berla.*

were not paid to said Association on January 23, 1929, and I am informed have not been paid in full up to the present time. I have been informed that one months dues and interest was paid on January 24th, 1929, and that the M. and L. Holding Company are still in arrears for the other months dues and interest and for fines for both months. 10

6. Mr. Maurice Levine, the secretary of the M. and L. Holding Company on Thursday, January 24, 1929, came to see me at my place of business and asked me what I was going to do. I told him that I was going to proceed with the foreclosure as I wanted my money and that my attorney had instructions to proceed. He then offered me a deed to the property which I declined telling him I did not want the property, all I wanted was my money, and if I took a deed I would have the property subject to an additional third mortgage of \$8,000 held by Samuel Litwin, which I knew he had procured and placed on the premises. Mr. Levine made no mention in said conversation of any objection to any work and made no claim of any defects or any counter-claim or defense to my mortgage. 20

SOLOMON BERLA. 30

Sworn and subscribed to before me  
this 14th day of March, 1929.

Rudolph L. Trench,  
Notary Public of New Jersey.

## IN CHANCERY OF NEW JERSEY.

10	Between SOLOMON BERLA and SAMUEL BERLA, Complainants, and M. AND L. HOLDING COMPANY, a corporation, <i>et als.</i> , Defendants.	}	On Bill, Etc. Affidavit.
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State of New Jersey, }  
 County of Essex,     } ss.:

Helen Jedell, of full age, being duly sworn according to law, on her oath deposes and says:

20     1. I am the Managing Clerk in the office of Philip J. Schotland, and as such have full charge of all mortgage loan transactions and the closing of mortgage loans granted by Building and Loan Associations that Mr. Schotland represents.

30     2. The Richmond Building and Loan Association granted a loan to the M. and L. Holding Company on the same premises described in the bill in this cause in the sum of \$135,000 and I had personal charge of disbursing the proceeds of said mortgage loan on behalf of said Building and Loan Association; among the disbursements I made was the sum of \$10,870.35 by check dated November 5th, 1928 to the order of the M. and L. Holding Company, which the M. and L. Holding Company endorsed over to Elias Berla, the trade name of Solomon and Samuel Berla, the complainants in this cause.

40     3. The amount for which said check was drawn was communicated to me by George and Maurice

*Affidavit of Helen Jedell.*

Levine, the president and secretary respectively of the M. and L. Holding Company, and all of the checks in payment of labor or material in the erection of said building were drawn by me in the same manner; that is, the M. and L. Holding Company gave me the amount and I made the check to their order and they endorsed it to the party to whom it was owing, and I received from all of the persons who supplied labor or material, including Solomon and Samuel Berla releases and postponements of lien, keeping the postponements for the benefit of the Building and Loan Association and the absolute releases for the benefit of the M. and L. Holding Company. At no time did the M. and L. Holding Company, or any of its officers make any mention of any dissatisfaction with the performance of the contract, or the character of the work done by Solomon and Samuel Berla, but on the contrary the officers of the M. and L. Holding Company procured from all of the persons and corporations who supplied labor or material in the erection of the building postponements of their rights of lien to the lien of the mortgage given to Solomon and Samuel Berla. This matter was not closed at one time, owing to the fact that the M. and L. Holding Company did not have sufficient money to pay everybody, and were unable to procure all of the postponements of mechanics' lien and releases of lien at one time.

4. At 8:15 in the morning of January 23, 1929, upon instructions from Mr. Schotland, I called Mr. Maurice Levine, the Secretary of the M. and L. Holding Company on the telephone, reached him at his home and told him that we had been instructed by Mr. Berla that unless the M. and

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*Affidavit of Helen Jedell.*

10 L. Holding Company paid the two months dues and interest in arrears on the Richmond Building and Loan Association mortgage by 12:30 P. M. of that day we would proceed with foreclosure proceedings on Mr. Berla's \$15,000 mortgage. Mr. Maurice Levine asked me to wait until four o'clock, which I agreed to do, but he did not pay said arrears either that day nor the next, nor has he paid the arrears in full up to the present time. He has paid one months dues and interest which he paid on January 24th, 1929 after I notified him that Mr. Berla had elected to declare his mortgage due in accordance with the terms contained in both the bond and mortgage.

HELEN JEDELL.

20 Sworn and subscribed to before me  
this 15th day of March, 1929.

Joseph J. Schotland,  
An Attorney at Law  
of New Jersey.

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## IN CHANCERY OF NEW JERSEY.

Between SOLOMON BERLA and SAMUEL BERLA, Complainants, and M. AND L. HOLDING COMPANY, a corporation, <i>et als.</i> , Defendants.	}	On Bill, Etc.  Affidavit.	  10
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State of New Jersey, }  
 County of Essex,     } ss.:

A. Sigmund Kanengieser, of full age, being duly sworn according to law, on his oath deposes and says:

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1. I am the Secretary of the Richmond Building and Loan Association, and as such am in full charge of and keep all the books and records and accounts of said association.

2. The Richmond Building and Loan Association holds a mortgage in the sum of \$135,000 on the property owned by the M. and L. Holding Company, located in the Town of Irvington, at the intersection of the southeasterly line of Rutgers Street with the southwesterly line of Chancellor Avenue, being a plot of ground approximately 100x100 feet. It is the same property upon which Solomon Berla and Samuel Berla hold a second mortgage, and Mr. Solomon Berla asked me to keep him informed at all times as to whether payments for dues and interest on the mortgage are promptly made by the M. and L. Holding Company.

30

3. The M. and L. Holding Company have not

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*Affidavit of A. Sigmund Kanengieser.*

10 paid the dues and interest which became due and payable on the fourth Tuesday of December, 1928 and did not pay the dues and interest which became due and payable on January 22, 1929. I thereupon, at the meeting of the Board of Directors of the Richmond Building and Loan Association, held January 22nd, 1929 after the time for payment had lapsed and the books were closed for the month reported to the Board of Directors that the M. and L. Holding Company were in arrears for two months dues and two months interest on said mortgage loan.

20 4. On January 24th, 1929, I received a payment from the M. and L. Holding Company of one months dues and interest, which left the account standing one months dues and interest besides fines still in arrears. At the present time the M. and L. Holding Company is still in arrears for one months dues, interest and fines, and also for the fire insurance premium for fire insurance on said building required to be carried for the benefit of the Building and Loan Association, by the terms of its mortgage and the Building and Loan Association has paid said premium and charged it to the account of the M. and L. Holding Company on said mortgage in accordance with the terms of the mortgage.

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A. SIGMUND KANENGIESER.

Sworn and subscribed to before me  
this 13th day of March, 1929.

Joseph J. Schotland,  
Attorney at Law of  
New Jersey.

**Answering Affidavits.**

Filed April 13, 1929.

IN CHANCERY OF NEW JERSEY.

Between SOLOMON BERLA and SAMUEL BERLA, Complainants, and M. AND L. HOLDING COMPANY, a corporation, <i>et als.</i> , Defendants.	}	On Bill, Etc.      10 Affidavit.
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State of New Jersey, }  
 County of Essex,    {ss.:

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

1. I am the President of the M. and L. Holding Company, one of the defendants in the above entitled cause, and as such officer am fully familiar with the affairs of said corporation, and especially with its affairs inconnection with the property involved in the foreclosure in this cause, and the mortgage sought to be foreclosed by the complainants herein. 30

2. On November 5, 1928, the M. and L. Holding Company closed its mortgage transaction with the Richmond Building and Loan Association. At that time there was a balance due from my company to the complainants herein of \$10,870.35, under the contract heretofore made between the M. and L. Holding Company and the complainants, dated April 27, 1928, wherein and whereby the complainants agreed to furnish and install all of the plumbing and heating work in the apartments and 40

*Affidavit of Maurice Levine.*

stores building being erected upon the premises described in the Bill of Complaint herein, said sum of \$10,870.35 being duly only after the work had been done by the complainants in accordance with the aforesaid contract.

10 3. The agreement relative to the heating work contained a guarantee as follows: "The system is guaranteed to heat the several rooms to 70 degrees Fahrenheit in zero weather."

4. The complainants were told by me that the M. and L. Holding Company would be unable to pay the balance due them unless they agreed to finance the company by taking a \$15,000.00 second mortgage upon the mortgaged premises, and deducting from the \$15,000.00 the amount owing to them on their contract.

20 5. At the time that the mortgage loan was closed, one Samuel Goldfarb had a construction loan of \$75,000.00 upon the mortgaged premises, and as he was anxious to receive payment of his mortgage, he agreed to lend to the complainants the sum of \$4,000.00, and did actually lend the same to the complainants, so that he was able to receive the money due on his construction mortgage at the time that the entire transaction was closed.

30 6. The mortgage transaction of the complainants was closed simultaneously with the placing of the Building and Loan mortgage upon the premises, and although the complainants issued their check for \$15,000.00 to show the consideration for the mortgage being foreclosed, it nevertheless was a washed transaction, the complainants issuing their check for \$15,000.00, and receiving a check from Samuel Goldfarb for \$4,000.-  
40 00 and a check from Philip J. Schotland's office

*Affidavit of Maurice Levine.*

for \$10,870.35. The mortgage transaction with the complainants and the transaction involving the plumbing and heating contract were involved with each other.

7. At the time the mortgage transaction was closed, the weather was still moderate and an opportunity had not been afforded to ascertain whether the heating system installed by the complainants complied with their contract. The first cold weather occurred in December, 1928, and immediately thereafter I received complaints from the superintendent of the building that although he forced the boiler to its utmost capacity, he was unable to keep the apartments properly heated. I immediately communicated with Mr. Solomon Berla, one of the complainants herein, and he told me that he would take care of it. He sent his engineer to the mortgaged premises; I was there at the time, and the complainants' engineer told me that there was something wrong with the boiler, and also that it was too small. 10  
20

8. The complainants' engineer thereafter came back two or three times, and he suggested changing some of the valves in the radiators. The complainants sent some new valves which were installed by my superintendent, but they did not remedy the situation. 30

9. I phoned to Mr. Samuel Berla numerous times and received his promise that he would take care of the matter but nothing was ever done. The final certificate issued by the Department of Health of the Town of Irvington, and which is mentioned in Mr. Solomon Berla's affidavit herein, refers to the plumbing part of the contract and has nothing whatsoever to do with the steam heating feature thereof. 40

*Affidavit of Maurice Levine.*

10. On numerous occasions after I had received a complaint from the superintendent, I made personal tests of the temperature in the apartment house. These tests were made at times when the weather was 20 degrees Fahrenheit. The boiler in the building was fired at its utmost capacity and still it was unable to heat the apartments to 70 degrees Fahrenheit.

11. At the time that the mortgage loan of the Richmond Building and Loan Association was closed, I was charged with interest from the October, 1928 meeting to the November, 1928, meeting. I made objections to this charge to Miss Helen Jedell, who was closing the mortgage transaction, and she told me that at the December, 1928 meeting I would be allowed the interest from the 20 October paynight until November 5, 1928, on which date the Building and Loan transaction was actually closed and the Association issued the consideration for the mortgage.

12. The December, 1928 dues and interest were not paid by the M. and L. Holding Company and Miss Jedell immediately phoned me to inquire as to why the December payment had not been made. I told her that she had promised to 30 advise me as to the amount that I was to pay after receiving credit for the apportionments of the interest, and she said that she would take the matter up with the secretary of the Building and Loan Association and advise me thereafter as to the exact amount that I was to pay.

13. On the morning of January 23, 1929, Miss Jedell phoned me at my house that I had not paid the Building and Loan dues and interest due to the Richmond Building and Loan Association on 40

*Affidavit of Maurice Levine.*

the previous evening, and she gave me until 4:30 P. M. of January 24, 1929 to pay the same. I told her that I would come down to her office to see her because it was important that the Building and Loan straighten out the question of the interest.

14. I phoned Miss Jedell on the morning of January 24, 1929 and asked her whether she had the statement ready from the Building and Loan Association. She told me that if I would come to her office at eleven o'clock that morning that she would have Mr. Kanengieser, the secretary, there. I was at her office at eleven o'clock but Kanengieser was not there. I waited there until 1:30 P. M. and Mr. Kanengieser had not as yet arrived. 10

15. I became worried about the situation and went to Mr. Kanengieser's office on Belmont Avenue, Newark, N. J. and he told me that if I would go back to Miss Jedell's office she would give the figures to me. I realized that if I were to keep running back and forth between Miss Jedell's office and Mr. Kanengieser's office that I might jeopardize the standing of my company's mortgage, so I then and there paid the full month's dues and interest and received the Building and Loan receipt therefor. 20 30

16. I have read the affidavit of Solomon Berla, and it is true that I went to his place of business. I went there for the purpose of telling him that I was willing to pay the Building and Loan dues and interest, but that a question had arisen as to the amount because of the failure of the Association to give me a statement of the interest due. He told me that he would leave the matter entirely to Miss Jedell. 40

*Affidavit of Maurice Levine.*

17. It is not true that I offered him a deed for the property. I did say to him that from the instructions that he had given to Miss Jedell it would seem that he was anxious to take the property away from my company.

10 18. The cost of the property to the M. and L. Holding Company was \$200,000.00, and it is encumbered by mortgages totalling \$158,000.00, now reduced to \$155,000.00, so that the equity of my company in the property is \$45,000.00.

19. Since then I have paid the Building and Loan dues and interest regularly.

MAURICE LEVINE.

Sworn and subscribed to before me  
this 9th day of April, 1929.

Antoinette E. Jork,

20 A Notary Public of N. J.

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## IN CHANCERY OF NEW JERSEY.

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 Between

 SOLOMON BERLA and SAMUEL  
 BERLA,  
 Complainants,  
 and

 M. AND L. HOLDING COMPANY,  
 a corporation, *et als.*,  
 Defendants.
 

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} On Bill, Etc.

} Affidavit. 10

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

Richard Cooggan, of full age, being duly sworn according to law on his oath deposes and says:

1. I am the superintendent in charge of the building at No. 30 Rutgers Street, Irvington, N. J. and which is located upon the same premises as are involved in the mortgage sought to be foreclosed in this matter. I have been acting as such superintendent since November 15, 1928, and have been a superintendent prior to that date for the past twenty years. 20

2. The building upon the mortgaged premises is a three story brick building arranged for occupancy as six stores on the first floor, and twenty-seven apartments on the upper floors. 20

3. Since the weather became cold subsequent to my acting as superintendent in said building, I found that it was physically impossible to heat the apartments to seventy degrees Fahrenheit. I fired the boiler to its utmost capacity and had three and a half to four pounds of steam, and still was unable to properly heat said apartments. One pound of steam should be sufficient to heat said 10

*Affidavit of Richard Cooggan.*

apartments if the boiler was of sufficient capacity. In my opinion the boiler installed in this building was of a small size and has not the capacity to heat the radiation in the building.

10 4. On several occasions while the weather was quite cold outside, and the boiler was fired to its utmost capacity, I made tests in the various apartments and was unable to heat the same more than sixty to sixty-two degrees Fahrenheit.

5. On one occasion in December of 1929, I recall a gentleman coming to the building for the purpose of inspecting the steam heating apparatus. He said that he was employed by the firm that installed the steam heating system and that the boiler installed was not the proper boiler for this building. This firm subsequently sent valves  
20 for the heating of the radiators in this building, which I installed, but this did not help out the situation.

6. The tenants in the building have repeatedly complained to me and to the Board of Health of Irvington, N. J. The inspectors of the Health Department came to the apartment house and after they saw that I was doing the best that I could under the circumstances, they did not prefer any  
30 charges under the Health Code of Irvington, N. J.

RICHARD COGGAN.

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

Nathan G. Krasner,  
A Master in Chancery of N. J.

## IN CHANCERY OF NEW JERSEY.

Between

SOLOMON BERLA and SAMUEL  
BERLA,

Complainants,

and

M. AND L. HOLDING COMPANY,  
a corporation, *et als.*,

Defendants.

On Bill, Etc.

Affidavit.

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

Louis Kasoff of full age, being duly sworn according to law on his oath deposes and says:

1. I am an architect duly licensed to practice as such in the State of New Jersey, and have been such architect in the State of New Jersey for the past four and one-half years, and practiced as an architect in the State of New York for five years prior thereto. 20

2. In connection with my profession as an architect, I am fully familiar with the installation of steam heating systems.

3. At the request of the M. and L. Holding Co. I inspected the steam heating system installed at premises Nos. 30-32 Rutgers Street, Irvington, N. J. 30

4. At the time of the examination I had with me plans and specifications under which the steam heating system was to be installed in said premises. The plans and specifications call for an installation of approximately five thousand feet of direct radiation, and also call for the installation of a 48-8S Novus steam boiler. This boiler is 40

*Affidavit of Louis Kasoff.*

rated at ten thousand five hundred feet of boiler radiation which takes into consideration the necessity of supplying heat for the piping and safety factor beyond the direct radiation.

10 5. There has actually been installed in said premises a thirty-six inch, 7S Burnham boiler, which is rated at approximately five thousand feet of boiler capacity, so that there is a difference in the boiler actually installed, and the boiler required under the plans and specifications, of approximately fifty-five hundred feet of boiler radiation.

20 6. With the amount of direct radiation and pipes installed in said premises, it is impossible for the boiler installed in said premises to provide heat for the entire building to seventy degrees Fahrenheit in zero weather.

7. In order to comply with requirements of the plans and specifications, it will be necessary to remove the present boiler and disconnect the same from the heating appurtenances and install a new boiler of sufficient size to take care of the installed system of steam heating. It will also be necessary to re-pipe all mains to a greater size in harmony with the new boiler.

30 8. In order to install the proper boiler and re-piping in connection therewith, I have estimated the cost to be approximately Twenty-five Hundred (\$2500.00) Dollars, which I consider to be a reasonable amount.

LOUIS KASOFF.

Sworn and subscribed to before me

this 8th day of April, 1929.

Antoinette E. Jork,

A Notary Public of N. J.

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*Order.*

stituting the words "installments of principal."  
April 17th, 1929.

Yours respectfully,

PHILIP J. SCHOTLAND,  
Solicitor for Complainants.

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**Order Striking out Part of Answer and Amend-  
ing Bill of Complaint.**

Filed April 23, 1929.

IN CHANCERY OF NEW JERSEY.

20	Between	}	On Bill, Etc. Order.
	SOLOMON BERLA and SAMUEL		
	BERLA,		
	Complainants,		
	and		
	M. AND L. HOLDING COMPANY,		
	a corporation, <i>et als.</i> ,		
	Defendants.		

30 This matter being opened to the court by Philip J. Schotland, solicitor for and of counsel with the complainants, in the presence of David M. Litwin, Esq., solicitor for and of counsel with the defendants, Maurice Levine, George Levine and M. and L. Holding Company, and the court having considered the complainants' motion to strike out paragraphs 6, 7, 8, 9 and 10 of the answer filed by Maurice Levine, George Levine and M. and L. Holding Company, and also the application of the

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*Order.*

complainants to amend their bill of complaint by striking out the word "dues" in the 10th line of paragraph 4 of the bill of complaint and inserting in lieu thereof "installments of principal", and the court being of the opinion that the motion on behalf of the complainants should be granted,

It is on this 23rd day of April, 1929, ORDERED, that paragraphs 6, 7, 8, 9 and 10 of the answer filed by the defendants, Maurice Levine, George Levine and M. and L. Holding Company, be and are hereby stricken out; and

It is further ORDERED that the bill of complaint be amended by inserting in the 10th line of the 4th paragraph the words "installments of principal", instead of the word "dues".

E. R. WALKER,

C.

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

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**Order Striking out Counterclaim.**

IN CHANCERY OF NEW JERSEY.

	Between SOLOMON BERLA and SAMUEL BERLA, Complainants, and M. AND L. HOLDING COMPANY, a corporation, <i>et als.</i> , Defendants.	}	On Bill, Etc.  Order.
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20 This matter being opened to the court by Philip J. Schotland, solicitor for and of counsel with the complainants, in the presence of David M. Litwin, Esq., solicitor for and of counsel with the defendants, M. and L. Holding Company, Maurice Levine and George Levine, and the court having considered a motion made on behalf of the complainants and the arguments of the respective counsel and being of the opinion that the counter claim should be stricken out, and that paragraphs six, seven, eight, nine and ten of the answer, which pleads an abatement to the mortgage set forth an independent cause of action at law, by the defendants against the complainants;

30 It is on this 23rd day of April, 1929, ORDERED, that the counter claim annexed to and made a part of the answer of the defendants be stricken out.

It is further Ordered that the motion to strike out the answer be denied; but the complainants are hereby given leave to serve notice of a new motion to strike out that part of the answer which

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*Order Striking out Counterclaim.*

pleads an abatement of the amount owing on the mortgage.

E. R. WALKER,  
C.

Respectfully Advised,  
JOHN H. BACKES,

V. C.

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**Replication.**

Filed April 30, 1929.

IN CHANCERY OF NEW JERSEY.

Between

SOLOMON BERLA and SAMUEL  
BERLA,

Complainants,  
and

M. AND L. HOLDING COMPANY,  
a corporation, *et als.*,  
Defendants.

On Bill, &c.  
Replication.

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The complainants join issue on the answer of the defendants M. and L. Holding Company, Maurice Levine and George Levine. 30

PHILIP J. SCHOTLAND,  
Solicitor for Complainants.

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**Testimony.**

IN CHANCERY OF NEW JERSEY.

10	Between	SOLOMON BERLA and SAMUEL BERLA, Complainants,	}
	and	M. & L. HOLDING COMPANY, Defendants.	}

Newark, New Jersey,  
October 1, 1929.

20 Before—HON. JOHN H. BACKES, Vice-Chancellor.

APPEARANCES:

PHILIP J. SCHOTLAND, ESQ., Solicitor for  
Complainant.

DAVID M. LITWIN, ESQ., Solicitor for De-  
fendant.

30 SOLOMON BERLA, called as a witness on be-  
half of the Petitioners, being first duly sworn, tes-  
tified as follows:

*Direct-examination by Mr. Schotland:*

Q. Mr. Berla, you and Samuel Berla are the  
complainants in this suit? A. Yes, sir.

Q. You are the holders of this bond and mort-  
gage given by the M. & L. Holding Company to  
you? A. Yes.

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*Solomon Berla—Direct.*

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

(The bond and mortgage referred to were received in evidence, the bond being marked Exhibit P-1, and the mortgage being marked Exhibit P-1A.)

Mr. Schotland: The bond is dated the 23rd day of October, 1928, and is in the penal sum of \$30,000 to secure the payment of \$15,000, on the 23rd day of October, 1930. 10

The Mortgage is dated October 23rd, 1928, and given by the M. & L. Holding Company, the defendant, to the complainants, is recorded November 5th, 1928, in Book X-65 of Mortgages for Essex County, Page 354 and so forth, and is given to secure the sum of \$15,000. 20

The default clause, if your Honor please, which is the subject matter of dispute in this case, reads as follows: "This mortgage is second in priority to a mortgage in the nominal sum of \$135,000 held by the Richmond Building & Loan Association, and in case default is made in the payment of two monthly instalments of principal and interest of the Richmond Building & Loan Association mortgage, which is a first lien on said premises, then and in that event the principal sum herein secured shall be due and payable immediately thereafter, notwithstanding anything herein to the contrary." 30

*By Mr. Schotland:*

Q. Mr. Berla, has anything been paid to you on account of this mortgage? A. Nothing. 40

*Solomon Berla—Direct.*

Q. Has anything been paid to you on account of this mortgage? A. No.

Q. What is due to you? A. \$15,000 plus the interest since some day in October, 1928.

The Court: What is the default you allege? In the prior mortgage?

10 Mr. Schotland: Yes, sir, two monthly instalments only, in accordance with this clause.

Q. Are you connected in any way with the Richmond Building & Loan Association? A. Yes, sir, I am a director.

20 Q. Do you know whether or not the M. & L. Holding Company paid the monthly instalments of dues and interest on the \$135,000 to the Richmond at the December meeting? A. They did not pay it.

*By the Court:*

Q. December meeting of what year? A. 1928.

*By Mr. Schotland:*

30 Q. Do you know whether or not they paid the instalment of monthly dues and interest in the January meeting of 1929? A. They did not pay it.

Q. At the close of the meeting on the fourth Tuesday in January, 1929, how much was the M. & L. Holding Company in default—not in dollars and cents, but as to time? A. Two months.

Q. Two instalments? A. Two instalments.

40 Q. When you learned of that, what action if any did you take regarding your mortgage? A. I requested you to communicate with or get in touch

*Solomon Berla—Direct.*

with the M. & L. Holding Company or their officers and say to them that unless they paid these two instalments that were past due by 12:30 the next day that I elected to foreclose, if I didn't get my money.

Q. After you gave those instructions to me or to someone in my office, did anyone connected with the M. & L. Holding Company see you? A. Not until two days afterwards. 10

Q. Who of the M. & L. Holding Company came to see you? A. Mr. Maurice Levine.

Q. Do you know what officer of the company he is? A. I don't know whether he is president or secretary.

Mr. Schotland: It is admitted that he is the president. 20

Q. What conversation did you have with him then regarding your mortgage? A. He came to my office at 4 o'clock, I believe, the second day after the meeting, and I told him that I wanted my money, that he had had his opportunity to pay, he didn't live up to his obligation, and I wanted the matter cleared, and I had given your office instructions to proceed, and I could not take the matter out of your hands if I had a deal with you. 30

Q. What did he say? A. Well, he offered me the deed to the property. I told him I didn't want it, that there was a third mortgage on it, that I didn't care to assume that.

Q. Oh, there was another mortgage behind yours? A. Yes, sir.

*Cross-examination by Mr. Litwin:*

Q. Mr. Berla, you have no personal knowledge 40

*Solomon Berla—Cross.*

of the fact that the December payment was not made to the Building & Loan? A. I have.

Q. That is based on what? A. On the books of the Association.

10 Q. Are you in charge of the books of the Association? A. No, but there is a custom there, if I may explain it, that each meeting of the Building & Loan they read the names of the delinquents from one month to three or more, and the M. & L. Holding Company was read at that meeting as being one month in arrear.

Q. Your information is based on what somebody else has told you? A. That is the only information a director can get from the books, as read by the secretary, who is supposed to be honest.

20 Q. Your information from the books as to the January 1929 instalment is based on the information you got from the secretary reading off a list of the delinquents? A. No, the fact that he didn't appear to pay that night, and I waited until the close of the meeting, and was told that he didn't come in to pay his dues that night and interest.

Q. Well, checks are mailed to the Association at times, aren't they? A. This one wasn't.

30 Q. In any event, on that same night you gave instructions to Mr. Schotland that unless the payment was made to the Building & Loan by 12:30 the next day he, Mr. Schotland, was to institute foreclosing proceedings, is that right? A. Yes.

Q. Two days after Mr. Levine came to your office. What did he come for? A. Came to ask me not to foreclose.

Q. Did he tell you why? A. No, not that I recall. He may have said so.

40 Q. Did he tell you of the dispute in the Building

*Solomon Berla—Cross.*

& Loan Association as to the amount of interest that was due the Association? A. I don't think that question came up that afternoon.

Q. Did it come up at any time? A. Subsequently I heard that he questioned the amount that was due of the interest to the Building & Loan.

Q. The Building & Loan meets on the fourth Tuesday of the month, is that right? A. Yes, sir. 10

Q. You say that Mr. Levine came to you two days later and had this conversation with you? A. Yes, Thursday, afternoon.

Q. Don't you know, Mr. Berla, that on that same Thursday Mr. Levine made a payment of some eight hundred and some odd dollars to the Association in payment of January dues and interest?

A. I did at 5 o'clock that afternoon. After he left my office, he paid. 20

Q. At that time you had not countermanded your instructions to Mr. Schotland to foreclose? A. No, I never did after Wednesday afternoon.

Q. Wasn't it your suggestion that Mr. Levine give you a deed to the property in order to avoid the expense of foreclosure and weren't you willing to assume the \$8,000 third mortgage on the property? A. Absolutely not.

Q. Didn't you tell Mr. Leveine that you didn't think he would be able to carry the property? A. No such conversation ever took place. 30

Q. Didn't you as a friend suggest that Mr. Levine turn over the property to you? A. Oh, no, no such conversation ever took place.

Q. Didn't he tell you that he had an equity in the property of some \$20,000 and that if he turned over the property to you he would lose \$20,000? A. He offered the property to me, as I stated be-

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*Solomon Berla—Cross.*

fore, and I refused to take it. That was the only conversation that came up in regard to the property.

Q. Didn't Mr. Levine tell you that the property cost \$200,000? A. He may have said so.

10 Q. And that it was encumbered with mortgages of \$158,000 and that he had an equity of \$45,000? A. I knew what the property was worth. I had made an investigation. I knew that the property had mortgages on it. I knew there was \$135,000 first, \$15,000 second, and \$8,000, third.

Q. You knew that there was an equity in addition to the \$8,000 third mortgage? A. I didn't know what there was.

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A. SIGMUND KANENGIESER, called as a witness on behalf of the Petitioners, being first duly sworn, testified as follows:

*Direct-examination by Mr. Schotland:*

Q. You are the secretary of the Richmond Building & Loan Association? A. Yes, sir.

30 Q. Have you, as secretary, charge of the books and accounts of the Building & Loan Association? A. Yes, sir.

Q. Have you brought with you the bond and mortgage given by the M. & L. Holding Company to the Richmond Building & Loan Association in the sum of \$135,000? A. Yes, sir.

Q. Will you produce it, please? A. This is the mortgage and this is the deed taken from our files (producing papers).

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Mr. Schotland: I offer them in evidence.

A. *Sigmund Kanengieser—Direct.*

(The bond and mortgage referred to were received in evidence, the mortgage being marked P-2 and the bond P-2A.)

Mr. Schotland: The bond given by the M. & L. Holding Company and Maurice Levine and George Levine to the Richmond Building & Loan Association is in the penal sum of \$270,000, condition for the payment of \$135,000, and contains this provision as to the manner of payment: "\$135,000 with interest to be computed from the date hereof at the rate of 6 per cent. per annum in the manner following: by the payment of \$1 per month on each of 338 shares of the June, 1928, series of the capital stock of said Association owned by the said M. & L. Holding Company in its name on the books of the said association and assigned to it as collateral security for the payment hereof, and on which this loan is based, on the fourth Tuesday of each and every month hereafter."

The provision for the interest is as follows: "Interest at the rate of 6 per cent. per annum and payable monthly at the same time and in the same manner as the stock payments aforesaid."

The mortgage is recorded on the 23rd of August, 1928, in Book R-65 of Mortgages for Essex County on pages 49 to 52 and is given by the M. & L. Holding Company to the Richmond Building & Loan Association, covers the same premises described in the complainants' bill, and contains the same provisions, word for word, as the provisions in the bond as to the manner of payment—

*A. Sigmund Kanengieser—Direct.*

one dollar per month on each of 338 shares of the capital stock of the issue, and so forth, on the fourth Tuesday of each and every month hereafter—and the same for interest—at the rate of 6 per cent. to be paid monthly at the same time and in the same manner as the stock payments.

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*By Mr. Schotland:*

Q. Mr. Kanengieser, have you the books of original entry of the Building & Loan Association wherein receipts are entered? A. Yes, sir.

Q. What do you call that book? A. Dues ledger, sir.

Q. Will you turn to the pay night for December, 1928. What date of the month did it fall on?

20 A. December 22nd, 1928.

*By the Court:*

Q. When was that? On a Tuesday? A. Yes, sir.

*By Mr. Schotland:*

Q. That was the fourth Tuesday of December? A. That particular night, sir, wasn't the fourth Tuesday, due to the fact that the fourth Tuesday was on Christmas day.

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Q. Christmas was the fourth Tuesday? A. It was Christmas. The fourth Tuesday of last year was on Christmas Day, and for that reason we had the meeting on the Saturday night before, which we advised our shareholders.

Q. You gave notice of that? A. Yes.

*By the Court:*

Q. What happened? A. That the fourth Tuesday was on the 25th, sir, Christmas. We had the

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*A. Sigmund Kanengieser—Direct.*

meeting on December 22nd, so we advised shareholders, not to have a meeting on a holiday.

Q. Was it the following Saturday or the Saturday previous? A. The Saturday previous, sir. We advised the shareholders.

*By Mr. Schotland:*

Q. Did the M. & L. Holding Company make the payment of the dues on the shares and the interest on the principal of the mortgage loan due that night to the Building & Loan Association? A. No, sir.

10

Q. Will you turn to January, 1929, meeting night record? A. Yes, sir.

Q. What night did that fall on? A. January 22nd, 1929.

Q. Was that on the fourth Tuesday? A. Yes, sir.

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Q. That was the regular scheduled meeting night? A. Yes, sir.

Q. Did the M. & L. Holding Company at the January, 1929, pay night make a payment of their dues on the shares or of the interest on the principal of the mortgage loan? A. Not on the night of January 22nd, when I left there, approximately one o'clock in the morning.

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Q. One o'clock the next morning? A. One o'clock the next morning.

Q. Up to the time that the books were closed for that pay night, had the M. & L. Holding Company made payments of their dues or interest for December, 1928, or January, 1929, or for either of the two months? A. Not at the time, sir. The Board of Directors, meeting at 9:30 the night of January 22nd, when I reported all delinquents to the Board, as is customary with the Association—

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*A. Sigmund Kanengieser—Direct.*

*By the Court:*

Q. On the same night? A. Yes, sir.

*By Mr. Schotland:*

10 Q. When, if at all, did the M. & L. Holding Company make a payment for dues or interest to the Richmond Building & Loan Association? A. On January 24th, 1929, within a few moments of three o'clock in the afternoon I received in cash \$1013 from Mr. Morris Levine.

Q. Were there any instructions as to how to apply it? A. No, sir, except payment of the building and loan.

20 Q. How did you apply that payment? A. I applied that as one month's dues and one month's interest.

Q. Is this a split mortgage? A. Yes, sir. That is, \$75 a month interest and \$338 a month dues—principal.

Q. For 338 shares? A. 338 shares.

Q. The remainder of the principal sum secured by the mortgage is not paid by share installments? A. No, sir, \$67,400 of unpledged without any shares.

30 *By the Court:*

Q. The 24th of January was that? A. Yes, sir.

*By Mr. Schotland:*

Q. That was two days after the regular meeting? A. Yes, sir.

Q. He paid up one month's dues and interest? A. Yes, sir.

40 Q. What, if anything, did the M. & L. Holding Company remain in arrears for after paying that

*A. Sigmund Kanengieser—Direct.*

one month's dues and interest on January 24th?

A. An additional month's interest, sir.

Q. Which month? A. The month of December.

*By Mr. Litwin:*

Q. Additional interest only? A. One month's interest and dues—complete month—of \$1013. 10

*By Mr. Schotland:*

Q. You did not mention dues. A. I beg your pardon.

Q. Was the M. & L. Holding Company in arrears for anything else at that time? A. Nothing else at that time, sir.

Q. Had the fire insurance premium been paid? A. On February 26th, 1928.

Q. I am asking you if there were any arrears in January, 1929, for anything else besides the dues and instalments and interest. 20

Mr. Litwin: I object to it upon the ground that it is not one of the defaults alleged in the bill of complaint. The only default alleged is the failure to pay two monthly installments of principal and interest.

A. The insurance was in default to the extent that Mr. Levine had not met a note at that time. 30

*By the Court:*

Q. Speak louder, please. A. That Mr. Levine tendered a note for part of the insurance premium that was not met at its maturing date, and at the February, 1929, meeting the Association advanced the sum of \$713.88, the amount of the note.

*A. Sigmund Kanengieser—Cross.*

*By Mr. Schotland:*

Q. After the period when the M. & L. Holding Company had been two months in default of the interest and had paid up one month, did they continue to make the regular monthly payments of dues and interest?

10

Mr. Litwin: I object.  
(Discussion off the record).

*Cross-examination by Mr. Litwin:*

Q. Mr. Kanengieser, when was the loan originally granted to the M. & L. Holding Company? A. (Referring to a paper) July 24th, 1928.

20

Q. The bond and mortgage of the Association, which you produced, Exhibits P-2 and P-2A, were signed on July 23rd, 1928, that is right, isn't it? A. I could not tell, sir.

Q. Have you the check here that was given by the Association for this loan? A. I have the checks drawn to the order of the attorney for his trust account, yes, sir.

Q. Will you produce those, please? A. (The witness produces some papers).

30

Q. What is Check 1564? A. Check 1564 drawn on the National Newark & Essex Banking Company under date of October 25th, 1928, to the order of Philip J. Schotland, attorney for \$67,000 for the account of M. & L. Holding Company, Chancellor Avenue, Rutgers Street, Irvington, New Jersey, mortgage loan.

Q. When was that paid by the bank? A. October 29th, according to the stamp—"Received Payment, Newark Clearing House, October 28th,

40

*A. Sigmund Kanengieser—Cross.*

1928, New Jersey National Bank and Trust Company, Newark, New Jersey, No. 10.”

Check No. 1565, drawn upon the same bank, dated October 25th, 1928, to the same party's order, of Philip J. Schotland, attorney, in the sum of \$17,000 for the same cause.

Q. When was that paid at the bank? A. October 29th, 1928, through the Clearing House. 10

Check No. 1566, upon the same bank drawn to the order of Philip J. Schotland, attorney for M. & L. Holding Company mortgage dated October 29th, 1928, for the sum of \$15,000.

Q. When was that paid by the bank? A. “Received payment through the Newark Clearing House, November 7th, 1928;” and a check No. 1567, dated November 7th, 1928, to the order of Philip J. Schotland, attorney for the M. & L. Holding Company, mortgage loan, paying for balance in full plus Building & Loan charges of \$8,103, check amount \$27,907, and cleared, or received payment, through the Newark Clearing House on November 7th, 1928; total of \$135,000. 20

Q. Will you state, Mr. Kanengieser, why the association drew checks in the latter part of October for part of the loan and checks on November 7th, 1928, for part of the loan? A. Part of the receipts of the evening were received on October 23rd, deposited on October 24th, and additional money was received in the week following. It is customary in building and loans to receive second and third receipts after pay night. 30

Q. That is customary? A. I think so.

Q. When did the Association, prior to November 5th, 1928, have \$135,000 less its charge in connection with this loan to its credit? 40

*A. Sigmund Kanengieser—Cross.*

Mr. Schotland: I object, if your Honor please. We are not dealing with the Building & Loan Association mortgage. That is not the mortgage that is being foreclosed nor the consideration here in controversy. It is immaterial.

The Court: Overruled.

10

A. According to my records the payments received on my accounts on October 23rd, 1928, pay night, show the entire amount in possession of the Association.

Q. Then, why did you wait until November 7th, 1928, before you drew a check for \$27,897? A. Because of the fact that checks are to be cleared by the bank before we draw against them.

20

Q. Then, as a matter of fact, the Association did not have full consideration for the whole \$135,000 loan in its hands to check out until November 5th, 1928, is that right? A. No, I didn't say that. I am not in possession at this moment of the balance on hand on October 23rd or 24th—the morning of the 24th.

30

Q. Without wishing to argue with you, sir, if you had \$135,000 on hand, you would have drawn one check on October 24th for \$135,000? A. No, I draw checks in accordance with the instructions from the attorney.

Q. Have you your dues book? A. Yes, sir.

Q. Have you your ledger here? A. This is the dues ledger (indicating).

Q. Will you indicate the date upon which you had in the account of the Association \$135,000 with which to meet this loan? A. No, sir, it would not indicate.

40

*A. Sigmund Kanengieser—Cross.*

Q. Isn't it necessary to issue prepaid stock to partially finance this loan and to depend upon the money coming into the Association, in order to make good your \$135,000 check? A. We have never issued any prepaid stock, sir, to any mortgage holder for any loan.

Q. Did the Association borrow from anyone prepaid stock in order to have finances to pay the \$135,000 loan? A. The Association is continually borrowing on prepaid stock, and desiring to do so today. 10

Q. Without evasion, Mr. Kanengieser— A. I am not trying to evade, sir.

Q. (Continued) —will you please tell the Court when the Association had \$135,000 to its credit immediately prior to November 5th, 1928, to meet the checks issued for the loan? A. I could not say, Mr. Litwin, on that, when exactly they had it. I know the income for one night. I know the income that comes in is considered for the pay night. Altogether we have three checking accounts. I could not truthfully tell you. 20

Q. As a matter of fact, the Association didn't have \$135,000 until November 5th? A. I don't know that of my knowledge or to say so.

Q. Would that check book disclose the balance of your Association? A. No, sir. 30

Q. What book does disclose the balance of the Association from time to time? A. The cash book discloses at the close of the meeting and when everything is absolutely closed for the month.

Q. Does your cash book disclose the balance to the credit of the Association in the bank? A. It would show our balance as I reported it to the Board from one meeting to another, sir. (Refer- 40

## A. Sigmund Kanengieser—Cross.

ring to a paper) It would show that as of October 23rd, 1928, prior to the October meeting—take out the last day's; my balance came to me the morning of the meeting night—we had a balance on hand of \$57,232.56, that the income for the October, 1928, pay night from all sources was \$107,-  
 10 879.25. Disbursements for the month of October for all sources \$142,103.26. I carried forward a balance on November 7th, 1928, of \$23,008.55.

Q. October 7th? A. November 27th, sir.

Q. When did the Association collect the different parts of the \$107,000? A. I do not keep the entry, sir, when the deposits are made to the bank.

Q. Have you your bank book here? A. No, sir, I am not in possession of it; that is the treasurer's.

Q. On October 23rd you were short \$78,000 approximately to meet the \$135,000 loan? A. That was before the pay night of October 23rd, sir.  
 20

Q. You stated before that you drew the four checks that you drew on that bank from time to time as money came in. Is that right? A. I drew those checks, sir, in accordance with the instructions of the attorney's office.

Q. But you would not draw the checks unless you actually had the money on deposit? A. Unless the treasurer assured me the money was on deposit.  
 30

Q. What were your monthly receipts from stockholders and mortgage loans for the October meeting? A. Collection for dues for the October meeting was \$17,428; interest collections for that night, \$15,826.25; premiums, \$5,420; fines, \$25.

Q. \$5,420 represents the greater part of the 3 per cent. charge on the M. & L. loan? A. Considered fees of the night of October 23rd, sir. I am reading from my record.  
 40

## A. Sigmund Kanengieser—Cross.

Q. According to the record that you have just given me, your monthly receipts for the October pay night amounted to about \$40,000, which includes the \$5,400 of the M. & L. Holding Company?  
A. Yes.

Q. You had a balance on hand of fifty some odd thousand dollars? A. \$57,232.56.

Q. But you were still short some fifty or sixty thousand dollars to meet the \$135,000 check after you had deposited all those moneys? A. On the night of October 23rd, yes, but not for the fees of the month of October.

Q. Does the amount of \$107,000 that you gave as being received include the discount of the notes at the bank? A. In that particular month we discounted no notes.

Q. Doesn't the \$107,000 include the income from prepaid stock? A. Yes.

Q. When was that received? A. At various dates, sir.

Q. When? A. Some was received October—November 2nd.

Q. How much on November 2nd? A. \$2,000.

Q. Yes. A. November 5th, \$42,000; November 9th, \$15,000; November 24th—

Q. Up to November 9th is enough; so between November 2nd and November 9th the Association received \$52,000 of prepaid stock? A. \$59,000, sir.

Q. Without the income during the period from November 2nd to November 9th, you were not in a position to close the M. & L. loan? A. I wasn't in a position to draw the check during that time, if that is what you mean.

Q. Have you ever received a complaint from Mr.

*A. Sigmund Kanengieser—Cross.*

Levine regarding the charging of interest from the October pay night, and did he claim for an allowance from the October pay night until November 5th? A. Yes, sir.

10 Q. When? A. I believe in February. Either December—I am not certain of this—but I was down at Mr. Schotland's office when Mr. Levine came in and discussed the matter. It was either in December, while I was there for a few moments, or else it was in February.

20 Q. I show you a letter and ask you whether it refreshes your memory as to whether the conversation took place in December or in February? A. I would say this is the action of January, 1929, after our meeting. The letter states that the question has been referred to the president for decision.

Q. So the conversation must have taken place prior to that time? A. Prior to January 30th, 1929, sir.

Q. You had two conversations—one in December and one in February of 1929? A. I think that is all.

30 Q. Was Mr. Levine's complaint based upon the fact that he was charged interest from the October meeting? A. The complaint was based upon the fact that he thought he had been paying for an additional month which he did not pay.

Q. When the loan was closed by Mr. Schotland's office on November 5th, the loan was charged with an interest payment of \$675, is that right? A. Yes, sir.

Q. That was for what month? A. From October 23rd to November 27th.

40 Q. Mr. Levine was also charged with dues for

*A. Sigmund Kanengieser—Cross.*

the month of November? A. He was charged for dues for the month of September—November, at his own request.

Q. Why? A. He asked that the November payment be taken off from the amount granted at that time. What other arrangement he had made with Mr. Schotland's office I don't know, but that was the request made at that time. 10

Q. Did Mr. Levine make the request, or did Mr. Schotland's office make the request? A. I was told that Mr. Levine had made the request.

Q. By whom were you told that? A. First by Mr. Schotland's office, Miss Jedell, and later informed by Mr. Levine himself, while I was talking to him, because he wanted an opportunity to collect the rents and be in a position to carry on with the loan. 20

Q. Was anything ever done towards giving the M. & L. Holding Company an allowance for interest from October 23rd to November 5th? A. The matter was discussed by the Board of Directors and they felt that there was no allowance due to Mr. Levine at the time.

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HELEN JEDELL, called as a witness on behalf of the Petitioners, being duly sworn, testified as follows: 30

*Direct-examination by Mr. Schotland:*

Q. Miss Jedell, you are the managing clerk in Mr. Schotland's office? A. I am.

Q. As such you have charge of the paying out of mortgage loans? A. I do.

Q. Did you have charge on behalf of the com- 40

*Helen Jedell—Direct.*

plainants, Sol and Samuel Berla, and the M. & L. Holding Company? A. I did.

Q. Did you also have charge of this transaction involving the mortgage loan on behalf of the Richmond Building & Loan Association with the M. & L. Holding Company? A. I did.

10 Q. Were you present at the January, 1929, meeting of the Richmond Building & Loan Association? A. Yes.

Q. Did you receive any instructions from Mr. Solomon Berla at the close of the January, 1929, meeting of the Richmond Building & Loan Association regarding the M. & L. mortgage held by the Berlas? A. I did.

20 Q. As a result of the instructions of Mr. Berla, what, if anything, did you do in connection with the M. & L. Holding Company?

*By the Court:*

Q. Tell what instructions Mr. Berla gave you? A. Mr. Berla instructed me the first thing the next morning as early as I could reach Mr. Levine, to notify him that unless both payments of interest and principal were paid to the Richmond Building & Loan by 12:30 that noon, he elected to call in his mortgage and proceed with the foreclosure.

30 *By Mr. Schotland:*

Q. Did you follow those instructions? A. I did.

Q. How did you reach Mr. Levine? A. I reached him at his home at Goldsmith Avenue the next morning between eight and a quarter past eight, by telephone.

Q. Which Mr. Levine did you talk to? A. Mr. Maurice Levine.

40 Q. He is the president of the M. & L. Holding Company? A. Yes, sir.

*Helen Jedell—Direct.*

Q. What conversation did you have with him?

A. I asked him why he didn't pay the night before at the meeting. He said he didn't have the money, so I told him Mr. Berla told me to notify him that unless that payment was made either at our office or the office of the Richmond, at 12:30 that noon, that he elected to call in his mortgage, and I was to wait no longer than 12:30. 10

Q. What did Mr. Levine say? A. He pleaded with me to wait until 4 o'clock, and I agreed to do that.

Q. What happened next? A. At 4 o'clock he didn't show up, so I called up Mr. Berla and asked him if he had been there, and he said no, and then Mr. Berla said, "I want you to go ahead. I don't want you to wait another minute, to go ahead"; and I did. 20

Q. Did you file your bill on that day? A. I got the search. That took a day—the foreclosure search—and then I got the bill filed.

Q. Did you have any further conversation with Mr. Leveine around that time? A. Well, he phoned the next day and asked me to wait further, and I told him I could not do it, he would have to get permission from Mr. Berla. 30

*Cross-examination by Mr. Litwin:*

Q. Miss Jedell, you closed this loan on November 5th, 1928? A. I did.

Q. At that time there was deducted from Mr. Levine's company's account the sum of \$675 for November interest? A. That is right.

Q. And \$338 for November payment, is that right? A. That is right. 40

*Helen Jedell—Direct.*

Q. Didn't Mr. Levine complain that he was being charged for interest from the October meeting when as a matter of fact, the Association didn't have the money, and that he was entitled to be repaid? A. Made no complaint then.

10 Q. When did he make a complaint? A. After the December meeting.

Q. To whom? A. To me.

Q. What did you do then? A. I didn't do anything; I was just talking to him.

*By the Court:*

Q. What had you to do with the Building & Loan? A. Nothing except—

20 Q. (Continuing) —in connection with it? A. Nothing except in connection with the office—with Mr. Schotland's office.

Q. Is Mr. Schotland the solicitor? A. Mr. Schotland is the solicitor for the Association.

Q. Where are the meetings held? At his office? A. At Belmont Avenue. I think it is 14-16 Belmont Avenue.

*By Mr. Litwin:*

30 Q. All of the loans of the Richmond are closed in your office? A. Oh, yes.

Q. The practice of the Association is to have the checks drawn to Mr. Philip J. Schotland, as attorney? A. Oh, yes.

Q. He is the disbursing agent and closes the entire transactions for the Association? A. That is right.

40 Q. Miss Jedell, have you the trustee's account here for the Richmond Building & Loan Association? A. I have.

*Helen Jedell—Cross.*

Q. Does that account disclose the record of the checks received from the Association in connection with this loan? A. Yes.

Q. Will you kindly state when the various checks received from the Association were deposited? A. On October 29th, 1928, there was a \$84,000 deposit. On November 7th there was \$15,000 and \$27,897 deposited. 10

Q. When was the loan actually closed? A. Well, I think either the 5th or the 7th. There was a delay.

*By the Court:*

Q. The 5th or the 7th of what? A. November, 1928.

*By Mr. Litwin:*

Q. Do you recall Mr. Levine's coming to your office on January 24th? Your Building & Loan meeting was on January 22nd. You had a telephone conversation with him on January 23rd and you remember his phoning you on January 24th? A. Phoning? Yes. 20

Q. Do you recall that during the course of that conversation he asked you whether you had the statement ready from the Building & Loan Association, to see the apportionment of interest that he was to receive? A. I don't recall that. 30

Q. You don't recall that? A. In fact, that was never asked of me by Mr. Levine.

Q. Did he come to your office subsequent to that meeting? A. No.

Q. Didn't Mr. Levine come to your office about eleven o'clock pursuant to an appointment that you had made with him, at which appointment Kanengieser, the secretary of the Association, was 40

*Helen Jedell—Cross.*

going to be present? A. I don't recall it.

Q. Do you recall Mr. Levine's waiting at your office until half past one for Kanengieser? A. No, I don't recall it. I don't recall that any such thing happened that Mr. Litwin is asking about.

*By the Court:*

10 Q. Do you recall that those things did not happen? A. I recall they did not happen.

Q. When you say you do not recall, you mean that those things did not happen? A. They did not happen. I recall they didn't happen. I recall that Mr. Levine called up. That is all I recall.

*By Mr. Litwin:*

20 Q. Was Mr. Levine present at your office on Thursday, January 24th? A. As far as I remember, he telephoned me only.

*By the Court:*

Q. He did not come in? A. As far as I remember, sir.

*By Mr. Litwin:*

30 Q. Didn't he at about half past one leave your office and go to Kanengieser's office? A. I am never there at half past one, so it could not have been—

*By the Court:*

Q. Answer the question. A. No.

*By Mr. Litwin:*

40 Q. Did you receive word later on in the afternoon from Kanengieser that Levine had been there and had paid one month's dues and interest? A. I did.

*Helen Jedell—Cross.*

Q. Miss Jedell, according to the subpoena to answer this case, it is dated January 29th. I assume that the bill was filed and subpoena issued after you had knowledge of the payment of one month's dues and interests? A. The subpoena was issued afterwards.

Mr. Schotland: That is the complainants' case. 10

MAURICE LEVINE, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

*Direct-examination by Mr. Litwin:*

Q. Mr. Levine, you are the president of the M. & L. Holding Company? A. I am. 20

Q. Your company secured a mortgage loan from the Richmond Building & Loan Association? A. We did.

Q. At the time the loan was closed, on November 5th, 1928, there was a charge made of \$675 for one month's interest. How did that come about? A. Why, I requested Miss Jedell to hold back one month. In fact, I requested two months. My impression is she did hold back two months. 30

*By the Court:*

Q. Raise your voice, please. A. I asked Miss Jedell to hold back one month, both dues and interest.

*By Mr. Litwin:*

Q. Did you tell her why? A. Yes, because there would not be income on the building and I would be unable to pay it. I wanted to make sure that she had the money. 40

*Maurice Levine—Direct.*

(Discussion between Court and counsel).

Q. Was there any discussion as to interest that was to be charged by the Association from the October meeting until November 5th? A. We had that discussion at the time we signed the mortgage.

Q. With whom? A. With Miss Jedell.

10 Q. What was that discussion? A. In signing the mortgage, I think it was some time in July, I asked her from what date the interest would have to be paid. She says, "You don't have to pay interest until the actual time we pay out the money."

Q. When did you make a complaint to the Association, either to Miss Jedell or to Mr. Kanengieser, about the interest that was being charged for that period of time? A. I made it to Miss Jedell after the December meeting. Mr. Kanengieser was there at the time.

Q. Why didn't you pay your December instalment of dues and interest? A. I didn't know what the amount was. I didn't know what the credit for interest was from the \$1,013.

Q. Did you request either Miss Jedell or Mr. Kanengieser to give you a statement of the amount that you owed the Association? A. I requested Miss Jedell in Mr. Kanengieser's presence.

30 Q. When? A. I think it was the day after the December meeting.

Q. Did you get the statement? A. I did not.

Q. Did you get the allowances? A. I did not.

Q. When next did you make the complaint about the interest?

*By the Court:*

40 Q. What allowance? A. A credit from October 23rd to November 7th, the time she paid out the

*Maurice Levine—Direct.*

money. The Building & Loan wanted me to pay interest from October 23rd, and my arrangement with Miss Jedell was not to pay interest until the money was paid out. The money was paid out on November 7th.

Q. November what? A. November 7th. It was the day after Election Day.

10

Q. She wanted you to pay from when? A. October 23rd.

Q. Why was October 23rd fixed? A. That was the October meeting night.

*By Mr. Litwin:*

Q. What happened then? A. Miss Jedell told Mr. Kanengieser to let me know what the amount was. Mr. Kanengieser said, "That is rather unusual."

20

She says, "I know it is, but I have agreed with Mr. Levine to allow him that."

He was supposed to let me know the amount, but he never did. Then I spoke to him some weeks later, and he told me over the phone that it was a matter for the directors to decide, and I wrote him a letter asking him for the allowance, and he replied at that time that it was a matter for the directors.

30

*By the Court:*

Q. What was the sum total of the interest as of that time, without any allowance? A. \$675.

Q. What was the amount of the principal? A. \$135,000.

Q. No, the amount of the principal instalment. A. \$338.

Q. You paid neither? A. Paid neither.

40

*Maurice Levine—Direct.*

Q. Because you didn't have the amount of the interest? A. That is right.

Q. Why didn't you pay the amount of the principal instalment? A. I don't think you can pay one without the other.

10 Q. Why didn't you try? A. I happen to be director in two or three building and loans and I know you cannot do it.

Q. Only the interest was in dispute? A. That is all.

*By Mr. Litwin:*

Q. Did you receive this letter from Mr. Kanengieser (handing the witness a paper)? A. I did.

*By the Court:*

20 Q. You claim that there should be a deduction of interest from October— A. 23rd.

Q. From the 23rd? A. To November 7th.

Q. At what rate? A. 6 per cent.

Q. On what sum? A. \$135,000.

Q. Do you know how much that was? A. I could figure it, yes.

Q. Did you tender them the difference? A. I did not.

30 Q. Why? A. Mr. Kanengieser seemed to think that he had no right to make any such allowance.

Q. But you apparently give it as your reason for making the payment that he would not state to you the amount of the deduction? A. That is right.

Q. You have told me that you know how to calculate it yourself. A. Yes, sir, I do.

40 Q. Did you offer them the difference? A. I did not, no, sir.

*Maurice Levine—Direct.*

Q. Had you any reason for not offering it to them? A. No, not at all.

Q. You failed to make the payment of the interest and the instalment of the principal only because the secretary failed to make the calculation for you? A. That is correct.

Q. A calculation that you admit you could make yourself? A. Yes, sir. 10

Mr. Litwin: I offer in evidence a letter from the Richmond Building & Loan Association to Mr. Maurice Levine, dated January 30th, 1929, signed by A. Sigmund Kanengieser.

(The paper referred to was received in evidence and marked Exhibit D-1).

*By the Court:*

20

Q. Did you have the means of paying the net amount at that time? A. You mean the \$1013? Yes, sir, I did.

Q. At the December meeting? A. Yes, sir.

Q. Did you have it available in the bank? A. Yes, I had it in the bank.

*By Mr. Litwin:*

Q. On January 23rd, 1929, did you receive a telephone call from Miss Jedell? A. I did. 30

Q. What did she say to you and what did you say to her? A. She said I hadn't paid dues last night. I said I knew it. She said that Mr. Berla had instructed her to foreclose. I said, "I am still waiting to hear from your secretary as to the amount due for December."

She said, "Well, unless I was in by 4:30 she would foreclose. I came in—no, not the next day; 10

*Maurice Levine—Direct.*

4:30 of the 24th. I came in to see her 12 o'clock of the 24th and I asked her the amount due for December. She said Mr. Kanengeiser would be there about one o'clock and he would tell me the amount.

*By the Court:*

10 Q. You knew the amount all the time, didn't you? A. I never took the trouble to figure it. What I wanted was Mr. Kanengieser to send that amount. He signified to Miss Jedell's office that he knew nothing of any amount and that he would not take it.

20 Q. Had you any apprehension that he would not take any money if you offered it? A. I guess he would take any money that I gave him. That is, I think so now. I don't know whether he would take less than \$1013 and give me credit for the month.

30 Q. What happened after your call at Miss Jedell's office? A. I came in on the morning of the 24th. She said to wait for Mr. Kanengieser, he would give me the amount. Mr. Kanengieser didn't show up. I then went to Mr. Kanengieser's office and asked him what the amount was. He said he could not give it to me without the Board authorizing him to give it to me, so I then paid in cash one month and told him to please let me know what the other month was so I could pay it.

Q. Has the Association ever given you the allowance of interest? A. They have not.

Q. Did you go to Mr. Berla's place of business on the 23rd? A. I did, on the 24th.

Q. Did you offer him a deed for the property? A. No, I did not.

40

*Maurice Levine—Direct.*

Q. Was anything said about a deed for the property? A. Yes, I spoke to him and asked him not to foreclose. I said, "You are only going to incur an expense, and there is no defect in the mortgage." I said, "Are you trying to take the property away from me?"

He said, "No."

10

I said, "Then, why foreclose?"

He said, "That is a matter for Mr. Schotland. It is out of my hands."

Q. Did you discuss the value of the property with him at the time? A. In talking with him I said, "Anyway, this property is worth well over \$200,000."

He said, "Yes, I know it. I was on the committee that gave you the loan."

20

*Cross-examination by Mr. Schotland:*

Q. Do you mean to say, Mr. Levine, that you had the money in the bank to the credit of the M. & L. Holding Company in time for the payment at the December, 1928, meeting? A. I either had it to the credit of the M. & L. Holding Company, or the Newark Sash & Door Company.

Q. But you are sure you had it? A. Oh, positive. I have maybe four or five times that amount.

30

Q. At the time of the settlement in my office, when Miss Jedell completed making the disbursements, there was \$675 interest deducted from the proceeds of the mortgage loan for the November, 1928, interest, was there not? A. That is correct.

Q. That is, a full month's interest from the October pay night to the November pay night, is that not so? A. That is right.

40

*Maurice Levine—Cross.*

Q. If you were entitled, as you claim, to an allowance for interest, it was out of that deduction that the allowance should have been paid, was it not? A. No, no.

10 Q. Wasn't it? A. No. The idea of holding back one month was that I would have nothing to pay in November at all.

Q. But if you didn't owe a full month's interest in November, Miss Jedell should not have held back a full month's interest for November, should she? A. My arrangement with her was to hold back a full month's interest—a few months' interest and dues.

20 Q. Your statement shows that the dues including the November were deducted from the proceeds of the mortgage loan and that the interest from the October pay night and the November pay night, in full, was deducted from the mortgage loan? A. That is right.

Q. You say that that interest was deducted at your personal request? A. That is right.

Q. Now, the interest that you claim an allowance for is part of that very month's interest, is it not? A. No, it could have been paid at the next month.

30 Q. Isn't it a fact that you claim an allowance of interest charges from October 23rd to November 7th, 1928? A. That is correct.

Q. Isn't that the period covered by the \$675 deducted by Miss Jedell and turned over to the Building & Loan Association at your request? A. That is correct.

The Court: What period?

Mr. Schotland: From October 23rd to

*Maurice Levine—Cross.*

November 7th. That \$675 covers from October 23rd to November 7th, whenever the fourth Tuesday was.

The Witness: That request wasn't made at that time; that request was made maybe three or four months before she paid the money out.

10

*By the Court:*

Q. When did you make the loan? A. During July.

*By Mr. Schotland:*

Q. But you abided by your request at the time Miss Jedell disbursed the funds? A. I guess I did.

*By the Court:*

20

Q. Tell me, why should you, three or four months before, make the request to hold out enough interest to pay the amount due from October 23rd to November 7th? A. It wasn't just October 23rd. When I made the request I didn't know exactly when the loan would be closed.

Q. That is what I mean. You didn't know at that time when the money would be paid out. A. I knew it would be some time in October.

30

Q. What made you think that? A. Well, our building would be completed about the end of September.

*By Mr. Schotland:*

Q. The arrangement was, Mr. Levine, that the money wasn't to be paid out until your building was completed? A. That is correct.

Q. And that no interest was to be charged until

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*Maurice Levine—Cross.*

the October meeting of the Building & Loan? A. No, the arrangement was that no interest was to be charged until Miss Jedell paid the money out.

Q. Mr. Levine, you say that you have had experience in other building and loan associations?

A. That is right.

10 Q. You know that ordinarily interest is charged on the loan right from the night that the Board of Directors grants the loan? Isn't that so?

Mr. Litwin: I object.

The Court: Objection overruled.

A. There are some building and loan associations charge from the time the money is paid out, there are some building and loans charge from the time the money is granted. Sometimes—

20 (Discussion between Court and counsel).

Q. In this case you made an arrangement that the interest was to be charged from the time the money was paid out, you say? A. That is right.

Q. Now, the money that was paid out was the receipts of the October 23rd meeting, the last meeting in October, was it not? A. I suppose so.

30 Q. On November 7th, when the transaction was closed so far as disbursing the proceeds of both the \$135,000 Building and Loan mortgage and the \$15,000 Berla mortgage, and also the \$8,000 Litwin mortgage, did you make any objection to being charged \$675 interest from October 23rd to the date of the November meeting? A. I wasn't concerned with it at that time, Mr. Schotland.

*By the Court:*

40 Q. Answer the question. A. I didn't say anything.

*Maurice Levine—Cross.*

Q. These payments were paid out when? A. November 7th. 5th or 7th, I am not sure.

The Court: Are they different occasions, or on the same day?

Mr. Schotland: On the same day.

*By Mr. Schotland:*

10

Q. You had borrowed the \$15,000 from Berla and the \$8,000 from Mr. Litwin and deposited that \$23,000 in addition to the proceeds of the Building and Loan mortgage, in order to pay off all the claims against the building, had you not? A. That is correct.

Q. You say that you were not concerned with \$675 being held out on you at that time? A. At that time I could not change it any more. When we were short of money on the 5th, I asked Miss Jedell to release that money. She said, "I can't do that any more."

20

*By the Court:*

Q. Release what money? A. The \$1,013 that I originally requested her to hold out. She said that could not be done any more, the secretary had instructed her to take it.

*By Mr. Schotland:*

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Q. That was on November 5th? A. The day before election.

Q. You knew on November 5th that Mr. Kangieser had deducted a full month's interest? A. Yes.

Q. You are sure of that? A. I am quite sure I knew it on the 5th, yes.

40

*Maurice Levine—Cross.**By the Court:*

Q. You made no claim at that time for a deduction? A. I could not make any claim.

Q. You did not, in fact, make any? A. No, I didn't.

10 Q. You didn't go to the December meeting of the Building & Loan Association at all? A. I did not.

*By Mr. Schotland:*

Q. You knew that the Board of Directors of this Association meets immediately after the books are closed on the same night as the pay night, did you not? A. Yes, sir, I did.

20 Q. Why didn't you go to the office of the Building & Loan Association on the pay night and make your payment and make your claim? A. I didn't think it was necessary to go to the Building & Loan. Miss Jedell's word was good enough for me.

Q. What was her word? A. That I would get this allowance.

Q. What you would have to get, then, would be a reimbursement for part of the \$675 that she had deducted? A. No.

30 Q. From October 23rd to the date of the November meeting? A. I didn't want a reimbursement; I wanted a credit.

*By the Court:*

Q. You wanted a credit of \$1,013, but only upon payment of that sum, less the interest from November 23rd to November 7th? A. No, I wanted a credit, so that I could pay less the \$1,013.

40 Q. What credit? A. Credit of the interest.

*Maurice Levine—Cross.*

Q. Why didn't you go to the Board meeting and say to them, "Here is my money less the interest from October 23rd to November 7th"? A. Because it was only at the end of January that they told me it was a matter for the Board to decide.

Q. You were the debtor. You were the one who was seeking for the credit—and according to your version you were entitled to it—but knowing all of that—you knew that there was a difference in amount due the Building & Loan, assuming your situation to be true? A. That is right. 10

*By Mr. Schotland:*

Q. You didn't go there and make a payment in December? A. That is right.

Q. You had notice of that pay night meeting? A. I guess I did. 20

Q. When the January meeting came around, why didn't you go and pay dues or interest for either December or January? A. I didn't want to pay January, because they give me credit for December.

The Court: What?

Mr. Schotland: He was afraid they would credit it on the other month, instead of on the current month. 30

Q. So you made no payment either in December or January until after Miss Jedell called you up and told you that Mr. Berla had instructed her that unless you paid both months' dues and interest to the Building & Loan Association by 12:30 that day, he, Berla, elected to declare his mortgage due, and she, Miss Jedell, would have to go ahead and foreclose? A. Not 12:30 that day; 4:30 the next day. That is correct. 40

*Maurice Levine—Cross.*

Q. She called you up on the 23rd? That you admit? A. Yes, sir.

Q. You agree with her as to the conversation that took place as to the time limits? A. That is right.

Q. You say she gave you until 4:30 on the 24th?  
10 A. That is correct.

Q. She said that she only gave you until 12:30 that day? A. That is right.

Q. Did you ever appear before the Board of Directors and ask for the credit of the interest? A. I wrote them a letter about it.

Q. Why don't you answer my question? Did you ever appear before the Board of Directors and ask for the credit of the interest? A. I did not.

Q. Did you appear at the February meeting? A.  
20 I did.

Q. (Continuing) —and ask for the allowance of the interest? A. I did not.

Q. You never got any allowance of that interest that you claimed? A. I did not.

Q. You have since paid up that interest? A. Yes, sir.

*By the Court:*

Q. Interest from October 23rd? A. All paid up  
30 since the matter was taken up with the Board, and they rejected the idea of interest, and I paid it.

Mr. Litwin: That is our case.

*Helen Jedell—Rebuttal—Direct.*

HELEN JEDELL, recalled as a witness on behalf of the petitioners, in rebuttal, testified as follows:

*Direct-examination by Mr. Schotland:*

Q. Did you tell Mr. Kanengieser, in Mr. Levine's presence, in December, 1928, after the pay night of the Richmond Building & Loan Association, that Mr. Levine was entitled to receive a rebate of the interest from October 23rd, 1928, to November 7th, 1928, and that you had made that arrangement with Mr. Levine? A. I did not. 10

Q. Did you ever make any such statement to Mr. Levine or to anyone else? A. I did not.

Q. Did you ever make such an arrangement? A. I did not. 20

*By the Court:*

Q. Did you extend the time for a complete exercise of the option until 4 o'clock on the 24th of January, namely, Thursday? A. I did not.

*By Mr. Schotland:*

Q. What was the first limit of time that you gave Mr. Levine? A. 12:30 on the 23rd.

*By the Court:*

Q. Wednesday, the 23rd? A. That is right. 30

Q. And not until— A. And he pleaded for 4 o'clock of that day.

Q. Did you extend it any further than that? A. I didn't.

Q. Did you extend it up until four? A. Until four.

Q. Was there any arrangement at all for a further extension? A. No, sir. 10

*A. Sigmund Kanengieser—Rebuttal—Direct.*

Q. He paid when?

Mr. Schotland: The following day at 3 o'clock, on the 24th. He paid only one month.

10 A. SIGMUND KANENGIESER, recalled as a witness on behalf of the Petitioners, in rebuttal, testified further as follows:

*Direct-examination by Mr. Schotland:*

Q. Mr. Kanengieser, after the December meeting of 1928 of the Richmond Building & Loan Association and in that same month did Miss Jedell say to you in her office in the presence of Mr. Levine of the M. & L. Holding Company that Mr.  
20 Levine was entitled to a rebate of interest on the mortgage loan from October 23rd, 1928, to November 7th, 1928, because she had made that arrangement with him? A. She did not. Mr. Levine made the request.

Q. He made the request of what? A. Mr. Levine made the request for a reduction of interest.

*By the Court:*

Q. When? A. After the December meeting.

30 *By Mr. Schotland:*

Q. That is not the question; the question is, did Miss Jedell say that Mr. Levine was entitled to it because she had made that arrangement with him?  
A. No.

Q. And had you ever heard her say that at any other time or place? A. No, I did not hear her say it.

40 Q. She never said it? A. No.

Mr. Schotland: Our case is in.

**Exhibit P-1.**

Know All Men by these Presents: That M. and L. Holding Company, a corporation duly organized and existing under the laws of the State of New Jersey, and having and maintaining its principal office in the City of Newark, County of Essex and State of New Jersey, Maurice Levine and George Levine of the City of Newark in the County of Essex and State of New Jersey held and firmly bound unto Solomon Berla and Samuel Berla of the City of Newark in the County of Essex and State of New Jersey in the penal sum of Thirty Thousand Dollars lawful money of the United States of America, to be paid to the said Solomon Berla and Samuel Berla their heirs, executors, administrators or assigns: For which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally firmly by these presents. Sealed with our seal Dated the twenty-third day of October One Thousand Nine Hundred and twenty-eight.

The Condition of the above obligation is such that if the above bounden M. and L. Holding Company, a corporation as aforesaid, Maurice Levine and George Levine their heirs, executors or administrators, successors and assigns, shall well and truly pay, or cause to be paid unto the above named Solomon Berla and Samuel Berla, their heirs, executors, administrators or assigns, the just and full sum of Fifteen Thousand Dollars on the twenty-third day of October which will be in the year One Thousand Nine Hundred and thirty and the interest thereon, to be computed from October 30th, 1928 at and after the rate of six per cent. per annum, and to be paid semi-annually without

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*Exhibit P-1.*

any fraud or other delay then the above obligation to be void, otherwise to remain in full force and virtue.

10 And it is hereby expressly agreed, that should any default be made in the payment of the said interest, or of any part thereof, on any day where-  
on the same is made payable as above expressed; or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposi-  
tion or lien be hereafter imposed or acquired upon the premises described in the mortgage accompany-  
ing this bond, and become due and payable; or should the said obligors their heirs, executors, ad-  
20 ministrators or successors in title to the said mort-  
gaged premises fail to keep the building or build-  
ings now or hereafter thereon insured against loss  
or damage by fire and assign the policy or policies  
for such insurance to the said obligee, their execu-  
tors, administrators or assigns, and such insurance  
be effected and premium or premiums therefor  
paid by the said obligee their executors, adminis-  
trators or assigns, pursuant to the agreement con-  
tained in the said mortgage; and should the said  
interest, or any part thereof, remain unpaid and  
in arrear for a period of thirty days; or said tax,  
30 assessment, water rent, or other municipal or gov-  
ernmental rate, charge, imposition or lien, or any  
or either of them, remain unpaid and in arrear for  
a period of ninety days; or said insurance premi-  
um or premiums so paid by the said obligee, their  
executors, administrators or assigns remain un-  
paid for a period of thirty days after demand there-  
for by the said obligee, their executors, adminis-  
trators or assigns upon the said obligee, their  
40 heirs, executors, administrators or successors in

*Exhibit P-1.*

title; then and from thence forth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of money, or so much thereof as may then remain unpaid, with all arrearage of interest thereon, shall, at the option of the said obligee, their executors, administrators or assigns, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary in anywise notwithstanding. 10

And it is further expressly agreed, that the said obligor, their heirs, executors, administrators or successors in title to said mortgaged premises, shall not be entitled to and will not claim any credit on the interest payable on the mortgage securing this bond for taxes which may be levied upon the said mortgaged premises, nor for any part of said taxes. All of the conditions contained in the mortgage accompanying this bond are to be included in this bond as if here again repeated. 20

M. AND L. HOLDING COMPANY,  
 Maurice Levine,  
 President,  
 (Seal) 30

MAURICE LEVINE, L.S.  
 GEORGE LEVINE, L.S.

Attest:

George Levine,  
 Secretary.  
 Helen Jedell.

(\$7.50 Documentary Stamps, cancelled, affixed)

*Exhibit P-1.*

For Value Received, M. and L. Holding Company, a corporation duly organized and existing under the laws of the State of New Jersey, and having and maintaining its principal office in the City of Newark, County of Essex and State of New Jersey, does hereby assign, transfer and set over

10   unto Solomon Berla and Samuel Berla, three hundred and thirty-eight shares of the June, 1928 series of shares of the capital stock, held by it in the Richmond Building and Loan Association, as collateral security for the payment of a \$15,000 mortgage loan. And in case of default in payment of dues, interest, cost of insurance or taxes upon premises mortgaged to the said Solomon Berla and Samuel Berla, or fines for non-payment of same it hereby authorizes the said Solomon Berla

20   and Samuel Berla or their attorney to make sale of said three hundred and thirty-eight shares of stock, at auction at any general meeting thereafter, or otherwise, and in their name to make and execute a transfer of said three hundred and thirty-eight shares of stock to the purchaser of same, applying the proceeds of said sale to the payment of said mortgage loan.

And further it does hereby elect to treat all

30   past and future payments of dues on said stock as credits on the bond and mortgage given to the Richmond Building and Loan Association, and authorizes the said Solomon Berla and Samuel Berla in case it becomes necessary, to foreclose said Mortgage.

In Witness Whereof the M. and L. Holding Company has caused these presents to be signed by its president, attested by its secretary and its corporate seal to be hereto affixed the 2nd day of No-

40

*Exhibit P-1.*

vember, One Thousand Nine Hundred and Twenty-eight.

M. AND L. HOLDING COMPANY,  
By Maurice Levine,  
President.  
(Seal)

Attest: 10  
George Levine,  
Secretary.

Endorsed:

M. AND L. HOLDING COMPANY a corporation,  
MAURICE LEVINE AND GEORGE LEVINE.

To

SOLOMON BERLA AND SAMUEL BERLA. 20

**Exhibit P-1A.**

This Indenture, made the twenty-third day of October in the year of our Lord One Thousand Nine Hundred and Twenty-eight Between M. and L. Holding Company, a corporation, duly organized and existing under the laws of the State of New Jersey, and having and maintaining its principal office if of the City of Newark in the County of Essex and State of New Jersey, of the First Part; 30

And Solomon Berla and Samuel Berla, of the City of Newark in the County of Essex and State of New Jersey, of the Second Part;

Witnesseth, That the said party of the first part, for and in consideration of the sum of Fifteen Thousand Dollars, Money of the United States of America, to it in hand well and truly paid by the said party of the second part, at or 40

*Exhibit P-1A.*

before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part 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  
10 said party of the second part, and to their heirs and assigns forever, All that tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Town of Irvington in County of Essex and State of New Jersey.

Beginning at a point formed by the intersection of the southeasterly line of Rutgers Street with southwesterly line of Chancellor Avenue, running  
20 thence along southeasterly line of Rutgers Street south 44 degrees 17 minutes west a distance of 100.06 feet to a point; thence south 47 degrees 43 minutes 20 seconds east a distance of 100.06 feet to a point; thence north 44 degrees 17 minutes east a distance of 100.06 feet to a point on southwesterly line of Chancellor Avenue; thence along southwesterly line of Chancellor Avenue north 47 degrees 43 minutes 20 seconds west a distance of  
30 100.06 feet to southeasterly line of Rutgers Street at place of Beginning.

The above description being in accordance with a survey made by John B. Acocella, Civil Engineer, dated July 23, 1928.

Being the same premises conveyed to the M. and L. Holding Company, a corporation of New Jersey, by deed from Goldbloom Realty Corporation, a New Jersey Corporation dated April 19, 1928 and recorded April 19th, 1928 in Deed Book Y-77,  
40 page 115.

*Exhibit P-1A.*

This mortgage is second in priority to a mortgage in the nominal sum of \$135,000 held by the Richmond Building and Loan Association, and in case default is made in the payment of two monthly payments of principal and interest of the Richmond Building and Loan Association mortgage, which is a first lien on said premises, then and in that event the principal sum herein secured shall be due and payable immediately thereafter notwithstanding anything herein to the contrary. 10

Party of the first part is hereby given the privilege of paying off the principal sum herein secured at any time prior to the expiration of this mortgage, provided interest is paid to the date of payment.

Together with all and singular the profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining. Also, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof. To Have and to Hold, all and singular the above described tract or lot of land and premises, with the appurtenances, unto the said party of the second part, their heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, their heirs and assigns forever. 20 30

Provided Always, and it is agreed by and between the parties to these presents, that if the said M. and L. Holding Company, a corporation as aforesaid do and shall well and truly pay, or cause to be paid, to the said party of the second part, or to their certain attorney or attorneys, heirs, executors, administrators or assigns, the sum of Fifteen Thousand Dollars in two years from the date 10

*Exhibit P-1A.*

hereof, with lawful interest for the same from October 30th, 1928, at the rate of six per centum per annum, payable semi-annually, according to the conditions of a certain Bond bearing even date herewith;

10 without any deduction of defalcation for taxes, assessments, or any other imposition whatsoever; then and from henceforth, these presents and said obligation, and everything herein and therein contained, shall cease and be void; anything herein and therein contained to the contrary in any-  
wise notwithstanding; And the said party of the first part and its successors does covenant and grant to and with the said party of the second part, their heirs and assigns, that the said party of the first part, its successors and assigns, shall  
20 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 payments of which this mortgage is made for so much of the taxes assessed against said lands as is equal to the tax rate applied to the amount due on this mortgage or any part thereof; and that the said party of the second part, their heirs and assigns, shall and may from time to time, and at all times  
30 after default shall be made in the performance of the proviso or condition herein contained, peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy all and singular the above granted and bargained premises, with the appurtenances, without the let, suit, trouble, hindrance or denial of the said M. and L. Holding Company, a corporation as aforesaid, and its assigns, or of any other person or persons whatsoever. And it is also agreed by and between the  
40 parties to these presents, that the said party of

*Exhibit P-1A.*

the first part shall and will keep the buildings erected and to be erected upon the lands above conveyed, insured against loss or damage by fire in some safe and responsible Insurance Company or Companies, to an amount not less than Fifteen Thousand Dollars, and assign the policy and certificate thereof to the said party of the second part as collateral security for the payment of the principal and interest aforesaid; 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, and payable on demand with legal interest. 10

In Witness Whereof, the said party of the first part has caused these presents to be signed by its Maurice Levine, its president, and its common seal to be hereto affixed, the        day of November, 1928. 20

M. AND L. HOLDING COMPANY,  
By Maurice Levine,  
(Seal)                      President.

Attest:

George Levine, 30  
Secretary.

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

Be it Remembered, That on this 2nd day of November, in the year of our Lord One Thousand Nine Hundred twenty-eight, before me, the subscriber, a Notary Public of New Jersey, personally appeared George Levine, who being by me duly sworn, doth depose and make proof to my satis- 40

*Exhibit P-1A.*

10 faction, that he well knows the corporate seal of M. and L. Holding Company, a corporation, the grantor mentioned in the within Indenture; that the seal affixed is the proper corporate seal of the said company; that the same was so affixed there-  
 to and the said deed signed and delivered by Maurice Levine, who was at the date and execution thereof, the President of said company in the presence of the said deponent, as the voluntary act and deed of the said company, and that the said deponent thereupon signed the same as subscribing witness.

GEORGE LEVINE.

Sworn and subscribed before me  
 on the day and year aforesaid.

20 Helen Sedell,  
 Notary Public  
 Of New Jersey.

Endorsed:

MORTGAGE

M. and L. Holding Company, a corporation  
 to  
 Solomon Berla and Samuel Berla

30 Dated October 23rd, 1928

Received in the Register's Office of the County of Essex, N. J. on the 5th day of November A. D. 1928, at 3:49 o'clock in the afternoon and Recorded in Book X-65 of Mortgages for said County, on pages 354-356.

Howard S. Dodd,  
 Register.

40

**Exhibit P-2.**

Know All Men by these Presents: That We, M. and L. Holding Company, a corporation duly organized and existing under the laws of the State of New Jersey, and having and maintaining its principal office in the City of Newark, County of Essex and State of New Jersey, and Maurice Levin and George Levin, of the City of Newark, County of Essex and State of New Jersey, are held and firmly bound unto Richmond Building and Loan Association, a corporation duly organized and existing under the laws of the State of New Jersey, and having and maintaining its principal office in the City of Newark, County of Essex and State of New Jersey, in the sum of Two Hundred and Seventy Thousand Dollars lawful money of the United States of America, to be paid to the said Association, its certain attorney, successors or assigns, for which payment well and truly to be made we bind ourselves, our successors and assigns, heirs, executors, administrators and assigns, firmly by these presents. Sealed with our seals, dated the thirteenth day of July, One Thousand Nine Hundred and Twenty-eight.

The condition of the above obligation is such that if the above bounden M. and L. Holding Company, a corporation as aforesaid, and Maurice Levin and George Levin, their successors and assigns, heirs executors or administrators and assigns, shall well and truly pay, or cause to be paid, unto the above named Association, its certain attorney, successors or assigns, the just and full sum of One Hundred and Thirty-five Thousand Dollars in the manner following, viz: By the payment of One Dollar per month on each of three hundred and thirty-eight shares of the June, 1928 series of shares of the capital stock of said Association,

*Exhibit P-2.*

owned by the said M. and L. Holding Company and standing in its name on the books of said Association, and assigned to it as collateral security for the payment hereof, and on which this loan is based, on the Fourth Tuesday of each and every month hereafter, or such other time as may hereafter be appointed for that purpose, until the said shares shall attain the par value of Two Hundred Dollars each, together with interest on said sum of One Hundred and Thirty-five Thousand Dollars to be computed from the date hereof, at the rate of six per cent. per annum, and payable monthly at the same time and in the same manner as the stock payments aforesaid, and all insurance premiums and charges for insurance placed by the party of the second part upon the property described in the mortgage accompanying this bond, also all fines that may become due as provided for by the constitution and by-laws of said Association, which have been duly assented to by said obligors, and made a part hereof, without any fraud or other delay, together with the sum of Sixty-seven Thousand Four Hundred Dollars in addition thereto which shall become due and payable at the same time that the sum of Sixty-seven Thousand Six Hundred Dollars has been paid by the maturity of the shares pledged to secure that part of said indebtedness, without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force and virtue.

And it is hereby expressly agreed that should any default be made in the payment of the said installments or principal or interest, or of any part thereof, on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent, or other municipal or govern-

*Exhibit P-2.*

mental rate, charge, imposition or lien be here-  
 after imposed or acquired upon the premises de-  
 scribed in the mortgage accompanying this bond,  
 and become due and payable; and should the said  
 installment or principal or interest, or any part  
 thereof remain unpaid and in arrears for the space  
 of three months, 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 arrears for the space of three  
 months, or should the said obligors refuse or ne-  
 glect for thirty days after demand to produce and  
 exhibit to the obligee the vouchers showing the pay-  
 ments of such tax, assessment, water rent or other  
 lien due and payable, 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 One Hundred and Thir-  
 ty-five Thousand Dollars or the balance thereof re-  
 maining unpaid with all arrearage of interest, pre-  
 miums and fines thereon, shall, at the option of  
 the said Richmond Building and Loan Association,  
 become due and payable immediately thereafter,  
 although the period first above limited for the pay-  
 ment thereof may not then have expired, anything  
 hereinbefore contained to the contrary thereof in  
 anywise notwithstanding, and the said obligee 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  
 above mentioned and shall be payable on demand  
 with interest at six per cent per annum.

And it is also agreed by and between the parties  
 to these presents that the said party of the second  
 part shall have the right is hereby authorized to  
 keep the buildings erected, and to be erected upon

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*Exhibit P-2.*

the lands conveyed in the mortgage accompanying this bond, insured against loss or damage by fire in some safe or responsible insurance company or companies, in an amount sufficient in its judgment to protect its interests, and that the policy or policies procured by the party of the second part shall  
10 be assigned to it by the party of the first part, and the premium or premiums charged by the insurance company in effecting the same shall be a lien on the said premises described in the mortgage accompanying this bond and added to the amount of this bond or obligation, and secured by the mortgage accompanying this bond, payable on demand with interest at the rate of six per cent per annum from the time of payment of such premium or premiums, by the party of the second part, and that  
20 the party of the first part shall not have the right to procure insurance on the said premises described in the mortgage accompanying this bond so long as it has any interest in said premises described in the mortgage accompanying this bond. And it is also agreed that should the party of the first part refuse to pay the premium for insurance effected by the party of the second part covering the buildings to be erected, or now erected, upon the  
30 lands conveyed in the mortgage accompanying this bond, within thirty days after demand for payment of same by the party of the second part, that then and in that event the entire principal sum secured by this bond and the mortgage accompanying, shall immediately become due and payable, anything herein to the contrary notwithstanding.

It is further agreed that if the party of the first part shall make default in the payment of any insurance, taxes or assessments that may be assess-  
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*Exhibit P-2.*

ed or levied against said premises described in the mortgage accompanying this bond, it shall be lawful for said party of the second part to pay such insurance, assessments or taxes, and the amount so paid shall be a lien on the said premises described in the mortgage accompanying this bond, added to the amount of this bond or obligation and secured by the mortgage accompanying this bond, payable on demand with interest at the rate of six per cent per annum from the time of payment of such insurance, taxes or assessments. 10

M. AND L. HOLDING COMPANY,

By Maurice Levin

President. (Seal)

MAURICE LEVIN (L.S.)

GEORGE LEVIN (L.S.) 20

Attest:

George Levin

Secretary.

Signed, Sealed and Delivered

in the presence of

Helen Jedell

Philip J. Schotland.

For value received the within named M. and L. Holding Company does hereby assign, transfer and set over unto Richmond Building and Loan Association three hundred and thirty-eight shares of the June, 1928 series of shares of the capital stock held by it in said Association, as collateral security for the payment of the debt mentioned in the within bond. And in case of default in payment of the dues, interest, cost of insurance or taxes upon premises mortgaged to the Association, or fines for non-payment of same, it hereby authorizes the said 30 40

*Exhibit P-2.*

Association or its attorney to make sale of said three hundred and thirty-eight shares of stock, at auction, at any general meeting thereafter, or otherwise, and in its name to make and execute a transfer of said three hundred and thirty-eight shares of stock to the purchaser of same, applying the proceeds of said sale to payment of said loan.

10 And further it does hereby elect to treat all past and future payments of dues on said stock as credits on the within bond and mortgage accompanying the same, and authorizes and directs the officers of said Association to so appropriate and credit the same in case it becomes necessary to foreclose said mortgage.

20 In Witness whereof the M. & L. Holding Company has caused these presents to be signed by its President, attested by its Secretary and its corporate seal to be hereto affixed the 13th day of July, one thousand nine hundred and twenty-eight.

M. AND L. HOLDING COMPANY,  
By: Maurice Levin  
President. (Seal)

Attest:  
George Levin,  
Secretary.

30 Endorsed:

## BOND

M. and L. Holding Company, a corporation, and  
Maurice Levin and George Levin,

To

Richmont Building and Loan Association.

Dated: July 13, 1928.

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**Exhibit P-2A.**

This Indenture made the thirteenth day of July, in the year of our Lord One Thousand Nine Hundred and Twenty-eight,

Between M. and L. Holding Company, a corporation duly organized and existing under the laws of the State of New Jersey and having and maintaining its principal office in the City of Newark, County of Essex and State of New Jersey, party of the first part, and Richmond Building and Loan Association, a corporation duly organized and existing under the laws of the State of New Jersey, and having and maintaining its principal office in the City of Newark, County of Essex and State of New Jersey, party of the second part. 10

Whereas, the said party of the first part is justly indebted to the said party of the second part in the sum of One Hundred and Thirty-five Thousand Dollars lawful money of the United States of America, secured to be paid by its certain bond or obligation, bearing even date with these presents, in the penal sum of Two Hundred and Seventy Thousand Dollars lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of One Hundred and Thirty-five Thousand Dollars lawful money as aforesaid, to the said party of the first part, its successors or assigns, in the manner following, viz: By the payment of One Dollar per month on each of three hundred and thirty-eight shares of the capital stock of said Association owned by M. and L. Holding Company and standing in its name on the books of said Association, and assigned to said party of the second part as collateral security for the payment hereof, and on which this loan is based on the Fourth Tuesday of each and every month hereafter, or 20 30 40

*Exhibit P-2A.*

such other time as may hereafter be appointed for that purpose, until the said shares shall attain the par value of Two Hundred Dollars each, together with interest on said sum of One Hundred and Thirty-five Thousand Dollars to be computed from the date hereof at the rate of six per cent. per annum and payable monthly at the same time and in the same manner as the stock-payments aforesaid, and also all fines that may become due, as provided for by the Constitution and By-Laws of said Association, which have been duly assented to by said party of the first part and are made a part hereof, and the said sum of Sixty-seven Thousand Four Hundred Dollars which is part of said One Hundred and Thirty-five Thousand Dollars which is not secured by said shares, and upon which no payments to be applied on account of the principal are made, shall become due and payable at the same time that the sum of Sixty-seven Thousand Six Hundred Dollars has been paid by the maturity of the shares pledged to secure that part of said indebtedness.

And it is thereby expressly agreed, that should any default be made in the payment of the said installment or interest, or of any part thereof, on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage, and become due and payable, and should the said installment or interest, or any part of them or either of them remain unpaid and in arrear for the space of three months, or said tax, assessment, water rent or other municipal or gov-

*Exhibit P-2A.*

ernmental rate, charge, imposition or lien, or any or either of them, remain unpaid and in arrear for the space of three months, or should the said party of the first part refuse or neglect for thirty days after demand to produce and exhibit to the party of the second part the vouchers showing the payments of such tax, assessment, water rent or other lien due and payable, 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 One Hundred and Thirty-five Thousand Dollars or the residue thereof with all arrearage of interest, premiums and fines thereon, shall at the option of the said party of the second part, or its legal representatives, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding; and the said mortgagee may at 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 bond and by this mortgage, and shall be payable on demand, with interest at six per centum per annum; as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear.

Now this indenture witnesseth, that the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar to it in hand paid by the

*Exhibit P-2A.*

10 said party of the second part, at or before the en-  
sealing and delivery of these presents, the receipt  
whereof is hereby acknowledged, have granted, bar-  
gained, sold, aliened, released, conveyed and con-  
firmed, and by these presents do grant, bargain,  
sell, alien, release, convey and confirm, unto the  
said party of the second part, and to its success-  
ors and assigns forever, all that certain tract or  
parcel of land and premises hereinafter particu-  
larly described, situate, lying and being in the  
Town of Irvington, in the County of Essex and  
State of New Jersey.

20 Beginning at the corner formed by the intersec-  
tion of the Southerly line of Chancellor Avenue  
with the Easterly line of Rutgers Street; thence  
running southerly along the said Easterly line of  
Rutgers Street one hundred feet and six one-hun-  
dredths of a foot; thence running Easterly and  
parallel with Chancellor Avenue one hundred feet  
and six one-hundredths of a foot; thence running  
Northerly and parallel with the first course one  
hundred feet and six one-hundredths of a foot to  
the said Southerly line of Chancellor Avenue; and  
thence westerly along the same one hundred feet  
and six one-hundredths of a foot to the point and  
30 place of Beginning.

Being lots Nos. 1, 2, 3 and 4 on the map of  
Union Park, Irvington, New Jersey, made by I. J.  
Casey, Jr. Civil Engineer and Surveyor, Novem-  
ber 28th, 1924.

40 Being the same premises conveyed to party of  
the first part by Goldbloom Realty Corporation by  
deed dated April 19th, 1928 and recorded in the  
Register's Office of Essex County in Book Y-77 of  
Deeds for said County, page 115-116.

*Exhibit P-2A.*

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, 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. 10

To have and to hold the above granted and described premises, with the appurtenances, unto the said party of the second part, its successors and assigns, to its and their own proper use, benefit and behoof forever. And the said party of the first part, and its successors and assigns will warrant and forever defend the above described and granted premises, and every part thereof, with the appurtenances, in the quiet and peaceable possession of the said party of the second part, its successors, legal representatives and assigns against every person whomsoever. 20

Provided always, and these presents are upon this express condition, that if the said party of the first part, its successors and assigns, shall well and truly pay unto the said party of the second part, its successors 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. 30

And it is also agreed, by and between the par- 40

*Exhibit P-2A.*

ties to these presents, that the said party of the second part shall have the right and is hereby authorized to keep the buildings erected, and to be erected upon the lands above conveyed, insured against loss or damage by fire, in some safe or responsible insurance company or companies in an amount sufficient in its judgment to protect its interests, and that the policy or policies procured by the party of the second part shall be assigned to it by the party of the first part, and the premium or premiums, charges by the insurance company in 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 percent per annum from the time of payment of such premium or premiums by the party of the second part, and that the party of the first part shall not have the right to procure insurance on the said premises covering the interests of the party of the second part so long as it has any interest in said premises. And it is also agreed that should the party of the first part refuse to pay the premium for insurance effected by the party of the second part covering the buildings to be erected or now erected upon the lands above conveyed within thirty days after demand for payment of same by the party of the second part, that then and in that event the entire principal sum secured by this mortgage and the accompanying bond shall immediately become due and payable, anything herein to the contrary notwithstanding.

It is further agreed that if the party of the first part shall make default in the payment of any insurance, taxes or assessments that may be assessed

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*Exhibit P-2A.*

or levied against said premises, it shall be lawful for said party of the second part to pay such insurance, assessments or taxes, and the amount so paid 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 percent per annum from the time of payment of such insurance, taxes or assessments. 10

And the said party of the first part, the owners 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, its successors 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. 20

And said mortgagor for itself, its successors and assigns, does further covenant and agree that in any action that may be taken by said mortgagee, its successors or assigns, to foreclose the within mortgage for any breach of any of the stipulations and agreements herein contained, or in the bond accompanying the same, that the mortgagee, its successors and assigns, shall be entitled to the appointment of a Receiver of the above premises, and the rents, issues, and profits thereof, without proof of insolvency, and without adequacy of security 30 40

*Exhibit P-2A.*

shall be no defense to the appointment of a receiver in such action.

10 That during the continuance of this mortgage the mortgagor will keep all buildings subject there-  
to in good substantial repair; and that if they shall  
neglect to do so, the mortgagee may at its discre-  
tion enter upon the said premises from time to  
time in order to repair and keep in repair the said  
buildings, without thereby becoming liable as a  
mortgagee in possession, and that its expenses of  
so doing shall be repaid to said mortgagee by the  
mortgagor, on demand, and until so repaid shall  
be added to the principal sum secured and bear  
interest accordingly.

20 It is further understood that all the terms, con-  
ditions, covenants and agreements are binding up-  
on the party of the first part, its successors and as-  
signs.

In Witness Whereof the said party of the first  
part has caused these presents to be signed by its  
President and attested by its Secretary and its cor-  
porate seal fixed hereto the day and year first above  
written.

M. AND L. HOLDING COMPANY,

By: Maurice Levin,

President.

(Seal)

30 Attest:

George Levin,  
Secretary.

*Exhibit P-2A.*

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

Be it Remembered that on this 23rd day of July,  
 in the year of our Lord one thousand nine hundred  
 and twenty-eight, before me, the subscriber, a Mas-  
 ter in Chancery of New Jersey, personally appear- 10  
 ed George Levin who being by me duly sworn, doth  
 depose and make proof to my satisfaction that he  
 well knows the corporate seal of M. and L. Hold-  
 ing Company, the mortgagor mentioned in the  
 within indenture; that the seal thereto affixed is  
 the proper corporate seal of the said company;  
 that the same was so affixed thereto and the said  
 mortgage signed and delivered by Maurice Levin  
 who was at the date and execution thereof, the  
 president of said company, in the presence of the 20  
 said deponent as the voluntary act and deed of  
 the said company, and that the said deponent there-  
 upon signed the same as subscribing witness.

GEORGE LEVIN.

Sworn and Subscribed before me on  
 the day and year aforesaid.

Philip J. Schotland,  
 Master in Chancery of New Jersey.

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*Exhibit P-2A.*

Endorsed:

MORTGAGE

M. and L. Holding Company

To

Richmond Building and Loan Association.

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Dated: July 13, 1928.

Compared by 70 & 12

Received Register's Office August 23, 1928 3:52

P. M. Essex County, Newark, New Jersey.

Received in the Register's Office of the County  
of Essex N. J. on the 23rd day of August, A. D.  
1928 at 3:52 o'clock in the afternoon and record-  
ed in Book R 65 of Mortgages for said County on  
pages 49-52.

20

HOWARD S. DODD,  
Register.

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40

**Conclusions of Vice Chancellor.**

Filed Feb. 10, 1930.

IN CHANCERY OF NEW JERSEY.

Between	}	Opinion.	10
SOLOMON BERLA and SAMUEL BERLA, Complainants,			
and	}		
M. & L. HOLDING COMPANY, Defendants.			

ON FINAL HEARING.

1. A stipulation in a mortgage for the whole debt to mature upon default in an interest payment is not treated as a forfeiture clause, but rather a stipulation for a period of credit on condition. 20

2. Equity will in a proper case stay the execution of its decree until the defendant can recover at law and plead the recovery as an offset against the complainant. The discretion is exercised only in equitable circumstances. There must be some privity between the causes for action; the defendant must be diligent; the recovery at law must be apparent, and he must show irreparable harm if the execution be not stayed. 30

For Complainants, MR. PHILIP J. SCHOTLAND..

For Defendant, MR. DAVID M. LITWIN.

BACKES, Vice Chancellor:

The complainant's \$15,000 mortgage which they 40

*Conclusions of Vice Chancellor.*

seek to foreclose bears date October 23, 1928, and is payable in two years. It contains this stipulation:

10            "This mortgage is second in priority to a mortgage in the nominal sum of \$135,000 held by the Richmond Building & Loan Association, and in case default is made in the payment of two monthly instalments of principal and interest of the Richmond Building & Loan Association mortgage, which is a first lien on said premises, then and in that event the principal sum herein secured shall be due and payable immediately thereafter, notwithstanding anything herein to the contrary."

20            The building and loan mortgage, also dated October 23, 1928, is payable in instalments of principal of one dollar on each of three hundred and thirty-eight shares of the association, owned by the mortgagor, and assigned to the association as collateral security, on the fourth Tuesday of each month until the shares shall attain the par value of two hundred dollars, and interest at six per cent on the debt payable at the same time.

30            Two instalments of principal and interest, one due the fourth Tuesday of December, 1928, the other the fourth Tuesday of January, 1929, were not paid and the day following the last default the complainants called their mortgage. The defense is, that part of the December interest instalments was paid and consequently that "two monthly instalments of principal and interest" were not in default. Payment is based on this: The defendant had paid

40            in advance the instalment of principal and interest due the fourth Tuesday of November. Some

*Conclusions of Vice Chancellor.*

substantial part of the building and loan mortgage money was not paid until November 7th, fifteen days after the date of the mortgage and, the defendant says, it was promised a rebate and credit—approximately two hundred dollars. The responsible clerk of the association, alleged to have made the promise, then and at the hearing denied having made it, and if the case turned on the promise the decision would be that the defendant did not prevail on that issue. The claim was first asserted after the December instalment fell due and it was in dispute when the January instalment fell due. Assuming that the defendant was entitled to a credit for overpaid interest on its November instalment, the fact does not relieve it of the default. Only the payment or tender of the difference would do that and the defendant made no offer in that direction.

The contention that there was no default, maturing the mortgage and justifying foreclosure, because two full instalments were not unpaid is unsound. The condition of the mortgage was breached when two instalments stood unpaid in full. If we adopt the defendant's interpretation of the condition, a default could be staved off indefinitely by the payment of a slight fraction of each monthly instalment as it comes due.

Two days after the default the defendant paid the January instalment and the Court is urged not to grant relief on the theory that the default clause is in the nature of a forfeiture from which equity may relieve. This is a misconception of the condition. "A stipulation in a mortgage for the whole debt to mature upon default in an interest payment is not treated as a forfeiture clause, but

*Conclusions of Vice Chancellor.*

rather as a stipulation for a period of credit on condition. *Bergman v. Fortescue*, 74 N. J. Equity 266, *Weiner v. Cullens*, 97 N. J. Equity 523. The complainants were "sharp on the trigger" in calling their mortgage but were within their rights. The Court has no discretion to deny them relief.

10 The defendants ask that execution be stayed until it can recover damages at law against the complainants for breach of a contract to install a heating plant in the apartment house on the mortgaged premises. This claim was set up as a defense and stricken out because there was no privity of contract, and as an offset, the damages were unliquidated. The mortgage was for money lent. In *Kuhnan v. Parker*, 56 N. J. Equity 286 and *Bergman v. Fortescue*, *supra*, relief was granted in  
20 abatement, not offset.

Equity will in a proper case stay the execution of its decree until the defendant can recover at law, and plead the recovery as an offset against the complainant. The discretion is exercised only in equitable circumstances. There must be some privity between the causes for action; the defendant must be diligent; the recovery at law must be apparent, and he must show irreparable harm if  
30 the execution be not stayed. This suit was brought a year ago. The defendant has not as yet commenced an action at law. If and when it recovers it can collect, for the solvency of the complainant is assured. In *Brown v. Hendrickson*, 39 N. J. Law 239, the Supreme Court offset judgments. In *Blackburn v. Reilly*, 48 N. J. Law 92, that court stayed execution on a judgment until the defendant could recover money damages he could have  
40 recovered by way of recoupment in the judgment

*Conclusions of Vice Chancellor.*

suit had he pleaded it. In *Conant v. Pettit*, 92 N. J. Law 543, where the Court of Appeals suggested the propriety of a stay, the cause of action resulting in judgment and the cause of action of the prospective judgment arose out of the same transaction. The complainants are entitled to a decree. Execution will not be stayed. 10

**Final Decree.**

Filed March 4, 1930.

## IN CHANCERY OF NEW JERSEY.

Between

SOLOMON BERLA and SAMUEL  
BERLA,

Complainants,

and

M. & L. HOLDING COMPANY, *et als.*,

Defendants.

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On Bill, Etc.

Final Decree.

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This cause coming on to be heard in the presence of Philip J. Schotland, Solicitor for and of Counsel with complainants Solomon Berla and Samuel Berla, in the presence of David M. Litwin, Esq., the solicitor of the defendants, and the Court having examined the pleadings and having taken proofs orally in open court, and having heard and considered the arguments of the respective solicitors, and it appearing to the satisfaction of the Court that there is due to the complainants 40

*Final Decree.*

on the date hereof, for principal and interest on their mortgage the sum of \$15,000.00, together with lawful interest from October 23, 1928 amounting to \$1,172.50, making a total of \$16,172.50 and that there is due to the defendant Samuel Litwin on his mortgage, for principal and interest, the sum of \$5429.70 and that the mortgage of the complainants Solomon Berla and Samuel Berla, is first in registry and execution, and is entitled to priority of payment, and that the mortgage of the defendant Samuel Litwin is second in registry and execution, and is entitled to be secondly paid, and that it is necessary and advisable that the whole of the mortgaged premises be sold to raise and pay the moneys so due as aforesaid, and no cause being shown or appearing to the contrary;

It is, on this 4th day of March, in the year One Thousand Nine Hundred and Thirty, by Edwin Robert Walker, Chancellor of the State of New Jersey,

Ordered, Adjudged and Decreed, and the Chancellor doth by virtue of the power and authority of this Court, hereby Order, Adjudge and Decree that the said mortgaged premises be sold to raise and satisfy the said sums of money so due to the said complainants Solomon Berla and Samuel Berla, and the defendant Samuel Litwin, that is to say, that a writ of Fieri Facias do issue for that purpose out of this Court directed to the Sheriff of the County of Essex commanding him to make sale according to law of the said mortgaged premises, and that out of the money arising from such sale, he pay in the first place, to the complainants Solomon Berla and Samuel Ber-

*Final Decree.*

la, or to their solicitor, said debt, interest and costs, and in the second place to the said defendant Samuel Litwin, or to his solicitor, his said debt, interest and costs, and in case more money should be raised by said sale than shall be sufficient to answer such several payments, then such surplus be brought into this Court to abide the further order of this Court, unless otherwise previously disposed of by the order of this Court; and that the said Sheriff make return without delay of his proceedings by virtue of the said writ. 10

And it is Further Ordered, Adjudged and Decreed, that the defendants stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises when sold as aforesaid by virtue of this decree. 20

And it is Further Ordered, Adjudged and Decreed, that the sum of \$500.00 be allowed and paid to the solicitor of the complainants as a counsel fee, and that the sum of \$25.00 for transcript of the testimony ordered for the Court be included in the taxed bill of costs.

E. R. WALKER,  
C.

Respectfully advised,  
JOHN H. BACKES,

V. C. 30



**Petition of Appeal.**

Filed April 7, 1930.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

Between

SOLOMON BERLA and SAMUEL  
BERLA,

Complainants-Respondents,

and

M. & L. HOLDING COMPANY, *et als.*,  
Defendants-Appellants.On Appeal  
from the  
Court of  
Chancery.Petition  
of Appeal.

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*To the Honorable the Court of Errors and Appeals  
in the Last Resort in All Causes:*

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The petition of the M. & L. Holding Company,  
the appellant in the above entitled cause, respect-  
fully shows that:

1. Petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of his Honor, John H. Backes, one of the Vice-Chancellors of said Court, bearing date the fourth day of March, 1930, in a certain cause in said Court of Chancery wherein the said Solomon Berla and Samuel Berla were complainants, and the said M. & L. Holding Company, *et als.* were defendants, in this respect, to wit: That the said decree adjudges and decrees that there is due to the complainants on the date thereof, for principal and interest on their mortgage, the sum of Sixteen Thousand One Hundred

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*Petition of Appeal.*

Seventy-two Dollars and Fifty Cents (\$16,172.50), and that there is due to the defendant Samuel Litwin on his mortgage for principal and interest the sum of Five Thousand Four Hundred Twenty-nine Dollars and Seventy Cents (\$5,429.70), and that it is necessary and advisable that the whole of the mortgaged premises be sold to raise and pay the moneys so due as aforesaid; and further adjudges and decrees that a Writ of Fieri Facias do issue for that purpose out of said Court of Chancery of New Jersey, directed to the Sheriff of the County of Essex, commanding him to make sale according to law of the said mortgaged premises, and that out of the money arising from such sale, that the said Sheriff pay in the first place to the complainants Solomon Berla and Samuel Berla, or to their solicitor, their said debt, interest and costs, and in the second place to the said defendant Samuel Litwin, or to his solicitor, his said debt, interest and costs; and said final decree further adjudges that in case more money should be raised by said sale than shall be sufficient to answer such several payments, then such surplus be brought into said Court of Chancery of New Jersey to abide the further order thereof, unless otherwise previously disposed of by the order of said Court; and said final decree further adjudges that the defendants stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises when sold as aforesaid by virtue of said decree; and further adjudges that there be allowed and paid to the solicitor of the complainants as a counsel fee the sum of \$5500.00, and that the sum of \$25.00 for a transcript of the testimony ordered for the Court be included in the taxed bill of costs.

*Petition of Appeal.*

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:

(A) It adjudges the complainants entitled to the relief prayed for when it should have denied the relief prayed for in the Bill of Complaint, and dismissed the Bill. 10

(B) It adjudges that there is due and that the complainants are entitled to receive the sum of Sixteen Thousand One Hundred Seventy-two Dollars and Fifty Cents (\$16,172.50). The default charged in the complainants' Bill of Complaint, which is claimed to have accelerated the time of payment of the principal and interest secured by the mortgage sought to be foreclosed, was the default in two monthly installments of principal and interest due on a prior mortgage held by the Richmond Building and Loan Association upon the mortgaged premises. There was no default existent in this term nor in any of the other terms of the mortgage sought to be foreclosed in said action at the time of the filing of the Bill of Complaint so that the mortgage has not matured by the terms thereof. 20 30

(C) It decrees that a Writ of Fieri Facias issue out of said Court of Chancery of New Jersey directed to the Sheriff of the County of Essex commanding him to make sale according to law of the said mortgaged premises, and that out of the proceeds of said sale to pay the amounts due the complainants and the defendant Samuel Litwin as 40

*Petition of Appeal.*

hereinbefore stated. No sum of money is due the complainants at this time upon their mortgage and therefore no Writ of Fieri Facias should issue at this time.

10 (D) It denied the right of the defendant M. & L. Holding Co. to set-off an amount due it for certain plumbing and heating work agreed to be performed by the complainants under the terms of a certain contract, which amount this appellant was equitably entitled to set off against the amount adjudged to be due the complainants.

20 (E) Execution was not stayed upon the final decree until the defendant could recover at law the amount claimed to be due it under the preceding paragraph so that it could plead the recovery as a set-off against the complainants.

30 (F) Said decree adjudges that this defendant stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the mortgaged premises when sold by virtue of said decree. No amount of money is due the complainants upon their mortgage at this time and therefore a sale should not take place at this time which would debar and foreclose this defendant from its equity of redemption in said mortgaged premises.

(G) The Bill of Complaint should have been dismissed in that there has been no default in the terms of the mortgage sought to be foreclosed, and the complainants should have been denied the relief sought by them.

(H) The said final decree is further erroneous in that it allows counsel fees and costs to the respondents. Since the Bill of Complaint of the re-

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*Petition of Appeal.*

spondents should have been dismissed, the final decree should have awarded costs to the appellant.

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.

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DAVID M. LITWIN,  
Solicitor for and of Counsel  
with Appellant.

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**Answer to Petition of Appeal.**

Filed April 7, 1930.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

10	Between SOLOMON BERLA and SAMUEL BERLA, Complainants-Respondents,  and M. & L. HOLDING COMPANY, <i>et als.</i> , Defendants-Appellants.	}	On Appeal from the Court of Chancery.  Answer to Petition of Appeal.
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20 The Answer of Solomon Berla and Samuel Berla, the above-named respondents to the petition of appeal of M. & L. Holding Company, et als., the above named appellants:

30 These respondents, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admit that a decree was on the 4th day of March, 1930, made and entered in the Court of Chancery, in the above-entitled cause, for the purposes in said petition mentioned, and as therein set forth, but as to the substance and form of said decree these respondents beg leave to refer thereto when the same shall be produced.

These respondents are advised and believe that the said decree is agreeable to equity; and they pray that the same may be affirmed with costs to be taxed in favor of these respondents.

40 PHILIP J. SCHOTLAND,  
Solicitor for and of Counsel  
with Respondents.

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## New Jersey Court of Errors and Appeals

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Between	}	
SOLOMON BERLA and SAMUEL		On Bill, Etc.
BERLA,		
Complainants-Respondents,		On Appeal
and		from the
M. AND L. HOLDING COMPANY,	Court of	Chancery.
a corporation, <i>et als.</i> ,		
Defendants-Appellants.		

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### BRIEF OF APPELLANT.

#### Statement.

This is an appeal from a final decree advised by the Honorable John H. Backes, Vice-Chancellor, and entered in the Court of Chancery on March 4, 1930. The decree was in favor of the complainants and is a decree of foreclosure.

#### Facts.

The bill in this cause is to foreclose a \$15,000.00 mortgage made by the defendant M. & L. Holding Company, to the complainants, dated October 23, 1928, payable two years after date. The mortgage is a second lien upon the premises described therein being next in priority to a mortgage in the sum of \$135,000.00 held by the Richmond Building and Loan Association. The mortgage sought

to be foreclosed contains the following stipulation:

“This mortgage is second in priority to a mortgage in the nominal sum of \$135,000.00 held by the Richmond Building and Loan Association, and in case default is made in the payment of *two monthly payments of principal and interest* of the Richmond Building and Loan Association mortgage, which is a first lien on said premises, then and in that event the principal sum herein secured shall be due and payable immediately thereafter notwithstanding anything herein to the contrary.” (P. 85, ll. 1-12.)

The bill charges that on January 22, 1928 the M. and L. Holding Company was in arrears for December and January *dues* and interest of the Richmond Building and Loan Association mortgage (P. 3, ll. 23-26). The bill was subsequently amended to conform to the default clause in the mortgage, to wit: That there was a default in “*installments of principal.*” (P. 35, ll. 17-20). The answer of the defendants denies the existence of the default and pleads further that the complainants and the defendant M. & L. Holding Company had entered into a written contract wherein and whereby the complainants agreed for the consideration of \$20,000.00 to complete the plumbing and heating work in the building which was then being erected upon the mortgaged premises described in the bill of complaint; that said work was to comply with certain specifications, and that the heating system was guaranteed to heat the several rooms to 70 degrees Fahrenheit in zero weather; that the complainants did not perform their contract in accordance with the terms thereof; that it is impossible to heat the several rooms in said building to 70 degrees Fahrenheit, and

that it would cost \$6,000.00 to have the plumbing and heating work comply with the terms of said contract (P. 7, ll. 18-40, to P. 8, ll. 1-26). The answer pleaded further that the principal sum of the mortgage sought to be foreclosed by the complainants represented a loan of \$4,000.00 in cash made by the complainants to the M. and L. Holding Company at the time of the execution of the bond and mortgage, and that the balance of \$11,000.00 represented the amount that would have been due the said complainants under their said plumbing and heating contract if they had fully performed and carried out the terms, conditions and covenants thereof, and that the defendant was entitled to a credit upon the said bond and mortgage to the extent of \$6,000.00. (P. 8, ll. 28-40). The defendant, by way of counterclaim against the complainants, set up the same facts relating to the plumbing and steam heating contract, and asked that an account be taken as to the inferior materials furnished and work performed under the said contract, and that the complainants be decreed to give credit to the defendant upon the bond and mortgage sought to be foreclosed for the value of said defective, deficient and inferior materials and work. (P. 9, ll. 30-40 to P. 12, ll. 1-10). A motion was made to strike out the answer and counterclaim upon the ground that the answer was sham and did not constitute a defense to the bill of complaint, and the counterclaim upon the ground that it did not set forth the subject matter of a proper counterclaim, and upon the further ground that it set forth a cause of action for which there is an adequate remedy at law. Affidavits were submitted by the complainants and by the defendants and an order was entered by the court striking out that part of the answer which pleads the abatement of principal claimed by the

defendant by reason of the defective work performed upon the plumbing and heating contract. (P. 35, ll. 10-14). An order was also entered striking out the counterclaim (P. 36, ll. 32-34).

At the final hearing it appeared that the mortgage of the Building and Loan Association was dated July 13, 1928, recorded on August 23, 1928, and was given to secure the payment of the principal sum of \$135,000.00 "by the payment of One Dollar per month on each of three hundred and thirty-eight shares of the capital stock of said Association owned by the M. and L. Holding Company and standing in its name on the books of said Association and assigned to said party of the second part as collateral security for the payment hereof and on which this loan is based on the Fourth Tuesday of each and every month hereafter, or such other time as may hereafter be appointed for that purpose, *until the said shares shall attain the par value of Two Hundred Dollars each*, together with interest on said sum of One Hundred and Thirty-five Thousand Dollars to be computed from the date hereof at the rate of six per cent. per annum, and payable monthly at the same time and in the same manner *as the stock payments aforesaid*, and also all fines that may become due as provided for by the Constitution and by-laws of said Association, which have been duly assented to by said party of the first part and are made a part hereof, and the said sum of Sixty-seven Thousand Four Hundred Dollars which is part of said One Hundred and Thirty-five Thousand Dollars which is not secured by said shares, and upon which no payments to be applied on account of the principal are made, *shall become due and payable at the same time that the sum of Sixty-seven*

*Thousand and Six Hundred Dollars has been paid by the maturity of the shares pledged to secure that part of said indebtedness.*" (P. 95, ll. 31-40 to P. 96, ll. 1-25). The Association consummated its loan with the M. and L. Holding Company on November 7, 1928 (P. 61, ll. 17-18). It was proved at the hearing that the Building and Loan Association did not have the full principal sum of its mortgage, to wit, One Hundred and Thirty-five Thousand Dollars for disbursement until that time. A. Sigmund Kanengieser, the secretary of the Association testified that the money was paid to the Association's attorney by the delivery of four checks as follows: \$67,000.00 on October 25, 1928; \$17,000.00 on October 25, 1928; \$15,000.00 on October 29, 1928 and cleared through the bank on November 7, 1928, and a check for \$27,907.00 dated November 7, 1928 and cleared through the bank on the same date, (P. 50, ll. 30-40, to P. 51, l. 26).

The secretary of the Association testified further that the Building and Loan Association was not in a position to draw a check for the full principal of the Building and Loan mortgage until November 9, 1928, because of a shortage of funds; that it was dependent upon receipts of \$44,000.00 derived through the issuance of prepaid stock in order to consummate the transaction with the defendant, and that without the income it received during the period from November 2 to November 9th, it was not in a position to draw the check to close the M. and L. Holding Co. mortgage loan, (P. 55, ll. 26-39).

Maurice Levine, the president of the defendant mortgagor, M. and L. Holding Company, testified that at the time the Building and Loan mortgage was signed he was told that he would not have to

pay interest upon the Building and Loan mortgage until the money was actually disbursed (P. 64, ll. 10-15; P. 65, ll. 1-5); that at the time the loan was closed one month's interest was deducted from the Building and Loan check for the period from October 23, 1928 until the November paynight (P. 63, ll. 24-30); that he made objection about the interest that was charged for the period during which the Association did not advance the loan and asked for credit for the period from October 23, 1928 to November 7, 1928 (P. 64, ll. 14-21; P. 64, ll. 39-40 to P. 65, ll. 1-12); that he did not make payment of the dues and interest that became due in December and January because he had not received the credit for the excess interest; that during that period of time he was attempting to procure a statement as to the amount due; that on January 24, 1929 he was still endeavoring to receive the statement and finally, because he was worried about the situation, paid a full month's dues and interest to the Association on that date. Immediately thereafter, on January 26, 1929, the complainants' bill to foreclose was filed.

## ARGUMENT.

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### POINT I.

**The defendant M. and L. Holding Company was not in default in two monthly installments of principal and interest in the prior building and loan mortgage.**

The undisputed evidence is that the Building and Loan Association closed its transaction with the M. and L. Holding Company on November 7, 1928, and that it did not have the necessary funds in the bank, or on hand, with which to consummate the transaction until that date. The Building and Loan Association charged interest for the period from October 23, 1928 to November 7, 1928 amounting to \$292.50, for which amount the defendant was entitled to a credit. The court is respectfully referred to the case of Homestead Building Co. v. Waverly Building and Loan Association, decided by this Court in 99 N. J. L. p. 276, and in which case it affirms the Supreme Court upon the latter's *per Curiam* opinion. As the opinion is very short it will bear repetition at this point:

“The state of the case shows that on March 8, 1921, plaintiff applied to the defendant for a loan upon a mortgage of \$10,000.00 and executed a mortgage as of that date; that on June 14, 1921, the defendant, not having sufficient cash to make the loan, gave the plaintiff \$6,000.00 in cash and \$4,000.00 in prepaid stock, but retained interest on the mortgage from the date of execution amounting to \$150.00. For this sum the

plaintiff brought suit and recovered, and the defendant appeals. The only question is whether the plaintiff was bound to pay interest from the date of the mortgage or from the date he was paid the money. The trial court determined it was from the date the money was paid and this we think was right. It is quite manifest from the state of the case that the money was not being held for the plaintiff from March 8th, because they were not able to consummate the loan in cash on June 14th. There is no dispute about the facts, but the defendant claims that according to the mortgage they are entitled to have interest from March 8th, although they did not have the money until June 14, 1921. Our opinion is that they are only entitled to interest from the time they advanced the money unless there was some arrangement that the defendant was to hold the money subject to the plaintiff's order, and there is no such proof.

The judgment will be affirmed, with costs."

It is respectfully submitted that under the authority of this case the Association cannot charge for the full month's interest from October 23, 1928 inasmuch as it did not have the necessary funds on hand, nor did it hold the money subject to the defendant's order, and there is no such proof in the case. The monthly payment due the Association was \$338.00 for dues upon shares, plus \$675.00 for interest, amounting to \$1013.00. It is contended that when the mortgage sought to be foreclosed provides that default shall be "made in the payment of two monthly installments of principal and interest of the Richmond Building and Loan Association mortgage", that it is tantamount to a statement that default shall be made in the payment of installments of principal and interest totalling \$2,026.00. On January 22, 1929 the de-

defendant was in arrears in the sum of only \$1,733.50 as it was entitled to the credit for the excessive interest of \$292.50.

The complainants may argue that under the General Building and Loan Association Act, Revision of 1925, P. L. 1925, page 189, and which was enacted subsequent to the Homestead case, *supra*, the charge of the excessive interest by the Association is legal, and may depend upon Section 16 of the Building and Loan Act which reads as follows:

“PREMIUMS AND INTEREST. Any such association may take from its members a premium for priority or privilege of loan or acquisition of real estate, and no premiums so taken for such purpose shall be deemed usurious, and it shall be lawful for the rate of said premium to be agreed upon, instead of being determined by auction to the highest bidder *and the payment of interest in advance for not exceeding one month shall not be deemed usurious.*”

The complainants may argue that the charge for the period from October 23, 1928 to November 7, 1928 comes within the one month provision. It is respectfully submitted, however, that the statute provides that the rate of premium may be agreed upon, and that the premium may include one month's interest in advance.

In the present case the only proof is that there was an agreement that the borrower should pay a premium of four per cent. There was no proof whatsoever that the borrower was to pay an additional one month's interest. The premium of four per cent. amounting to \$5,410.00 was deducted at the time of the consummation of the loan, so that if the complainants will argue the charge of the excess interest was legal, these defendants con-

tend that the charge was made without any agreement having been made relative thereto.

It is also submitted that under the wording of the statute the interest allowed is for one month's interest payable *in advance*, and not for interest payable for the past. The interest sought to be charged by the Association is for a period prior to the date of the paying out of the mortgage moneys.

The complainants may contend further that the excessive interest, having been paid to the Association, the defendant cannot recover the same because it may be termed a voluntary payment. In the Homestead case, *supra*, it would appear from the Court's opinion that the mortgage moneys were advanced by the Building and Loan Association and the deduction of interest made at the time of the consummation of the loan. That suit was for the recovery of the excessive interest charged. In the present case the deduction was likewise made at the time of the consummation of the loan, and following the authority of the Homestead case it is contended that the mortgagor can institute suit at any time to recover the excessive interest deducted. Then again, if the Building and Loan Association charged excessive interest, such excess payment would be in the nature of a usurious payment made by the borrower. It is settled in this state that a usurious payment made can be recovered by the borrower either in an action at law or in equity. *Taylor v. Hintze*, 57 N. J. L. p. 239; *Weitz v. Quigley*, decided by this court in 88 N. J. L. p. 617; *Martin v. Morales*, decided by this court in 142 Atl. p. 31. (Not officially reported)

## POINT II.

**It is impossible for the defendant to be in default under the wording of the default clause contained in the complainants' mortgage.**

The default clause as contained in the mortgage sought to be foreclosed provides that it shall become due "in case payment is made in the payment of two monthly installments of *principal* and interest of the Richmond Building and Loan Association mortgage." The Building and Loan bond and mortgage provide that the payment of the principal sum thereof shall be paid "by the payment of One Dollar per month on each of three hundred and thirty-eight shares of the capital stock of said Association owned by the M. and L. Holding Company and standing in its name on the books of said Association and assigned to said party of the second part as collateral security for the payment hereof, and on which this loan is based, on the Fourth Tuesday of each and every month hereafter \* \* \* \* *until the said shares shall attain the par value of Two Hundred Dollars each*, together with interest on said sum of One Hundred and Thirty-five Thousand Dollars to be computed from the date hereof, at the rate of six per cent. per annum, and payable monthly at the same time and in the same manner as the *stock payments aforesaid*, \* \* \* \* and the said sum of Sixty-seven Thousand Four Hundred Dollars which is part of said One Hundred and Thirty-five Thousand Dollars which is not secured by said shares \* \* \* \* shall become due and payable at the same time that the sum of Sixty-seven Thousand Six Hundred Dollars has been paid by the maturity of the shares

*pledged to secure that part of said indebtedness.*" (P. 95, ll. 31-40, to P. 96, ll. 1-25).

It is submitted that the monthly payments on account of dues are not credited against the principal of the mortgage but are credited against the shares of stock subscribed for by the stockholder. When each share of stock attains the value of Two Hundred Dollars, then for the first time is there an application of the amount represented by the maturity value of the stock against the principal of the mortgage. In the case of Mechanics Building and Loan Association v. Conover, 14 N. J. Eq. page 219, <sup>reversed</sup> affirmed by this Court, in 17 N. J. Eq. page 497, <sup>on ~~another~~ another point, the new expression</sup> (the case being entitled Herbert v. Mechanics Building and Loan Association,) Chancellor Green wrote as follows:

" \* \* \* The member has taken a loan of \$200. He is to repay it by monthly instalments. He is to have, moreover, the benefit of all premiums, fines and advanced rates of interest paid by himself and all his associate members. It is very natural, therefore, for the member to suppose that, when he has paid \$100 in monthly instalments, no more than the balance of \$100 can remain due on the mortgage. But he forgets that the payments are made not upon his mortgage debt, but go into a general fund, the benefits of which are to be shared by every member of the association. And while he may reap great profits from premiums, fines, and high rates of interest, he incurs the hazards of losses from dishonest officers, defaulting members, and ill secured loans, so that he may actually repay the whole amount loaned, with a high rate of interest, and yet be a debtor to the association. The debt is in fact never discharged until it is either actually paid according to the terms of the mortgage or until the accumulation shall be sufficient to redeem every mortgage given by a

*below being concerned,*

shareholder, and cancel every share of members who have taken no loan at its par value. The undertaking of the member to repay the loan is absolute, and he must perform his engagement. He can only redeem his mortgage by paying its full amount. *He can have no credit for the value of his shares until the scheme closes, and there are funds sufficient to divide the full amount of the shares among all the shareholders according to terms of the scheme*". (Italics mine)

To the same purport is the case of Merchantville Building and Loan Association v. Zane, 38 Atl. p. 420 (not officially reported) in which Vice-Chancellor Reed says:

"It is entirely settled that payment of dues upon the stock is not a payment upon the mortgage debt and does not *ipso facto* work as an extinguishment *pro tanto* of the mortgage."

To the same effect is Schaefer v. Metzger, 105 N. J. Eq. p. 307.

The bond and mortgage of the complainants provide for default in payments of *principal* and not in dues of the prior mortgage. It is respectfully submitted that upon the authority of the cited cases that the words "principal" and "dues" are not synonymous. The Court of Chancery in the case at bar was of the same opinion because it compelled the complainants to amend their bill of complaint by striking out the word "*dues*" and substituting therefor the words "*installments of principal*". (P. 35, ll. 10-14). The Building and Loan mortgage relates to the payment on shares, whereas the default clause in the mortgage sought to be foreclosed relates to "*payment of principal*". No payments of principal could be made on ac-

count of the principal of the Building and Loan Association mortgage with the result that it is a physical impossibility to make default in a term of the mortgage that could not be performed. The complainants must stand upon their mortgage as written and it is therefore respectfully submitted that the mortgage sought to be foreclosed is not in default by reason of the defendant having failed to pay two monthly installments of dues on the Building and Loan mortgage, when the default provided for in the mortgage is in two monthly installments of principal.

### POINT III.

**The Court of Chancery should not have stricken out that part of the answer relating to the abatement of the amount due upon the mortgage, nor should it have stricken out the counterclaim.**

The answer set up that the defendant was entitled to a credit by reason of the complainants' failure to properly perform a certain plumbing and heating contract relating to work to be installed in the building upon the premises mortgaged to the complainants, and that the consideration of the mortgage sought to be foreclosed was given to secure part of the balance due upon said plumbing and heating contract. The counterclaim set up the same facts and prayed that the amount found to be due thereon should be credited against the amount found to be due upon the complainants' mortgage. Upon the motion to strike the defendant's answer and counterclaim, affidavits were sub-

mitted on behalf of the defendant. One of these affidavits stated that:

"6. The mortgage transaction of the complainants was closed simultaneously with the placing of the Building and Loan mortgage upon the premises, and although the complainants issued their check for \$15,000. to show the consideration for the mortgage being foreclosed, it nevertheless was a washed transaction, the complainants issuing their check for \$15,000.00 and receiving a check from Samuel Goldfarb for \$4,000.00 and a check from Philip J. Schotland's office for \$10,870.35. *The mortgage transaction with the complainants and the transaction involving the plumbing and heating contract were involved with each other.*" (P. 24, ll. 30-40 to P. 25, ll. 1-4).

The Court of Chancery in its opinion maintained that this defense was stricken out "because there was no privity of contract and as an offset the damages were unliquidated. The mortgage was for money lent." (P. 92, ll. 14-18). By striking out that part of the answer and the counterclaim the court sought to pass judgment upon a question of fact as to whether the mortgage transaction was tied up with the contract, without taking any oral proof and thereby ignored the statements contained in the defendant's affidavit as above set forth. It is submitted that the situation is analogous to the cases at law upon motion to strike an answer where the answering affidavits present a question of fact. It has been held that the defendant is entitled to have his case heard by a jury at the proper time. *Maurer v. Hahn*, 104 N. J. L. p. 254; *R. H. Muir v. Church Construction Company*, 7 N. J. Misc. p. 633.

In the case of *Curtis-Warner Corporation v.*

Thirkettle, 99 N. J. Eq. p. 806, and affirmed by this Court in 101 N. J. Eq. p. 279, in an action to foreclose a mortgage, a defendant entered a plea for abatement for unliquidated damages arising out of the sale of the property for which the mortgage was given. Vice-Chancellor Berry, in his opinion, said:

“ \* \* \* Set-off is a purely statutory right, and is strictly limited by the statute to liquidated damages. 4 Comp. Stats. p. 4836; 1 Comp. Stats. 433, Roseville Trust Company v. Barney, 88 N. J. Law, 146, 96 A. 69 reversed 89 N. J. Law, 550, 99 A. 343, but this principle approved; Norton v. Sinkhorn, 63 N. J. Eq. 313, 50 A. 506. On the other hand, recoupment is a common-law right (24 R. C. L. 793), and applies to unliquidated, as well as liquidated, damages (Norton v. Sinkhorn, *supra*). Counterclaim may include either set-off or recoupment, or both. In the Sinkhorn case, Chief Justice Depue said:

‘But the defendants’ claim, as set out in the answer, is not a counterclaim for liquidated damages, such as would constitute it a set-off. The claim set out in the answer is for unliquidated damages arising from the failure of the complainant to perform his contract according to its terms. The distinction between a set-off and recoupment is well settled. Recoupment, at common law, was a claim in reduction of the amount due to the party.  
\* \* \*

‘The doctrine of recoupment had been adopted in courts of equity long before it was introduced by statute into the practice of courts of law.

*The principle that lies at the foundation of this doctrine is that the amount which the plaintiff is entitled to recover shall be abated or reduced by reason of*

*his own failure to perform obligations which by the contract devolved upon him, whereby the defendant has sustained damages.*

*'In substance and effect, it may be likened to the reduction of the amount recoverable upon a contract because of a failure of consideration.'* (Italics mine).

"The application of this language to the present issue is obvious. It was a part of the mortgagee's contract to construct sidewalks and curbs. This part of the contract has never been performed. The cost of such construction was included in the purchase price of the property, and, it may be assumed, was covered by the mortgage, and an abatement of the amount it would have cost to construct that sidewalk and curb should be allowed. As stated above, the estimate of the cost of those sidewalks and curbs was \$451.74. *The mere fact that the damages sought to be set up as an abatement of the mortgage debt in a suit to foreclose the mortgage are unliquidated does not prevent equity from granting the abatement.* (Italics mine). *Coster v. Monroe Mfg. Co.*, 2 N. J. Eq. 467; *Couse v. Boyles*, 4 N. J. Eq. 213, 38 Am. Dec. 514; *O'Brien v. Hulfish*, *supra*; *Kuhnen v. Parker*, *supra*; *Peterson v. Reid*, *supra*."

To the same purport is the case of *Kuhnen v. Parker*, 56 N. J. Eq. p. 286. Vice-Chancellor Stevens wrote:

" \* \* \* These cases seem to me to demonstrate that where a purchase-money mortgage is being foreclosed, the defendant is not debarred from claiming a reduction merely because his claim is, at the time he makes it, unliquidated.

\* \* \* \* \*

Why does the court allow a reduction or

offset in foreclosure cases? One reason is to prevent circuitry of action. 'There can be no good reason assigned,' says Chancellor Vroom, in *Shannon v. Marselis*, *supra*, 'why there should be this circuitry, but a very good one why there should not, which is that the money might be lost to Carrick (the vendee in that case) altogether, he having no security but the covenant.'

I think that the true principle of decision goes at least to this extent: If the mortgagee foreclose a purchase-money mortgage against the mortgagor, and the mortgagor shows that the covenant against encumbrances has been broken in such manner as to give him a claim to substantial damages, he may reduce the mortgagees' demand to the extent of those damages."

In the case of *Norton v. Sinkhorn*, 63 N. J. Eq. p. 313, this Court held:

" \* \* \* In the present case the defendants gave notice of their election to recoup their damages by setting out their claim in the answer. The question then arises as to what disposition shall be made of that part of the answer. The vice chancellor directed that it be struck out. This ruling appears to have been made on the ground that a court of equity cannot entertain a claim for the recovery of unliquidated damages. This principle is well settled in terms as laid down by the vice-chancellor. *Trotter v. Heckscher*, 40 N. J. Eq. 656, 4 Atl. 83, and *Alpaugh v. Wood*, 45 N. J. Eq. 157, 16 Atl. 676. But, nevertheless, we think the order striking out this part of the answer, considered simply as notice of the purpose of the defendants to claim recoupment, was erroneous. We think the fund should be retained in the court of chancery, and the case allowed to stand over until the defendants shall have their damages arising from the breach

of contract by the complainant set out in the answer assessed in a court of law, within such time and in such manner as the court of chancery may direct."

It is respectfully submitted that the mortgage sought to be foreclosed in the present case, according to the plea for an abatement and counterclaim arose out of the same transaction and are related to the mortgage sought to be foreclosed. The affidavit on behalf of the defendant states that the mortgage was given to secure \$11,000.00 due upon the plumbing and heating contract and that the transactions "*were involved with each other*". The respondents may urge that the complainants issued their check for \$15,000.00 to the defendant as the consideration, and received a check for \$4,000.00 from one Samuel Goldfarb who loaned that sum to the complainants at the request of the defendant (P. 24, ll. 20-30), and a check from the disbursing agent of the Building and Loan Association for \$10,870.35 representing the balance due on the plumbing and heating contract. It is contended that while separate checks were drawn in order to have a record of the transaction, and the complainants may argue that each matter was an independent one, nevertheless a court of equity will look through them to ascertain the real situation. *Aiello Bros. v. Saybrook Holding Corp.*, 106 N. J. Eq. p. 3.

It is respectfully submitted that under the aforesaid authorities the court should not have stricken out that part of the answer or the counterclaim but should have held the same until the final hearing, and permitted the defendant to prove the amount due it in reduction of the amount due upon the mortgage, and to receive credit therefor.

#### POINT IV .

**If the complainants are entitled to a decree, execution should have been stayed until the defendants could establish their claim against the complainants at law.**

The court refused to stay the execution of its decree until the defendant could recover at law and plead the recovery as an offset against the complainants. It is submitted that if the complainants are entitled to a decree of foreclosure, then the issuance of execution should be restrained until the defendants establish their claim against the complainants at law as was done in the case of Norton v. Sinkhorn, *supra*.

#### Conclusion.

In conclusion, it is respectfully submitted that the decree in the case at bar should be reversed, set aside and for nothing holden and the court below directed to dismiss the bill of complaint with costs in favor of the defendants-appellant as against the complainants-respondents, or if the court is of the opinion that the complainants are entitled to a decree; that the defendant be permitted to establish and counterclaim against the amount due upon the complainants' mortgage, the damages sustained by reason of the complainants' default in the plumbing and heating contract, and that execution upon said decree be stayed until the appellant's counterclaim can be established.

Respectfully submitted,

DAVID M. LITWIN,  
Solicitor for and of Counsel with Appellants.

## New Jersey Court of Errors and Appeals

Between

SOLOMON BERLA and SAMUEL  
BERLA,

Complainants-Respondents,

and

M. & L. HOLDING COMPANY, *et als.*,  
Defendants-Appellants.

On Appeal  
from the  
Court of  
Chancery.

### BRIEF OF COMPLAINANTS-RESPONDENTS.

#### Facts.

On July 13, 1928 the M. and L. Holding Company executed and delivered its mortgage to the Richmond Building and Loan Association, to secure a loan of \$135,000.00, to be made by the said Association. Mr. Levine, who is the President of the M. and L. Holding Company, the defendant in this suit, was in full charge of this transaction, and also of the loan made by his company of \$15,000.00 from Solomon and Samuel Berla, to secure which loan a mortgage was executed on November 2, 1928, as a second lien on the same premises as the Building and Loan mortgage. This suit was brought to foreclose this \$15,000.00 mortgage.

This mortgage is in evidence, as Exhibit P-1-A, (State of Case, pages 83, 88). By the terms of said mortgage it is provided:

“and in case default is made in the payment

of two monthly payments of principal and interest of the Richmond Building and Loan Association mortgage, which is a first lien on said premises, then and in that event the principal sum herein secured shall be due and payable immediately thereafter, notwithstanding anything herein to the contrary." (State of Case, page 85, lines 3-12).

Complainants alleged in their Bill of Complaint, as amended, that there had been a default in the payment of two monthly payments of principal and interest of the Richmond Building and Loan Association mortgage, and therefore they elected to call their mortgage.

The Answer of defendants (State of Case, page 6-12) was a denial of default in payments on the prior mortgage; and further that the mortgage sought to be foreclosed was given as part payment on a plumbing and heating contract, whereby complainants had supplied a certain heating system which was alleged to be defective, and which, it was alleged, could only be brought up to the specifications of the contract by an expenditure of \$6,000.00. Defendant claimed to have given this mortgage as the balance due on the contract price. Defendant also filed a counter-claim for the \$6,000.00, based on the same allegations of defective performance of the plumbing and heating contract.

A motion to strike out this entire answer and counter-claim was made. By the affidavits offered on this motion on behalf of complainants and defendant (State of Case, pages 14-32) it appeared that complainants had loaned \$15,000.00 to defendant on October 30, 1928, by a check of that date. It further appeared that the Building and Loan Association disbursed the money it lent defendant, a week later, and that the Building and

Loan's check paid complainants the balance due on their contract. By orders of April 23, 1929, (State of Case, pages 34-37), both the counterclaim and that part of the Answer pleading an abatement, were stricken out. The single defense of the denial of default in payment of the prior mortgage, was held for final hearing.

On this issue Mr. Levine testified that he had arranged that the money from the Building and Loan was not to be paid out until the building was completed, and that no interest was to be charged until the money was paid out. (State of Case, page 71, line 37 to Page 72, line 3). Miss Jedell, with whom this arrangement is alleged to have been made, categorically denied the making of any agreement that no interest was to be charged until the money was actually paid out. (State of Case, page 77, lines 8-19). At the time of execution of the bond and mortgage to the building and loan, Mr. Levine says he requested that when it would be paid out, one or two months' dues and interest should be withheld, in order to carry him over the period during which the property might not bring in any income. (State of Case, page 63, lines 24-29, and page 70, lines 1-16). When the loan was paid out, the Building and Loan withheld the sum of \$675.00 as interest from October 23, 1928 to the November pay night of the Association, the fourth Tuesday in November.

The Brief filed on behalf of defendant states that Mr. Levine testified:

"that at the time the loan was closed on November 5, 1928, one month's interest was deducted from the Building and Loan check for the period from October 23, 1928 until November pay night; that he made objection about the interest that was charged for the period during which the Association did not advance the loan, and asked for credit for

the period from October 23, 1928 to November 7, 1928." (Brief of Defendant, page 6).

But to quote from Mr. Levine's testimony:

"Q. You knew on November 5th that Mr. Kanengieser had deducted a full month's interest? A. Yes.

Q. You are sure of that? A. I am quite sure I knew it on the 5th, yes.

By the Court:

Q. You made no claim at that time for a deduction? A. I could not make any claim.

Q. You did not, in fact, make any? A. No, I didn't.

Q. You didn't go to the December meeting of the Building and Loan Association at all? A. I did not.

(State of Case, page 73, line 34, page 74, line 11).

It is the fact in this case, therefore, that this money was paid without the slightest protest on behalf of the defendant corporation, at the time of payment. It was not until after the December meeting of the Association, held on December 22, 1928, which meeting Mr. Levine did not attend, that he claims he made a complaint about this charge.

"Q. When did you make a complaint to the Association, either to Miss Jedell or to Mr. Kanengieser, about the interest that was being charged for that period of time? A. I made it to Miss Jedell after the December meeting. Mr. Kanengieser was there at the time." (State of Case, page 64, lines 15-21).

He admitted he never appeared to make any complaint before the Board of Directors of the Association.

"Q. Why don't you answer my question? Did you ever appear before the Board of Di-

rectors and ask for the credit of the interest?

A. I did not."

(State of Case, page 76, lines 16-18).

He further admitted he never got any allowance for that payment.

"Q. You never got any allowance of that interest that you claimed? A. I did not.

Q. You have since paid up that interest?

A. Yes, sir."

(State of Case, page 76, lines 23-26).

There is no dispute that the dues and interest due for the months of December, 1928, and January, 1929, were not paid to the Association before January 24, 1929; that is, two days after the January payment was due, at which time the amount due for one month only was paid. This was after Mr. Levine had notice that the complainants had elected to foreclose their mortgage.

The learned Vice Chancellor who heard this case concluded, that if the case turned on the question of whether the defendant was entitled to this rebate because of any promise made to its officer, that:

"if the case turned on the promise, the decision would be that the defendant did not prevail on that issue." (State of Case, page 107, lines 11-13).

He further concluded that there was a default in the payment of two installments on the prior mortgage (State of Case, page 107, lines 22-31), and therefore, by final decree under date of March 4, 1930, ordered sale of the mortgaged premises to satisfy complainants' mortgage.

Defendant-Appellant filed its notice of appeal on March 13, 1930 in this Court, in which it is set forth that the appeal is from the final decree made

on March 4, 1930, (State of Case, page 112). By the petition of appeal defendant-appellant set forth that the said final decree is erroneous, in that, among other reasons:

“(D) It denied the right of the defendant, M. & L. Holding Co. to set-off an amount due it for certain plumbing and heating work agreed to be performed by the complainants under the terms of a certain contract, which amount this appellant was equitably entitled to set off against the amount adjudged to be due the complainants.” (State of Case, page 116, lines 8-14)

The fact is that that denial was made on April 23, 1929, by order of the Court of Chancery, and that from it no appeal was taken.

## ARGUMENT.

### I.

**The M. and L. Holding Company was in default on two monthly installments of principal and interest on the Building and Loan mortgage on January 22, 1929 when complainants elected to foreclose.**

The defendant admits that no payments were made for December or January at the times these payments were due; that is, on the respective pay nights of each month. A prima facie case of default thereby is established. However, defendant claims the full amount of this money was not due. The claim is that the sum of \$292.50 interest from October 23, 1928, the pay night of that month, to November 5, 1928, when the loan was paid out,

had been overpaid by the defendant at the closing, and that it was entitled to a credit of that amount on the money it owed the Building and Loan. Although it seems very doubtful whether the right to set-off, which is a creature of the statute and must be specially pleaded, is in law a reduction of indebtedness until it is deducted as the result of a judgment or decree of the court, complainants do not wish to rest their case on so technical a ground. Complainants contend that no credit was ever due to the M. and L. Holding Company.

In the first place, the statute provides:

“16. Premiums and interest.

Any such association may take from its members a premium for priority or privilege of loan or acquisition of real estate, and no premiums so taken for such purposes shall be deemed usurious, and it shall be lawful for the rate of said premium to be agreed upon, instead of being determined by auction to the highest bidder, and the payment of interest in advance for not exceeding one month shall not be deemed usurious.” (P. L. 1925, Chapt. 65, Sec. 16, page 195).

This statute deals with the premiums and interest as separate items. As to premiums, “and it shall be lawful for the rate of said premium to be agreed upon, instead of being determined by auction to the highest bidder.” But as to interest, there is no necessity for agreement. The borrower can take the loan under the terms lawfully imposed by the association, or leave it. When he takes it and pays the advance interest, there is no usury, that is the effect of the statute. And “interest in advance” can mean but one thing, in advance of the loan; otherwise there could be no question of usury.

Since it is lawful to charge interest for not ex-

ceeding one month in advance, and the period charged for in this case, from October 23rd to November 5th, was but thirteen days, there never was any right in the defendant corporation to this money. But even if they had a right, their President testified that he paid it knowing exactly what it was for and without a word of protest.

“Q. You knew on November 5th that Mr. Kanengieser had deducted a full month’s interest? A. Yes.

Q. You are sure of that? A. I am quite sure I knew it on the 5th, yes.

By the Court:

Q. You made no claim at that time for a deduction? A. I could not make any claim.

Q. You did not, in fact, make any? A. No, I didn’t.

Q. You didn’t go to the December meeting of the Building and Loan Association at all? A. I did not.”

(State of Case, page 73, line 34, page 74, line 11).

and further, that he never protested until almost two months afterwards.

“When did you make a complaint to the Association, either to Miss Jedell or to Mr. Kanengieser, about the interest that was being charged for that period of time? A. I made it to Miss Jedell after the December meeting. Mr. Kanengieser was there at the time.” (State of Case, page 64, lines 15-25).

A clearer case of a voluntary payment can scarcely be imagined. That such a payment cannot be recovered back is the settled law of this state.

*Koewing v. Town of West Orange*, 89 N. J. L. 539, 99 Atl. 203;

*Loesser Mfg. Co. v. Julius Schmid, Inc.*,  
100 N. J. L. 123, 125 Atl. 30;  
*Bellisfield v. Holcombe*, (not yet official-  
ly reported), 139 Atl. 817.

As has been demonstrated above, this payment was not a payment of usury, the Building and Loan Association had a legal right under the Statute to exact the payment as it did, and therefore the ordinary rules on voluntary payments apply. And the fact is that the defendant corporation never made any effort to collect it. Their president admitted he never appeared before the Board of Directors of the Building and Loan, to make a demand. (State of Case, page 76, lines 16-18). He admitted in answer to questioning by the Court, that he never tendered to the Building and Loan the difference between what he claimed was due his corporation as a credit and what he admitted the corporation owed. He never even took the trouble to figure the amount of his claim.

“By the Court:

Q. You claim that there should be a deduction of interest from October— A. 23rd.

Q. From the 23rd? A. To November 7th.

Q. At what rate? A. 6 per cent.

Q. On what sum? A. \$135,000.

Q. Do you know how much that was? A. I could figure it, yes.

Q. Did you tender them the difference?

A. I did not.

Q. Why? A. Mr. Kanengieser seemed to think that he had no right to make any such allowance.

Q. But you apparently give it as your reason for not making the payment that he would not state to you the amount of the deduction? A. That is right.

Q. You have told me that you know how to calculate it yourself. A. Yes, sir, I do.

Q. Did you offer them the difference? A. I did not, no, sir.

Q. Had you any reason for not offering it to them? A. No, not at all.

Q. You failed to make the payment of the interest and the instalment of the principal only because the secretary failed to make the calculation for you? A. That is correct.

Q. A calculation that you admit you could make yourself? A. Yes, sir."

(State of Case, page 66, line 20, page 67, line 11).

He was content to sit back and allow arrearages to pile up without regard to the effect of such arrearages on the security of the second and third mortgages on the property. Without explanation to these mortgagees, whose interests were vitally affected, that he had a bona fide dispute with the Building and Loan which he wished to settle as quickly as possible, and that he was afraid to make any further payments that might prejudice his rights, he just failed to pay until complainants had elected to foreclose. Then, he made his payments and abandoned all pretense of claim for credit.

As pointed out in the conclusions of the learned Vice Chancellor (State of Case, page 107, lines 16-31), the default clause in the mortgage under foreclosure in this case, says:

"in case default is made in the payment of two monthly payments of principal and interest of the Richmond Building and Loan Association mortgage,"

which necessitates the payment in full of the two monthly installments to prevent default and not a payment of a bit on each month. Any other interpretation would put it in defendant's power

to stave off default on subsequent mortgages while allowing large amounts to become due and unpaid prior to them.

It is submitted that on January 22, 1929 the defendant corporation owed the Building and Loan Association in full for two monthly installments of dues and interest, that there never was any rebate due it, that it was in default on the mortgage held by complainants, and that the complainants were within their rights in calling their mortgage.

## II.

### **Dues paid on a Building and Loan mortgage are payments on the principal of the mortgage when made.**

The contention of defendant-appellant, is that the monthly payments on account of dues are not credited against the principal of the mortgage until the shares of stock attain the par value of \$200.00 each and "then for the first time is there an application of the amount represented by the maturity value of the stock against the principal of the mortgage." (Brief of Defendant, page 12).

The case of *Mechanics Building and Loan Association v. Conover*, 14 N. J. Eq. 219, Reversed (Defendant-appellant states it as affirmed) 17 N. J. Eq. 497, sub nomine *Herbert v. Mechanics Building and Loan Association*, is cited in support of this contention. In that case the second mortgagee sought to have the amount paid in as dues credited on the mortgage so as to enforce the equitable doctrine of marshalling. Chancellor Green refused to marshal the assets in his favor. The Court of Errors and Appeals, speaking

through Chief Justice Beasley, in reversing the decision of the Chancellor, held, at page 499:

“the appellant had the right in equity to require the first mortgagee to look primarily to the stock in question.”

In reality, each dollar paid in as dues on the stock, was, by the decision, made so much credit on the mortgage debt. That is the result of the decision, and the result seems to overrule the language of the Chancellor.

The same result was reached in the case of *Schaefer v. Metzger*, 105 N. J. Eq. 307. In that case the Building and Loan Association refused to allow a second mortgagee to redeem without payment of the mortgage in full. When he did redeem, by such payment, the association deposited the shares into court, and the Court gave them to the second mortgagee. Again, the payment of dues are, in fact, a reduction of the mortgage debt.

If the rule contended for by defendant-appellant were followed, then upon foreclosure of a Building and Loan mortgage, the full nominal principal sum is the amount due and no deduction therefrom should be made by the Master for payments of dues before the default. But the universal practice is to make such a deduction. A suit for deficiency is always for the balance due on the mortgage debt, after subtracting the amount realized on the sale, plus the withdrawal value of the shares. No recovery for any greater amount would be allowed. These practical results are now recognized by the Court of Chancery.

*Calverley v. Ventnor Bldg. and Loan Assn.*,  
105 N. J. Eq., 159, 147 Atl. 334,—

“In this case, however, the stock was the original security for the loan, and all pay-

ments made thereon must be credited either as interest, other charges, or on account of principal."

Article 2, Section 7, of the constitution of the said association provides:

"When the shares of stock upon which mortgages or other loans have been granted shall have reached the matured value of two hundred dollars each, this amount shall be credited to the borrower and the loan or loans shall be fully paid and satisfied, if all dues, interest, fines and other indebtedness have been paid in full."

Article 14, Section 1, provides:

"Every member twenty-one years of age or over, shall, for each share held in his own right, be entitled to a loan of two hundred dollars, and whenever a loan is offered, and there is more than one applicant, it shall be disposed of by the board to the person first applying for same, provided his loan is granted."

It would appear absurd to believe that if the stock was paid in full, the mortgage would be non-effective; but that if any amount, no matter how small, remain due, the owner of the land would be entitled to no credit whatever thereon.

In other words, if at the time of sale the shares of stock had reached its matured value of \$200.00 each, the amount should be credited to the borrower and the loans be fully paid; but if the sale of said shares should have reached only \$195.00 each, no credit could be made." (Per Vice Chancellor Ingersoll, at pages 162 and 163).

The monthly payments of dues are monthly payments of the principal of the mortgage; and the

failure to pay dues is a default in the payment of principal and interest, which is the default provided for in the mortgage.

*In the instant case, however, it is unnecessary to decide whether as between the borrower and the Building and Loan Association, the payment of the monthly dues on the shares pledged to secure the mortgage loan is immediately applied to discharge the principal, or is not applied until the maturity of the shares, because the condition of complainants' mortgage refers to a default by the defendant in the following language:*

*"This mortgage is second in priority to a mortgage in the nominal sum of \$135,000 held by the Richmond Building and Loan Association, and in case default is made in the payment of two monthly payments of principal and interest of the Richmond Building and Loan Association mortgage, which is a first lien on said premises, then and in that event the principal sum herein secured shall be due and payable immediately thereafter, notwithstanding anything herein to the contrary." (State of Case, page 85, lines 1-12).*

*and the monthly payments of principal to be made to the Building and Loan Association therein referred to, mean and can only mean, the monthly dues which are applied directly or indirectly to the principal indebtedness.*

## III.

The third point argued by defendant-appellant, is:

**“The Court of Chancery should not have stricken out that part of the answer relating to the abatement of the amount due upon the mortgage, nor should it have stricken out the counterclaim.”**

This is not available to defendant-appellant on this appeal. The orders striking out that part of the answer and striking out the counter-claim, were made on April 23, 1929 (State of Case, pages 34 and 36). The time limit for appeal from these orders is forty days.

“All persons aggrieved by any order or decree of the Court of Chancery, any appeal from the same or any part thereof to the Court of Errors and Appeals, and all appeals except from final decrees shall be made within 40 days after filing the order or decree appealed from.” (Comp. Stat. 1911 Ed., Vol. 1, page 269, Sec. 33-111).

It must be conceded that these were not final decrees, but were orders limiting the proceedings in this suit to a certain subject-matter. This court has decided that appeals from such orders must be taken within 40 days:

*Butterfield v. Third Avenue Savings Bank*, 25 N. J. Eq. 553,

“But an order which simply regulates the proceedings, no matter how such order may affect the conduct of the cause or the rights of the parties, does not seem to be embraced within this field of uncertainty. Such

orders would manifestly seem to belong to that class which the statute requires shall be appealed, if at all, within 40 days; and to hold that such orders are so carried into the subsequent decree as to become a part of it, and appealable with it, would seem to annul this statutory restriction." (Per Chief Justice Beasley, at 535).

Defendants-appellants took no appeal within 40 days. On March 13, 1930, almost eleven months later, they gave notice of appeal—

"from the final decree made in the above entitled cause on March 4, 1930, and from the whole and every part thereof." (State of Case, page 112, lines 23-25).

By the petition of appeal, the attempt is made to inject this issue into this appeal:

"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:" (State of Case, page 115, lines 1-4).

"(D) It denied the right of the defendant, M. & L. Holding Co., to set-off an amount due it for certain plumbing and heating work agreed to be performed by the complainants under the terms of a certain contract, which amount this appellant was equitably entitled to set off against the amount adjudged to be due the complainants." (State of Case, page 116, lines 8-14).

The written conclusions of the learned Vice Chancellor, giving his reasons for his decision to strike out that part of the answer and the counterclaim, have not been printed by appellant in the state of the case. But the final decree did not de-

ny the defendant this right; it was the orders of April 23, 1929 that did.

This situation is not analogous to an order striking out an answer in an action-at-law, as is stated by defendants-appellants (Brief, page 15). The orders did not adjudicate the question of the validity or amount of defendant's alleged claim against complainants. It only decided that if it existed, it was foreign to the issue presented by the bill, not adapted to be tried with it as it raised entirely different factual questions, and refused to confuse this case with any such claim. The claim still stands for what it is worth.

It is submitted that this appeal does not bring up these orders at all.

And, further, complainants contend that the orders were proper and if brought up by this appeal, they should be affirmed. This mortgage was given to secure money lent on October 30, 1928. The alleged claim arises out of plumbing and heating work done by complainants under an entirely separate contract made and entered into without any mortgage in contemplation, for which defendant paid in full on November 5, 1928. Now it is alleged that the work was defective, and that \$6,000.00 must be expended to correct the alleged defects. The affidavits used by defendants on the argument of the motion to strike out, state—

“it nevertheless was a washed transaction.”  
(State of Case, page 24, lines 36-37).

“The mortgage transaction with the complainants and the transaction involving the plumbing and heating contract were involved with each other.” (State of Case, page 25, lines 1-4).

Both pure conclusions, and not facts.

The authorities cited by the defendants in their

Brief are cases of purchase money mortgages, where the abatement sought was for failure to convey all that was supposed to be conveyed, and for which the mortgage was given. No contention is made that the mortgage sought to be foreclosed in this case was a purchase money mortgage. The cases cited by defendant lay down the rule—

“The principle that lies at the foundation of this doctrine is, that the amount which the plaintiff is entitled to recover shall be abated or reduced by reason of his own failure to perform obligations which by the contract devolved upon him, whereby the defendant had sustained damages.”

(Per Justice Depue, in *Norton v. Sinkhorn*, 63 N. J. Eq., 313).

The complainants lent \$15,000.00, the full consideration of the mortgage, and the only obligation which by the contract devolved upon them.

The alleged claim of defendant was not founded on an equitable action. If it existed, it was purely a question for the law courts. Unliquidated damages were sought, therefore the Statute of Set-Offs (Compiled Statutes 1910 Ed., Vol. 4, page 4836) does not apply. It was not the proper subject for a cross-bill, and so not within the purview of Chancery Rule 70. It might seem to come within Chancery Rule 28—

“Subject to the provisions of other rules herein contained, a defendant may counterclaim or set-off any cause of action against the complainant.”

But this rule is to be read with Rule 70, and limited by it.

*Beller v. Fenning*, 101 N. J. Eq. 430, 139 Atl. 327.

Furthermore, the rule continues:

*“but in the discretion of the court, separate hearings may be ordered; or if the counter-claims cannot be conveniently disposed of in the pending action, the court may strike it out.”*

The Supreme Court has held:

*“Rules 28 and 70 do not make it compulsory to file a counterclaim. It is only permissive. If filed, the Court of Chancery in its discretion may refuse to consider it.”*  
(Yeskel v. Gross, not yet officially reported, 144 Atl. 312).

and this Court affirmed that decision on appeal in Yeskel v. Gross, (not yet officially reported) 148 Atl. 920.

It is submitted that it was not error for the Court of Chancery to refuse to consider this counter-claim, as it had no factual connection with the issues raised by the Bill of Complaint, and could not “conveniently be disposed of in the pending action”.

#### IV.

**It is submitted that defendant's request for a stay of execution ought not to be granted.**

The plumbing work in question was completed before November 7, 1928. This bill was filed in January, 1929. The defendant could have started its suit, and if entitled to judgment could have recovered the same before the decree appealed from was entered. It did not do so, but attempted to set up this claim as a defense to this suit. After the defense was stricken out by the learned Vice

Chancellor, it could then have started a suit at law, but failed to do so. It requested the same stay when the decree appealed from was entered. The stay was denied, and it did not even then start suit at law. Defendant nowhere claims complainants are insolvent, and that a judgment would not be collectible. The Court of Chancery, even where there is an equitable remedy, refuses relief to those who sleep on their rights. Here, defendant asks this court to tie up complainants' relief until defendant who has slept for a year, and one-half on an alleged damage claim, starts an action if the decree against it be affirmed. The restatement of the request, at this time, there having been no change in the situation, nor any move made by the defendant to establish its claim, for so long a period, is, in itself, the best reason for its denial.

**It is respectfully submitted, therefore, that the decree appealed from should be affirmed.**

Respectfully submitted,

PHILIP J. SCHOTLAND,  
Solicitor for and of counsel with  
Complainants-Respondents.

