

**INDEX.**

	Page
Bill of Complaint .....	1
Answer of Defendant Frank Melfi.....	16
Notice of Motion .....	20
Affidavit of Samuel O. Offen.....	21
Affidavit of Frank Melfi .....	25
Order Striking out Answer filed by Defendant, Frank Melfi .....	26
Order .....	28
Order .....	29
Notice of Motion .....	30
Affidavit of Samuel O. Offen.....	32
Affidavit of Samuel O. Offen.....	38
Affidavit of Frank Melfi .....	42
Opinion .....	45
Order .....	47
Notice of Appeal by Frank Melfi.....	49
Notice of Appeal by Frank Melfi.....	50
Petition of Appeal .....	52
Answer to Petition of Appeal.....	55

**New Jersey State Library**

**Bill of Complaint.**

Filed Sept. 27, 1927.

**In Chancery of New Jersey.**

To HIS HONOR, EDWIN ROBERT WALKER,

Chancellor of the State of New Jersey: 10

Complainant, Trojan Building and Loan Association of Newark, New Jersey, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, with principal office in the City of Newark and County of Essex therein, says:

**COUNT ONE.**

1. On or about October 24, 1923, the Philmar Construction Corporation, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, with principal office in the City of Newark and County of Essex therein, being indebted to complainant in the sum of \$5000. executed to complainant a bond of that date to secure the said sum, payable when a certain 25 shares owned by the said Philmar Construction Corporation in the said association and assigned by it as collateral security for the payment of said sum of \$5000. shall have matured, with interest at the rate of 6% per annum, payable monthly on the third Thursday of each and every month from the date of the same. 20 30

2. To secure payment of the principal sum in the said bond the said Philmar Construction Corporation executed to complainant a mortgage of even date with the said bond; and thereby conveyed to it, in fee, the lands and premises particular- 40

*Bill of Complaint.*

ly hereinafter described on the express condition that such conveyance should be void if payment should be made according to the terms and tenor of the said bond; which mortgage, having been first duly acknowledged, and the certificate of acknowledgment duly endorsed thereon, was recorded in the Register's office of the County of Essex in Book W 49 of Mortgages on page 104.

3. The mortgaged premises which are located and lien partly in the City of Newark, New Jersey and partly in the City of East Orange, New Jersey, are described as follows: "BEGINNING at a point on the northeasterly line of Tremont Avenue said point being distant southeasterly 75 feet from the point of intersection of the said northeasterly line of Tremont Avenue and the southeasterly line of Grand Avenue running thence north 32 degrees 30 minutes east 100 feet; thence south 57 degrees 28 minutes east 50 feet; thence south 32 degrees 30 minutes west 100 feet to the aforementioned northeasterly line of Tremont Avenue; thence along the same north 57 degrees 28 minutes west 50 feet to the point and place of BEGINNING."

4. The said bond and mortgage contained an agreement that should any default be made in the payment of the said interest, or any installment on the said shares, or any part thereof, on any day whereon the same is made payable, as above expressed, by the said Philmar Construction Corporation, its successors and assigns, and should the said interest or any installment on said shares remain unpaid and in arrears for the space of three months, then, and from thenceforth, that is to say, after the lapse or expiration of such period,

*Bill of Complaint.*

the aforesaid principal sum of \$5000., or the unpaid residue thereof, with all arrearages of interest thereon, fines, should, at the option of the party of the second part (the complainant herein) or its legal representatives, become and be due and payable immediately thereafter.

5. At the same time that the said Philmar Construction Corporation aforesaid executed the said bond one Maurice Schlesinger and one Philip Herman executed the same in their individual capacity, thereby agreeing to pay the said obligation in accordance with the tenor thereof.

6. On or about November 8, 1923, the said Philmar Construction Corporation conveyed the aforesaid lands and premises subject to complainant's aforementioned mortgage of \$5000. to H. J. Leonardo Citrano (the same person hereinafter referred to as Leonardo Citrano) by warranty deed of said date and recorded in the Essex County Register's Office in Book E 69 of Deeds on page 578. On November 7, 1924, the said H. J. Leonardo Citrano, under the name of Leonardo Citrano, and his wife, Philomena Citrano, conveyed the said lands and premises by warranty deed subject to complainant's aforesaid mortgage of \$5000. to Vincent Citrano which deed was of the same date and recorded in the Essex County Register's Office in Book C 71 of Deeds page 580.

7. On June 13, 1925, the said Vincent Citrano and Mary Citrano, his wife, mortgaged the said lands and premises in the sum of \$1000. to one Scottie Basile, which mortgage was, on June 16, 1925, recorded in the Essex County Register's Office in Book I 54 of Mortgages on page 355. By written assignment dated January 5, 1926, the

*Bill of Complaint.*

said Scottie Basile assigned his entire interest in said bond and mortgage to Joseph Zemel, which assignment was recorded in the Essex County Register's Office in Book 175 of Assignments of Mortgages, on page 418. By written assignment dated February 1, 1926, the said Joseph Zemel assigned his entire interest in said bond and mortgage to Frank Melfi, which assignment was recorded in Book 177 of Assignments of Mortgages in the Essex County Register's Office on page 455.

Any interest which the present holder of the said mortgage of \$1000., Frank Melfi, may have in the said lands and premises is subject to the lien of complainant's aforesaid mortgage.

8. On or about June 8, 1925, a recognizance was filed in the office of the Clerk of the New Jersey Supreme Court in the sum of \$1700., wherein one Alexander Isserman was the obligee and one James Citrano was one of the principals.

If the said James Citrano is the same person as Vincent Citrano (the same person hereinafter referred to as Vincent Citrano) who held the record title in and to the said lands and premises as aforesaid, then whatever interest the obligees in the said recognizance, Alexander Isserman, may have in the said lands and premises is subject to the lien of complainant's mortgage.

9. On or about June 27, 1925, a judgment in the sum of \$5127.50 and costs was entered in favor of one Alexander Isserman against one James Citrano, among others, in the New Jersey Supreme Court.

If the said James Citrano is the same person as Vincent Citrano (the same person hereinafter re-

*Bill of Complaint.*

ferred to as Vincent Citrano) who held the record title in and to the said lands and premises as aforesaid, then whatever interest the said Alexander Isserman may have in the said lands and premises by virtue of said judgment is subject to the lien of complainant's mortgage.

10. On or about July 1, 1925, a judgment was entered in the First District Court of Newark, New Jersey, in favor of the Fourteenth Avenue Security Loan Association, a corporation of New Jersey, against one James Citrano, among others, for \$227. and costs, which judgment was on said date docketed in the office of the Clerk of the Essex Common Pleas Court, in Book 25 of Docketed Judgments on page 173.

If the said James Citrano is the same person as Vincent Citrano (the same person hereinafter referred to as Vincent Citrano) who was the record owner of the said lands and premises as aforesaid, then whatever interest the said Fourteenth Avenue Security Loan Association may have in the said lands and premises is subject to the lien of complainant's mortgage.

11. On or about July 14, 1925, Vincenzo Citrano (the same person hereinabove referred to as Vincent Citrano) and Mary Citrano, his wife, conveyed the aforesaid lands and premises by warranty deed of said date to Teresina Lupia, wife of John Lupia, subject to complainant's mortgage, said deed being recorded in the Essex County Register's Office in Book V 72 of Deeds on page 47.

12. On or about November 8, 1926, said Teresina Lupia and John Lupia, her husband, conveyed the said lands and premises by warranty deed sub-

*Bill of Complaint.*

10 subject to complainant's aforesaid mortgage to Mary Citrano, wife of Vincenzo Citrano (the same person hereinabove referred to as Vincent Citrano), said deed being recorded in Book D 75 of Deeds on page 577. (On November 24, 1926, said Teresina Lupia and John Lupia, her husband, made, executed and delivered a corrective deed to said

10 Mary Citrano, wife of Vincenzo Citrano (the same person hereinabove referred to as Vincent Citrano), which was recorded in Book R 75 of Deeds in the Essex County Register's Office on page 95, wherein the said grantors conveyed all their right, title and interest in and to the said lands and premises as intended by the deed which was given on November 8, 1926).

20 Any interest which the said Mary Citrano may have by reason of the fact that she is the record owner of said premises is subject to the lien of complainant's mortgage. Any interest which Vincenzo Citrano (the same person hereinabove referred to as Vincent Citrano) may have by curtesy as the husband of Mary Citrano or otherwise is subject to the lien of complainant's mortgage.

30 13. Complainant is informed and believes that the said Mary Citrano, who is the present record owner of the said lands and premises and her husband, Vincent Citrano (the same person hereinabove referred to as Vincenzo Citrano) have conveyed their interest in and to the said lands and premises to one Joseph Testa and Anna Testa, his wife, by deed which has not been recorded. The said Joseph Testa and Anna Testa, his wife, are now in possession of the said lands and premises.

40 Any interest that the said Joseph Testa and Anna Testa, his wife, may have in the said lands

*Bill of Complaint.*

and premises are subject to the lien of complainant's mortgage.

14. Default has been made in the payment of the interest and installments on the shares of the Trojan Building and Loan Association (complainant herein) by the said Philmar Construction Corporation, the original mortgagee, and its assigns, 10 and the same have remained unpaid and in arrears for the space of three months and more. Complainant has elected that the whole principal sum with all unpaid interest, fines and forfeitures in the sum of \$3975.25 shall be now due.

15. The whole amount of the principal sum with all unpaid interest, fines and forfeitures is due upon complainant's bond and mortgage. 20

16. On or about February 14, 1918, such portion of the said lands and premises as lie in the City of Newark, were sold by the said City of Newark for non-payment of 1916 taxes to John H. Beyer. 20

The interest of the said John H. Beyer in the said lands and premises may be a superior lien to the lien of complainant's mortgage. Complainant therefore seeks to have the amount of said lien, if any, and the priority thereof ascertained. 30

17. On or about June 18, 1924, such portion of the said lands and premises as lie in the City of Newark were sold by the said City of Newark to the Cedar Realty Company, a corporation for the non-payment of 1922 taxes.

The interest of the said Cedar Realty Company in the said lands and premises may be a superior lien to the lien of complainant's mortgage. Complainant therefore seeks to have the amount of 40

*Bill of Complaint.*

said lien, if any, and the priority thereof ascertained.

10 18. On or about June 30, 1925, such portion of the said lands and premises as lie in the City of Newark were sold by the said City of Newark to the Cedar Realty Company for the non-payment of 1923 taxes.

The interest of the said Cedar Realty Company in the said lands and premises may be a superior lien to the lien of complainant's mortgage. Complainant therefore seeks to have the amount of said lien, if any, and the priority thereof ascertained.

20 19. On or about June 28, 1926, such portion of the said lands and premises as lie in the City of Newark, were sold and purchased by the City of Newark for nonpayment of 1924 taxes and assessments.

The interest of the said City of Newark in the said lands and premises may be a superior lien to the lien of complainant's mortgage. Complainant therefore seeks to have the amount of said lien, if any, and the priority thereof ascertained.

COUNT TWO.

30 1. On November 8, 1926, Mary Citrano and Vincenzo Citrano (the same person referred to in this bill as Vincent Citrano) being indebted to complainant in the sum of \$2500. executed to it a bond of that date to secure that sum, payable when certain 12½ shares owned by the said Mary Citrano and Vincenzo Citrano (the same person referred to in this bill as Vincent Citrano) in the 40 said association and assigned by them as collateral security for the payment of the said sum of

*Bill of Complaint.*

\$2500. shall have matured, with interest at the rate of 6% per annum, payable on the third Thursday of each and every month on the said bond.

2. To secure payment of the said bond the said Mary Citrano and Vincenzo Citrano (the same person referred to in this bill as Vincent Citrano) executed to complainant a mortgage of even date 10 with said bond and thereby conveyed to it in fee simple the lands and premises hereinafter described on the express condition that such conveyance should be void if payment should be made according to the terms of said bond, which mortgage having first been duly acknowledged, and the certificate of acknowledgment duly endorsed thereon, was recorded in the Essex County Register's Office in Book L 59 of Mortgages on page 324. 20

3. The mortgaged premises are particularly described in paragraph 3 of Count One.

4. The said bond and mortgage contained an agreement that should any default be made in the payment of the said interest, or any installment on the said shares, or any part thereof, on any day whereon the same is made payable, as above expressed, by Mary Citrano and Vincenzo Citrano 30 (the same person referred to in this bill as Vincent Citrano) their heirs, executors, administrators and assigns, and should the said interest or any installment on said shares remain unpaid and in arrears for the space of three months, then, and from thenceforth, that is to say, after the lapse or expiration of such period, the aforesaid principal sum of \$2500. or the unpaid residue thereof, with all arrearages of interest thereon, fines, should, at the option of the party of the second part (the 40

*Bill of Complaint.*

complainant herein) or its legal representatives, become and be due and payable immediately thereafter.

5. On June 13, 1925, Vincent Citrano (the same person referred to in this bill as Vincenzo Citrano) and Mary Citrano, his wife, being then  
10 the record owners of the said lands and premises, mortgaged same to one Scottie Basile for \$1000., said mortgage being recorded in Book 1 54 of Mortgages in the Essex County Register's Office, on page 355. By written assignment dated January 5, 1925, the said Scottie Basile assigned his entire interest in the said bond and mortgage to Joseph Zemel, said assignment being recorded in Book 175 of Assignments of Mortgages in the Essex County Register's Office on page 418. By  
20 written assignment dated February 1, 1926, said Joseph Zemel assigned his entire interest in the said bond and mortgage to Frank Melfi, which assignment was recorded in Book 177 of Assignments of Mortgages in the Essex County Register's Office on page 455. On November 24, 1926, the said Frank Melfi, being then the absolute and record owner of the said bond and mortgage postponed and subordinated the lien of said mortgage to the lien of complainant's aforesaid mortgage of  
30 \$2500.

Any interest that the said Frank Melfi may have in the said lands and premises by virtue of the bond and mortgage of \$1000., is subject to the lien of complainant's mortgage.

6. From November 7, 1924, to July 15, 1925, Vincent Citrano (the same person referred to as Vincenzo Citrano in this bill) and Mary Citrano,  
40 his wife, were the record owners of the aforesaid

*Bill of Complaint.*

lands and premises.

7. On June 8, 1925, a recognizance was filed in the Office of the Clerk of the New Jersey Supreme Court in the sum of \$1700. wherein one James Citrano, among others, was the principal and one Alexander Isserman, was the obligee. Complainant had no actual or constructive knowledge or  
10 notice of the fact that the said James Citrano is the same person as Vincent Citrano (the same person referred to in this bill as Vincenzo Citrano) at the time that complainant's aforesaid mortgage was executed and delivered, and complainant advanced the consideration therefor.

Complainant charges that a lien of record in the name of James Citrano is not constructive or record notice to complainant of a lien against Vincent Citrano or Vincenzo Citrano.  
20

If the said James Citrano referred to in the said recognizance is the same person as Vincent Citrano (the same person referred to in this bill as Vincenzo Citrano) then whatever interest the obligee in said recognizance may have in the aforesaid lands and premises is subordinate, inferior and subject to the lien of complainant's said mortgage.  
30

8. On June 27, 1925, a judgment was entered in the New Jersey Supreme Court in favor of one Alexander Isserman and against James Citrano, and others, in the sum of \$5127.50.

Complainant had no actual or constructive knowledge or notice of the fact that the said James Citrano is the same person as Vincent Citrano (the same person referred to in this bill as Vincenzo Citrano) at the time that complainant's aforesaid mortgage was executed and delivered,  
40

*Bill of Complaint.*

and complainant advanced the consideration therefor.

Complainant charges that a lien of record in the name of James Citrano is not constructive or record notice to complainant of a lien against Vincent Citrano or Vincenzo Citrano.

10 If the said James Citrano referred to in the said judgment is the same person as Vincent Citrano (the same person referred to in this bill as Vincenzo Citrano) then whatever interest the said judgment creditor may have in the aforesaid lands and premises is subordinate, inferior and subject to the lien of complainant's said mortgage.

20 9. On July 1, 1925, a judgment was entered in the First District Court of Newark, New Jersey, in favor of the Fourteenth Avenue Security Loan Association, a corporation, against one James Citrano, and others, for \$227. and costs which was docketed on the said day in the office of the Clerk of the Court of Common Pleas of the County of Essex.

30 Complainant had no actual or constructive knowledge or notice of the fact that the said James Citrano is the same person as Vincent Citrano (the same person referred to in this bill as Vincenzo Citrano) at the time that complainant's aforesaid mortgage was executed and delivered, and complainant advanced the consideration therefor.

Complainant charges that a lien of record in the name of James Citrano is not constructive or record notice to complainant of a lien against Vincent Citrano or Vincenzo Citrano.

40 If the said James Citrano referred to in the said judgment is the same person as Vincent Citrano

*Bill of Complaint.*

(the same person referred to in this bill as Vincenzo Citrano) then whatever interest the said judgment creditor may have in the aforesaid lands and premises is subordinate, inferior and subject to the lien of complainant's said mortgage.

10. On or about February 14, 1918, such portion of the said lands and premises as lie in the City of Newark, were sold by the said City of Newark, for nonpayment of 1916 taxes to John H. Beyer. 10

The interest of the said John H. Beyer in the said lands and premises may be a superior lien to the lien of complainant's mortgage. Complainant therefore seeks to have the amount of said lien, if any, and the priority thereof ascertained.

11. On or about June 18, 1924, such portion of the said lands and premises as lie in the City of Newark were sold by the City of Newark to the Cedar Realty Company, a corporation for the non-payment of 1922 taxes. 20

The interest of the said Cedar Realty Company in the lands and premises may be a superior lien to the lien of complainant's mortgage. Complainant therefore seeks to have the amount of said lien, if any, and the priority thereof ascertained. 30

12. On or about June 30, 1925, such portion of the said lands and premises as lie in the City of Newark were sold by the said City of Newark to the Cedar Realty Company for the non-payment of 1923 taxes.

The interest of the said Cedar Realty Company in the said lands and premises may be a superior lien to the lien of complainant's mortgage. Complainant therefore seeks to have the amount of 40

*Bill of Complaint.*

said lien, if any, and the priority thereof, ascertained.

10 13. On or about June 28, 1926, such portion of the said lands and premises as lie in the City of Newark, were sold and purchased by the City of Newark for non-payment of 1924 taxes and assessments.

The interest of the said City of Newark in the said lands and premises may be a superior lien to the lien of complainant's mortgage. Complainant therefore seeks to have the amount of said lien, if any, and the priority thereof ascertained.

20 14. Mary Citrano is the record owner of the said lands and premises. Whatever interest she has in the said premises is subject to the lien of complainant's mortgage.

15. Vincent Citrano (the same person referred to in this bill as Vincenzo Citrano) is the husband of the said Mary Citrano. Whatever interest the said Vincent Citrano (the same person referred to in this bill as Vincenzo Citrano) may have in the said premises by curtesy or otherwise is subject to the lien of complainant's mortgage.

30 16. Complainant is informed and believes that the said Mary Citrano and Vincent Citrano (the same person referred to in this bill as Vincenzo Citrano, her husband, have conveyed their entire interest in the said lands and premises to one Joseph Testa and Anna Testa, his wife, by deed which has not been recorded. The said Joseph Testa and Anna Testa, his wife, are now in possession of the said lands and premises.

40 Whatever interest the said Joseph Testa and Anna Testa may have in said lands and premises

*Bill of Complaint.*

by virtue of such deed or other conveyance is subject to the lien of complainant's mortgage.

Complainant is without adequate remedy at law and therefore prays:

1. That Philmar Construction Corporation, Maurice Schlesinger, Philip Herman, Frank Mel- 10 fi, Mary Citrano, Vincent Citrano (the same person referred to in this bill as Vincenzo Citrano), Joseph Testa, Anna Testa, his wife, Alexander Isserman, Fourteenth Avenue Security Loan Association, a corporation, John H. Beyer, Cedar Realty Com- 20 pany, a corporation, City of Newark, a municipal corporation, who are defendants in this suit may answer this bill of complaint without oath and each and every statement therein made.

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

3. That the defendants, or one of them, may be decreed to pay complainant the amount so found due, with interest and costs, by a short day, to be appointed by this court, and that in default of such payment, they, and each of them, be debarred and foreclosed of all equity of redemption in said lands; or 30

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

5. That a writ of subpoena may issue commanding the said defendants and each of them to

*Bill of Complaint.*

answer this bill of complaint and to abide by such decree as this court may make in the premises.

NELSON & OFFEN,  
Solicitors of Complainant.

10 SAMUEL H. NELSON,  
Of Counsel.

**Answer of Defendant Frank Melfi.**

Filed Dec. 10, 1927.

IN CHANCERY OF NEW JERSEY.

20 Between  
TROJAN BUILDING AND LOAN AS-  
SOCIATION, a corporation,  
Complainant,  
and  
PHILMAR CONSTRUCTION COR-  
PORATION, a corporation, *et als*,  
Defendants.

On Bill &c.  
Answer of  
Defendant  
Frank Melfi.

30 The defendant Frank Melfi, in answer to the bill of complaint heretofore filed herein by the complainant, says:

**ANSWER TO FIRST COUNT.**

40 1. He has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs one, two, three, four, five, six and leaves the complainant to such proof thereof as it may be informed as proper.

*Answer of Defendant Frank Melfi.*

2. He admits the allegations of paragraph seven.

3. He has no knowledge or information sufficient to form a belief as to the allegations of paragraphs eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, and nineteen and leaves the complainant to such proof thereof as it may be informed as proper.

10

**SEPARATE DEFENSE TO THE FIRST COUNT.**

Further answering the first count of the bill of complaint this defendant says:

1. That the mortgage of this defendant is superior in lien to those of all the defendants described in the said bill of complaint with the exception of those set forth in paragraphs one, sixteen, seventeen, eighteen and nineteen.

20

**ANSWER TO THE SECOND COUNT.**

1. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs one, two, three and four and leaves the complainant to such proof thereof as it may be informed as proper.

30

2. Answering the fifth paragraph of the bill of complaint this defendant says he admits the execution of the mortgage referred to in the said paragraph and the assignments of the said mortgage as set forth therein, "but denies that he post-

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*Answer of Defendant Frank Melfi.*

poned the lien of his mortgage aforesaid to the mortgage described in paragraph one of the second count."

10 3. He has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen and sixteen.

FIRST SEPARATE DEFENSE TO THE  
SECOND COUNT.

Further answering the second count of the bill of complaint this defendant says:

20 1. That the mortgage of this defendant is superior in lien to those of all the defendants described in the said bill of complaint with the exception of those set forth in paragraphs ten, eleven, twelve and thirteen.

SECOND SEPARATE DEFENSE TO THE  
SECOND COUNT.

30 Further answering the second count of the bill of complaint, this defendant says:

40 1. He admits that on or about November 24th, 1926, he executed a certain instrument wherein he agreed that his said mortgage would be inferior to a mortgage thereafter to be executed to the complainant and this defendant says that the mortgage described in the first paragraph of the second count of the bill of complaint is not the said mortgage.

*Answer of Defendant Frank Melfi.*

2. This defendant further says that he received no consideration therefore nor did the complainant or any one on its behalf pay any consideration therefore.

3. This defendant will further set up that the said instrument was executed without consideration and that the complainant did not rely thereon in any respect and that this defendant's mortgage is prior in lien to the said mortgage set forth in the first and second paragraphs of the second count of the bill of complaint. 10

JOSEPH ZEMEL,  
Solicitor and of counsel with  
Defendant Frank Melfi. 20

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40



*Affidavit of Samuel O. Offen.*

Philmar Construction Corporation made, executed and delivered to the said Trojan Building and Loan Association its bond to secure payment of the said sum, payable when a certain twenty five shares owned by the said Philmar Construction Corporation in the said association shall have matured, with interest at the rate of 6% per annum, payable monthly on the third Thursday of each and every month from the date of same. To secure payment of the principal sum of \$5000. in the said bond the said Philmar Construction Corporation executed to the Trojan Building and Loan Association (complainant herein) a mortgage of even date with said bond which was and became a first lien upon the premises mentioned in the bill of complaint herein, which was payable strictly according to the terms and tenor of said bond. I attended to the drawing up and execution of the said bond and mortgage and I actually paid over the consideration for the said bond and mortgage aforesaid. I shall produce the said original bond and mortgage when this matter is heard. The mortgagors and their assigns defaulted in the performance of the terms of the said bond and mortgage, by reason whereof there became due and is at present due thereon the sum of \$3975.25, with interest at the rate of 6% per annum from the 17th day of September, 1927.

Complainant's said mortgage is a first lien upon the lands and premises in question and is superior to the mortgage of the defendant, Frank Melfi. The said defendant does not challenge in his answer the priority of complainant's said mortgage over his mortgage.

According to the records (the chronological order of recording of the complainant's mortgages

*Affidavit of Samuel O. Offen.*

and the defendant's mortgage not being in dispute on June 13, 1925, defendant's mortgage for \$1000. was recorded. Same was assigned by Scottie Basile, mortgagee therein named, on January 5, 1926, to Joseph Zemel, who assigned same February 1, 1926, to the present defendant, Frank Melfi. On November 8, 1926, the Trojan Building and Loan Association granted an additional loan of \$2500. on said premises to Teresina Lupia and John Lupia, then owners of said premises and received a bond to secure payment of said sum and a mortgage accompanying same in like sum, conditioned upon strict performance of the terms in said bond. The complainant being by law unauthorized to accept any mortgage security which was not a first lien upon the lands and premises in question I communicated with the defendant, Frank Melfi, to obtain from him a postponement of the lien of his said mortgage to that of the complainant's mortgage for \$2500. so that the lien of complainant's said mortgage of \$2500. would be in the nature of a loan on the said premises additional to the loan of \$5000. made as aforesaid and secured by a first mortgage. In consideration for the granting of the said additional loan of \$2500. by the complainant and in consideration of complainant's payment of the proceeds of said loan to the then owner of the said premises, defendant postponed the lien of his said mortgage to the lien of complainant's mortgage of \$2500. I personally paid the proceeds of said loan to the mortgagors after obtaining the defendant's said postponement. The original bond and mortgage and the defendant's postponement will be produced at the hearing in this matter.

*Affidavit of Samuel O. Offen.*

The mortgagors in the said mortgage of \$2500. defaulted in the performance of the terms of the said bond and mortgage, by reason whereof there became and is due at present from the said mortgagors the sum of \$2530.15, on account of principal and interest from the 17th day of September, 1927.

10

Neither the mortgagors nor their assigns have filed any answer in this suit and do not contest the validity and priority of complainant's mortgages and the amount due thereon as herein specified.

The answer of the defendant, Frank Melfi, insofar as it challenges the priority of complainant's mortgages is sham and untrue and interposed merely for the purpose of delay.

20

SAMUEL O. OFFEN.

Sworn and subscribed before me  
this 15 day of December, 1927.

Bernard Jacobs

A Notary Public of N. Jersey.

30

40

**Affidavit of Frank Melfi.**

Filed Dec. 28, 1927.

IN CHANCERY OF NEW JERSEY.

Between	}	On Bill &c. 10 On Motion. Affidavit.
TROJAN BUILDING AND LOAN AS- SOCIATION,		
Complainant,		
and		
PHILMAR CONSTRUCTION COR- PORATION, <i>et als</i> ,	}	Defendants.
Defendants.		

Frank Melfi, of full age, being duly sworn on his oath, deposes and says:

I am one of the defendants in the above entitled cause and I am the holder of a certain mortgage in the sum of one thousand (\$1,000.00) dollars, the details of which are more fully set forth in the Bill of Complaint filed herein.

On or about November 24th, 1927, Mr. Samuel O. Offen called at my house, #240 South 7th Street, Newark, New Jersey, and requested me to sign an instrument in writing.

I did not receive any money or other consideration for the signing of the said paper.

I was not informed by Mr. Offen that the consideration for my signing the said paper was or would be payment to Teresina Lupia and John Lupia of the sum of twenty-five hundred (\$2500.00) dollars or any other sum by the complainant. Mr. Offen did not inform me that he would pay out any sum of money after obtaining my said postponement.

The answer heretofore filed by me in this cause

*Affidavit of Frank Melfi.*

contains the truth concerning the matters in issue in this cause to the best of my knowledge, information and belief, and is not sham or untrue or filed for the purpose of delay but it is filed because I verily believe that lien of my mortgage is prior to the lien of the complainant's mortgage in the  
10 sum of twenty-five hundred (\$2500.00) dollars.

FRANK MELFI.

Sworn and subscribed to before me this }  
nineteenth day of December, 1927. }  
Alexander M. Goldfinger  
A Master in Chancery of New Jersey.

20 **Order Striking out Answer filed by Defendant,  
Frank Melfi.**

Filed Dec. 20, 1927.

IN CHANCERY OF NEW JERSEY.

Between  
TROJAN BUILDING AND LOAN AS-  
SOCIATION, a corp.,  
Complainant,  
30 and  
PHILMAR CONSTRUCTION COR-  
PORATION, a corp., *et als*,  
Defendants.

} Order striking  
out Answer  
filed by  
Defendant,  
Frank Melfi.

40 This matter being opened to the Court by Samuel H. Nelson of the firm of Nelson & Offen, solicitors for the complainant, in the presence of Joseph Zemel, solicitor for the defendant, Frank Melfi,

*Order Striking out Answer filed by Defendant,  
Frank Melfi.*

on a motion to strike out the answer filed by the said defendant on the ground that the same is sham and the Court having examined the pleadings and having heard argument of counsel for the respective parties and it appearing to the Court that the answer filed by the said defendant, Frank  
10 Melfi, is sham, it is on this 20th day of December, 1927,

ORDERED that the answer filed by the defendant, Frank Melfi, be and the same is hereby stricken out. And it is

FURTHER ORDERED that the said defendant, Frank Melfi have and he hereby is given leave to prove his encumbrance and the amount due thereon before the Master to whom this matter  
20 may be referred in accordance with the rules and practice of this Court. And it is

FURTHER ORDERED that the defendant, Frank Melfi, pay to the complainant the taxed costs of this motion.

Respectfully Advised.  
JOHN H. BACKES  
V. C.

Note: This order was subsequently vacated.

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Order.

IN CHANCERY OF NEW JERSEY.

10 Between  
 TROJAN BUILDING AND LOAN AS-  
 SOCIATION, a corp.,  
 Complainant,  
 and  
 PHILMAR CONSTRUCTION CORPOR-  
 ORATION, a corp., *et als*,  
 Defendants.

} On Bill &c.  
 } Order.

20 This matter being opened to the Court by Joseph Zemel, solicitor for the defendant, Frank Melfi, in the presence of Nelson & Offen, solicitors for the complainant, and it appearing that an order was improvidently made and entered on December 20, 1927, striking out the answer filed by the defendant, Frank Melfi, it is on this day of January, 1928,

ORDERED that the order made and entered on December 20, 1927, striking out the answer of the defendant, Frank Melfi, be and the said is hereby vacated, and it is

30 FURTHER ORDERED that the order of reference made and entered on December 28, 1927, referring this matter to Maxwell M. Alback, one of the Masters of this Court, to ascertain and report the amount due to complainant and to other encumbrances be and the same is hereby vacated.

E. R. WALKER  
 C.

40 Respectfully Advised,  
 JOHN H. BACKES,  
 V. C.

Order.

IN CHANCERY OF NEW JERSEY.

Between  
 TROJAN BUILDING AND LOAN AS-  
 SOCIATION, a corp.,  
 Complainant,  
 and  
 PHILMAR CONSTRUCTION COR-  
 PORATION, a corp., *et als*,  
 Defendants.

} On Bill &c.  
 } Order.

10

20 This matter being opened to the Court by Joseph Zemel, solicitor for the defendant, Frank Melfi, in the presence of Nelson & Offen, solicitors for complainant, and the parties consenting to the entry hereof, it is on this day of January, 1928,

ORDERED that the notice of appeal filed by the defendant, Frank Melfi, from an order made and entered on December 20, 1927, striking out the answer of the defendant, Frank Melfi, be and the same is hereby withdrawn.

E. R. WALKER,  
 C.

30 Respectfully Advised,  
 JOHN H. BACKES  
 V. C.

We hereby consent to the entry of the above order.

NELSON & OFFEN,  
 Solicitors for Complainant.

JOSEPH ZEMEL,  
 Solicitor for Defendant,  
 Frank Melfi. 40

Notice of Motion.

Filed Feb. 6, 1928.

IN CHANCERY OF NEW JERSEY.

10	Between TROJAN BUILDING AND LOAN AS- SOCIATION, a corp., Complainant,  and  PHILMAR CONSTRUCTION COR- PORATION, a corp., <i>et als</i> , Defendants.	} On Bill &c. } Notice of } Motion.
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To the Defendant, Frank Melfi, or his Solicitor,  
Joseph Zemel:

20 Take notice that on Tuesday, January 31st,  
1928, at 10 o'clock in the forenoon, or as soon  
thereafter as counsel can be heard, at Chancery  
Chambers, 1060 Broad Street, Newark, New Jer-  
sey, we shall apply to the Chancellor for an order  
striking out those portions of your answer here-  
inafter set forth for the reasons herein given.

30 1. That portion of Paragraph 2 of the Answer  
to the Second Count which recites; "but denies  
that he postponed the lien of his mortgage afore-  
said to the mortgage described in Paragraph 1 of  
the Second Count", on the ground that same is  
sham.

40 2. That portion of the First Separate Defense to  
the Second Count which alleges that the lien of  
the defendants mortgage is superior to complain-  
ant's mortgage of \$2500. which is set forth in Par-  
agraph 1 of Count Two of the Bill of Complaint,  
on the ground that same is sham.

Notice of Motion.

3. That portion of Paragraph 1 of the Second  
Separate Defense to the Second Count which re-  
cites: "and this defendant says that the mortgage  
described in the First Paragraph of the Second  
Count of the Bill of Complaint is not the said  
mortgage", on the ground that same is sham.

4. Paragraph 2 of the Second Separate Defense 10  
to the Second Count on the ground that same is  
frivolous.

5. Paragraph 3 of the Second Separate Defense  
to the Second Count on the ground that same is  
sham.

NELSON & OFFEN,  
Solicitors for Complainant.

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*Affidavit of Samuel O. Offen.*

gage of the defendant, Frank Melfi. The said defendant does not challenge in his answer the priority of complainant's mortgage over his said mortgage.

10 3. On or about November 8, 1923, the said Philmar Construction Corporation conveyed the aforesaid lands and premises, subject to complainant's aforesaid mortgage of \$5000. to H. J. Leonardo Citrano (the same person referred to in the bill of complaint as Leonardo Citrano) by warranty deed recorded in the Essex County Register's Office in Book E 69 of Deeds on page 578.

20 4. On or about November 7, 1924, the said H. J. Leonardo Citrano, under the name of Leonardo Citrano, and his wife, conveyed the said premises, subject to complainant's mortgage of \$5000. to Vincent Citrano (also referred to in the bill as Vincenzo Citrano) by deed recorded in the Essex County Register's Office as Book C 71 of Deeds page 580.

30 5. On or about June 13, 1925, said Vincent Citrano and his wife mortgaged the said lands and premises for \$1000. to one Scottie Basile, which mortgage was recorded in the Essex County Register's Office in Book I 54 of Mortgages on page 355.

6. On January 6, 1926, said Scottie Basile assigned his interest in said bond and mortgage to Joseph Zemel, which assignment was recorded in the Essex County Register's Office in Book 175 of Assignments of Mortgages on page 418.

40 7. On February 1, 1926, said Joseph Zemel assigned his interest therein to the defendant Frank Melfi by assignment recorded in Book 177 of As-

*Affidavit of Samuel O. Offen.*

signment of Mortgages on page 455 in the Essex County Register's Office.

8. On or about July 14, 1925, Vincent Citrano and his wife conveyed said lands and premises subject to complainant's said mortgage of \$5000. to Teresina Lupia by deed recorded in the Essex County Register's Office in Book V 72 of Deeds on page 47. 10

9. On or about November 8, 1926, said Teresina Lupia, and her husband, conveyed said lands and premises subject to complainant's aforesaid mortgage of \$5000. to Mary Citrano, which deed was recorded in the Essex County Register's Office in Book D-75 of Deeds page 577.

20 10. On or about November 8, 1926, complainant association granted an additional loan of \$2500. on the aforesaid premises to Mary Citrano, record owner of said premises, (the affidavit previously filed on motion to strike the answer of the defendant, Frank Melfi, unintentionally and erroneously stated that the loan was granted to Teresina Lupia) with the understanding, however, and upon condition that the defendant, Frank Melfi, would first postpone the lien of his mortgage of \$1000. to the lien of complainant's mortgage of \$2500. to be given by Mary Citrano and her husband to secure unto complainant payment of the said additional sum of \$2500., before complainant would advance and pay the proceeds of said loan to Mary Citrano, to wit, \$2500. On November 8, 1926, the said Mary Citrano and her husband, Vincenzo Citrano, made, executed and delivered a bond to complainant association conditioned upon payment of the actual sum of \$2500. and a mortgage 40

*Affidavit of Samuel O. Offen.*

10 upon the aforesaid premises to secure payment of the bond with the understanding, however, that the complainant association would not advance and pay the consideration therefor (\$2500.) unless and until Frank Melfi, who then held a mortgage of \$1000. on the said premises, would postpone the lien thereof to the lien of the mortgage of \$2500. I personally attended to the drawing up and execution of the said bond and mortgage and recorded the mortgage in the Essex County Register's Office on November 9, 1926, same being recorded in Book L 59 of Mortgages on pages 324-326.

20 11. I communicated with the defendant, Frank Melfi, to obtain from him a postponement of the lien of said mortgage to that of complainant's mortgage of \$2500. so that the lien of complainant's said mortgage of \$2500. would be subordinate only to complainant's mortgage of \$5000. already affecting the said premises. In consideration for the granting of the said additional loan of \$2500. by the complainant to Mary Citrano the owner of said lands and premises, and the payment of the proceeds thereof to Mary Citrano, 30 Frank Melfi executed in my presence a postponement of the lien of his said mortgage to the lien of complainant's mortgage on November 24, 1926, which was delivered to me and recorded in the Essex County Register's Office on the same day in Book 90 of Releases of Mortgages for said county on page 506.

40 12. The said Mary Citrano, mortgagor, and her assigns, defaulted in the performance of the terms of the said bond and mortgage by reason whereof

*Affidavit of Samuel O. Offen.*

the principal sum of said mortgage became due upon complainant's option prior to the filing of the bill of complaint herein, complainant having exercised said option. There is due upon the said mortgage of \$2500. as of January 5, 1928, according to the Secretary's report the sum of \$2636.25 with interest from the said date at the rate of 6% 10 per annum.

13. After the aforesaid postponement of lien was made and delivered by the defendant, Frank Melfi, to me, on behalf of the complainant, complainant paid the full sum of \$2500., same being the proceeds of the aforesaid loan, to the mortgagor. I actually disbursed said moneys. The defendant, Frank Melfi, does not deny that complainant paid the full amount of \$2500. to the 20 mortgagor after the postponement was delivered.

14. I have read the defendant's answer and believe that those portions of the defendant's answer specified in the foregoing notice of motion should be stricken out for the reasons therein given.

SAMUEL O. OFFEN.

Sworn and subscribed before me this

25th day of January, 1928. }

Bernard Jacobs,

A Notary Public of N. Jersey. 30



*Affidavit of Samuel O. Offen.*

along the same north 57 degrees 28 minutes west 50 feet to the point and place of beginning.

10 And whereas, the said party of the second part has refused to make said loan of Twenty five hundred Dollars and accept said bond and mortgage unless said first mentioned mortgage is made a subsequent and subordinate lien to the lien of said mortgage about to be given by the party of the second part:

20 Now, therefore, in consideration of the premises and to induce the said party of the second part to make said loan and accept said bond and mortgage and of One Dollar paid to said party of the first part of said party of the second part, the receipt whereof is hereby acknowledged, the said party of the first part hereby covenants and agrees with said party of the second part that said mortgage held by said party of the first part is and shall continue to be subject and subordinate in lien to the lien of said mortgage for Twenty five hundred Dollars, about to be given by the party of the second part hereto, as to any and all sums advanced or hereafter to be advanced on said last mentioned mortgage, it being the intention of the parties hereto that the aforesaid mortgage of the party of the first part shall be a lien subsequent in every particular to the aforementioned mortgage of Twenty five hundred Dollars, about to be given by the said party of the second part hereto.

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

40 In witness whereof, the said party of the first

*Affidavit of Samuel O. Offen.*

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

FRANK MELFI.

In the presence of  
SAMUEL O. OFFEN.

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

Be It Remembered, that on this twenty-fourth day of November, in the year of our Lord One Thousand Nine Hundred and Twenty six, before me the subscriber, An Attorney at Law, personally appeared Frank Melfi, who, I am satisfied, is the grantor mentioned in the within instrument, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed. 20

SAMUEL O. OFFEN,  
An Attorney at Law of N. J.

On the back of the said mortgage appears the following endorsement:

Received in the Register's Office of the County of Essex, New Jersey, on the 26th day of November A. D. 1926 at 1:42 o'clock in the afternoon, and Recorded in Book 90 of Releases of Mortgages for said County, on pages 506. 30

HOWARD S. DODD,  
Register.



*Affidavit of Frank Melfi.*

forth that the complainant paid to the mortgagor the full amount of the proceeds of the said mortgage.

FRANK MELFI.

Sworn and subscribed to before me }  
this 26th day of Jan. 1928. }

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Alexander M. Goldfinger,  
A Master in Chancery of  
New Jersey.

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**Opinion.**

Filed Feb. 10, 1928.

IN CHANCERY OF NEW JERSEY.

Between  
TROJAN BUILDING AND LOAN AS-  
SOCIATION,  
Complainant,  
and  
PHILMAR CONSTRUCTION COM-  
PANY, *et als*,  
Defendants.

Opinion.

10

A postponement of the lien of a recorded mortgage to that of a junior mortgage of record is not without consideration where the loan on the latter was made after the Postponement and in reliance upon it. 20

On motion to strike part of answer as sham and frivolous.

For the motion, NELSON & OFFEN.  
Opposed, JOSEPH ZEMEL.

BACKES, *Vice Chancellor.*

The complainant is foreclosing a first and a second mortgage. The first mortgage of \$5000 is not disputed. The second mortgage of \$2500 was given November 8, 1923, and duly recorded. At that time there was of record a prior mortgage of \$1000 held by the defendant, Melfi, who, on November 25, 1923, executed to the complainant an instrument postponing the lien of his mortgage to that of complainant's second mortgage, and thereupon the complainant advanced the money thereon. These facts are established and not denied on this motion to strike out as sham and frivolous 30  
40

*Opinion.*

so much of the defendant Melfi's answer which denies that he postponed the lien of his mortgage to the mortgage of the complainant, and an allegation that the complainant's mortgage is not the mortgage to which the defendant postponed his mortgage, and so much as sets up that the postponement was executed without consideration and that the complainant did not rely thereon in making the loans. Melfi admits the execution of the postponement. It describes the mortgages involved with certainty and recites that the complainant refuses to make the loan without the postponement. He does not claim that it was improperly procured, nor does he deny that he knew its contents and understood, but his counsel's notion seems to be that as the complainant's mortgage was already executed and of record at the time his client executed the postponement, that the complainant was bound to make the loan and that therefore there was no consideration for the postponement. The fallacy of this is too obvious for serious consideration. The complainant's mortgage came into validity not by the recording but by the payment of the consideration, and its obligation to advance the money was conditioned upon procuring the postponement of the defendant's mortgage. Melfi's claim that he did not receive the recited one dollar consideration for signing the postponement and that he did not know of an understanding between the complainant and the mortgagor that the loan was dependent upon the execution of the postponement is sheer trifle.

The postponement of his mortgage was the inducement to the complainant to make the loan and parting with the money, relying on it, constituted the consideration.

The motion will prevail.

**Order.**

Filed Feb. 14, 1928.

## IN CHANCERY OF NEW JERSEY.

Between TROJAN BUILDING AND LOAN ASSOCIATION, <i>a corp.</i> , Complainant, and PHILMAR CONSTRUCTION CORPORATION, <i>a corp., et als</i> , Defendants.	}	On Bill &c. Order.	10
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This matter being opened to the Court by Nelson & Offen, solicitors for complainant, (Samuel H. Nelson, of counsel with complainant), in the presence of Joseph Zemel, solicitor for and of counsel with defendant, Frank Melfi, on a motion to strike out portions of the answer filed by the said defendant in this cause; and the Court having examined the pleadings filed and the affidavits submitted by the respective parties and having heard arguments of counsel and being of the opinion that the portions of said defendant's answer sought to be stricken out should be stricken out for the reasons given, it is on this 14 day of February, 1928, ORDERED:

1. That that portion of Paragraph 2 of the Answer to the Second Count of the Bill of Complaint which recites: "but denies that he postponed the lien of his mortgage aforesaid to the mortgage described in Paragraph 1 of the Second Count", be and the same is hereby stricken out on the ground that same is sham.

Order.

2. That that portion of the First Separate Defense of the Answer to the Second Count of the Bill of Complaint which alleges that the lien of the defendant's mortgage is superior to complainant's mortgage of \$2500. which is set forth in Paragraph 1 of Count Two of the Bill of Complaint, be and the same is hereby stricken out on the ground that same is sham.

3. That that portion of Paragraph 1 of the Second Separate Defense of the Answer to the Second Count of the Bill of Complaint which recites: "and this defendant says that the mortgage described in the First Paragraph of the Second Count of the Bill of Complaint is not the said mortgage", be and the same is hereby stricken out on the ground that the same is sham.

4. That paragraph 2 of the Second Separate Defense of the Answer to the Second Count of the Bill of Complaint be and the same is hereby stricken out on the ground that same is frivolous.

5. That paragraph 3 of the Second Separate Defense of the Answer to the Second Count of the Bill of Complaint be and the same is hereby stricken out on the ground that same is sham.

Respectfully Advised

JOHN H. BACKES  
V. C.

E. R. WALKER,  
C.

Notice of Appeal by Frank Melfi.

Filed Dec. 30, 1927.

IN CHANCERY OF NEW JERSEY.

Between TROJAN BUILDING AND LOAN ASSOCIATION, Complainant,  and PHILMAR CONSTRUCTION CORPORATION, a corporation, <i>et als</i> , Defendants.	}	On Bill &c. Notice of Appeal by Frank Melfi.	10
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The defendant Frank Melfi hereby appeals to the Court of Errors and Appeals in the Last Resort in all Causes from so much of the order made in the above entitled cause on December 20, 1927, by the Honorable Edwin Robert Walker, Chancellor, on the advice of the Honorable John H. Backes, Vice-Chancellor, as directs that the answer filed by the defendant Frank Melfi be struck out and that said defendant pay the costs on the motion to strike out said answer.

Dated December 30th, 1927.

JOSEPH ZEMEL, 30  
Solicitor for and of counsel with  
Defendant Frank Melfi.

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

JOSEPH ZEMEL,  
Of Counsel with defendant  
Frank Melfi.

*Notice of Appeal by Frank Melfi.*

Service of the foregoing notice is hereby acknowledged this thirtieth day of December, 1927.

NELSON & OFFEN,  
Solicitors for Complainant.

*Note*—This Notice of Appeal was subsequently  
10 withdrawn.

**Notice of Appeal by Frank Melfi.**

Filed March 1, 1928.

IN CHANCERY OF NEW JERSEY.

20	Between TROJAN BUILDING AND LOAN AS- SOCIATION, Complainant,  and PHILMAR CONSTRUCTION COR- PORATION, a corporation, <i>et als</i> , Defendants.	}	On Bill &c. Notice of Appeal by Frank Melfi.
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30 The defendant Frank Melfi hereby appeals to the Court of Errors and Appeals in the Last Resort in all Causes from the decree made in the above entitled cause on February 14th, 1928, by the Honorable Edwin Robert Walker, Chancellor, on the advice of the Honorable John H. Backes,

*Notice of Appeal by Frank Melfi.*

Vice-Chancellor, and from the whole and every part thereof.

Dated February 28th, 1928.

JOSEPH ZEMEL,  
Solicitor for and of counsel with  
Defendant Frank Melfi. 10

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

JOSEPH ZEMEL,  
Of counsel with defendant Frank Melfi.

Service of the foregoing notice is hereby acknowledged this twenty-eighth day of February, 1928.

NELSON & OFFEN, 20  
Solicitors for Complainant.

Petition of Appeal.

Filed March 16, 1928.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10 TROJAN BUILDING AND LOAN AS-  
SOCIATION,  
Complainant-Appellee,  
vs.  
PHILMAR CONSTRUCTION CORPOR-  
PORATION, *et als*,  
Defendants.  
and  
FRANK MELFI,  
Defendant-Appellant.

On Appeal  
from the  
Court of  
Chancery.  
Petition  
of Appeal.

20

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

The petition of Frank Melfi, one of the defend-  
ants and the appellant in the above entitled  
cause, respectfully shows that:

30 1. Petitioner finds himself aggrieved by a cer-  
tain decree made in the Court of Chancery by His  
Honor, Edward Robert Walker, Chancellor of  
the State of New Jersey, advised by the Honorable  
John H. Backes, Vice-Chancellor, bearing date the  
fourteenth day of February, 1928, in a certain  
cause in the said Court of Chancery wherein the  
said Trojan Building and Loan Association, a cor-  
poration, is complainant, and Philmar Construc-  
tion Corporation, and others, including your pe-  
titioner Frank Melfi, are defendants in this re-  
40 spect, to wit:

*Petition of Appeal.*

That the said order adjudges and orders that  
certain portions of the answer filed in this cause  
by the defendant be struck out, which portions of  
said answer are more particularly set forth here-  
inafter under the grounds of appeal.

And petitioner appeals from the said order of  
the Chancellor which decrees as aforesaid upon  
the ground that the same is erroneous in the fol-  
lowing respects: 10

(a) The court below erred in striking out that  
portion of paragraph two of the answer to the sec-  
ond count of the Bill of Complaint which recites:

“But denies that he postponed the lien of  
his mortgage aforesaid to the mortgage de-  
scribed in paragraph one of the second  
count,” 20

on the ground that the same is sham.

(b) The court below erred in striking out that  
portion of the first separate defense of the answer  
to the second count of the Bill of Complaint which  
alleges that the lien of the defendant's mortgage  
is superior to complainant's mortgage of twenty-  
five hundred (\$2500.00) dollars which is set forth  
in paragraph one of count two of the Bill of Com-  
plaint, on the ground that the same is sham. 30

(c) The court below erred in striking out that  
portion of paragraph one of the second separate  
defense of the answer to the second count of the  
Bill of Complaint which recites:

“And this defendant says that the mort-  
gage described in the first paragraph of the  
second count of the Bill of Complaint is  
not the said mortgage” 40

Petition of Appeal.

on the ground that the same is sham.

(d) The court below erred in striking out paragraph two of the second separate defense of the answer to the second count of the Bill of Complaint on the ground that the same is frivolous. The said paragraph reads as follows:

10 "This defendant further says that he received no consideration therefore nor did the complainant or anyone on its behalf pay any consideration therefore."

(e) The court below erred in striking out paragraph three of the second separate defense of the answer to the second count of the Bill of Complaint upon the ground that the same is sham.

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

JOSEPH ZEMEL,  
Solicitor for and of counsel  
with Appellant.

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Answer to Petition of Appeal.

Filed March 22, 1928.

NEW JERSEY COURT OF ERRORS AND APPEALS.

TROJAN BUILDING AND LOAN ASSOCIATION,  
Complainant-Appellee,  
vs.  
PHILMAR CONSTRUCTION CORPORATION, *et als*,  
Defendants.  
and  
FRANK MELFI,  
Defendant-Appellant.

10  
On Appeal from the Court of Chancery.  
Answer to Petition of Appeal.

20

By way of answer to the petition of counsel filed by the defendant, Frank Melfi, the appellant, the Trojan Building and Loan Association, the appellee, says:

The appellee, not admitting the truth of all or any of the matters in the said petition of appeal contained for answer thereto nevertheless admits that an order was made and entered in the Court of Chancery of New Jersey, in the above entitled cause on February 14, 1928, for the purposes in said petition mentioned and as therein set forth, but as to the substance and form of the said order, this appellee begs leave to refer thereto when the

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*Answer to Petition of Appeal.*

same shall be produced. This appellee is advised and believes that the said order is agreeable to equity; and it prays that the said order may be affirmed with costs to be taxed in favor of the appellees.

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NELSON & OFFEN,  
Solicitors for Appellees.

SAMUEL H. NELSON,  
Of Counsel with Appellee.

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**New Jersey Court of Errors and Appeals**

TROJAN BUILDING AND LOAN AS-  
SOCIATION,  
Complainant-Appellee,

vs.

PHILMAR CONSTRUCTION CORPOR-  
PORATION, *et als*,  
Defendants,

and

FRANK MELFI,  
Defendant-Appellant.

On Appeal  
from the  
Court of  
Chancery.

**BRIEF OF DEFENDANT-APPELLANT.**

**Statement.**

This is an appeal from a decree in Chancery striking out parts of an answer in a foreclosure suit advised by the Honorable John H. Backes, Vice-Chancellor. The action is brought in two counts to foreclose two mortgages. The first count concerns a mortgage of five thousand (\$5,000.00) dollars, the priority of which is not disputed by the appellant, and the said mortgage does not form any part of the subject matter of this appeal.

The second count concerns a mortgage of twenty-five hundred (\$2500.00) dollars and it is this mortgage over which the appellant asserts priority.

### Facts.

Prior to the execution and delivery of the mortgage described in the second count of the Bill of Complaint, hereafter referred to as "the second mortgage" the defendant-appellant Melfi was the owner of a mortgage on the same premises in the sum of one thousand (\$1,000.00) dollars, (Case, page 10, line 26). On November 8th, 1926, the owner of the premises executed the second bond and mortgage to the complainant, which mortgage was acknowledged the same date and recorded November 9th, 1926, (Case, page 36, line 11). On November 24, 1926, the defendant-appellant Melfi signed an agreement to the effect that his mortgage "is and shall continue to be subject and subordinate in lien to the lien of said mortgage of twenty-five hundred (\$2500.) dollars about to be given," (Case, page 40, lines 15-35). Melfi received no money consideration for signing this instrument, (Case, page 43, line 22). The mortgage referred to had already been executed, delivered and recorded, (Case, page 23, line 9). Although the \$2500.00 had not yet been paid to the mortgagee, the loan had already been granted, (Case, page 23, line 9), and the mortgagor was considered to be indebted to the complainant-respondent, (Bill of Complaint, Case, page 8, line 30).

The defendant Melfi set up in his answer that he had received no consideration for the making of the instrument purporting to be a postponement of mortgage; that the complainant had parted with no consideration therefor and that therefore the instrument is invalid as lacking consideration. The learned Vice-Chancellor struck out these parts of the appellant's answer.

### POINT ONE.

Under this point will be considered:

Ground "A". Namely, that the court below erred in striking out that portion of paragraph two of the answer to the second count of the Bill of Complaint which recites:

"But denies that he postponed the lien of his mortgage aforesaid to the mortgage described in paragraph one of the second count,"

on the ground that the same is sham.

Ground "B". Namely, that the court below erred in striking out that portion of the first separate defense of the answer to the second count of the Bill of Complaint which alleges that the lien of the defendant's mortgage is superior to complainant's mortgage of twenty-five hundred (\$2500.00) dollars which is set forth in paragraph one of count two of the Bill of Complaint, on the ground that the same is sham.

Ground "E". Namely, that the court below erred in striking out paragraph three of the second separate defense of the answer to the second count of the Bill of Complaint upon the ground that the same is sham. The said paragraph reads as follows:

"This defendant will further set up that the said instrument was executed without consideration and that the complainant did not rely thereon in any respect and that this defendant's mortgage is prior in lien to the said mortgage set forth in the first and second paragraphs of the second count of the Bill of Complaint."

**I. A defense should not be struck out where anything is alleged under oath which, if proved at the trial by the proper weight of evidence, would entitle the defendant to judgment. The appellant urges that sufficient facts are shown in the various pleadings and affidavits to prove that the instrument in question lacks consideration.**

1. The alleged postponement (hereafter called the instrument) is in the form of an agreement. It reads that the party of the first part covenants and agrees etc, (Case, page 40, lines 15-35). In order for this agreement to be binding it must be supported by a valuable consideration.

Graham vs. Spence, 71 N. J. E. 183.  
Tulane vs. Clifton, 47 N. J. E. 351.

2. No consideration for the postponement was pleaded and the only evidence before the court of consideration was contained in affidavits used on the motion. An answer should not be struck out on the strength of facts developed for the first time on the hearing of the motion.

Smith vs. Hopping, 88 Law 195.

The impropriety in doing so is clearly illustrated in the case at Bar. If the fact of consideration had been properly pleaded this defendant would have been entitled to at least twenty-five days to ascertain the truth of all the facts concerning consideration and to plead a denial of the facts alleged to constitute the consideration. When the matter is raised for the first time on motion the defendant has only five days to ascertain the facts

and has no opportunity of pleading a denial or failure of the consideration. While it is true that no motion was made to strike out the Bill of Complaint on the ground that it failed to set forth a consideration for the postponement, nevertheless this does not excuse the complainant for failure to plead facts sufficient to show that the alleged postponement is founded on a valuable consideration. In other words, the declaration or Bill of Complaint must set forth all the elements of a cause of action, and its failure to do so is not cured by the defendant's not objecting thereto.

3. In the case of Carter Lumber Co. vs. Shupe, 101 Law, 349, this Court held that a defendant is not required to deny what has not been asserted, and it is elementary law that where a cause of action is based upon a contract, the consideration must be pleaded and proved.

**II. The alleged postponement is invalid because not supported by a valuable consideration. Neither the Bill of Complaint nor the affidavits nor the alleged postponement itself sets forth or proves such a consideration therefor as is necessary to support its validity.**

1. Consideration may be defined as the doing of something which one is not legally obliged to do or the forbearance from doing what one has a legal right to do at the request of the promisor.

Obviously a past consideration will not support a contract. In order for the instrument to be binding it must have all the requisites of a binding contract, and among other requisites are offer and acceptance and a meeting of the minds.

2. The instrument itself sets forth as its consideration the making of the loan, the acceptance of the bond and mortgage and the payment of one dollar. The dollar was not paid, (Case, page 43, line 22). The bond and mortgage had already been accepted on November 9th, so that the acceptance of the bond and mortgage would at best be past consideration. Although the money had not been actually paid over, the loan had already been made, (Case, page 23, lines 9-16), and the complainant having accepted the bond and mortgage from the mortgagor was under a legal duty to pay over the twenty-five hundred (\$2500.00) dollars. It requires no citation of authority to show that doing what one is already legally obliged to do does not constitute valuable consideration.

3. The learned Vice-Chancellor seems to have taken the view that the complainant's having paid out the money after the instrument in question was delivered, constitutes a valuable consideration. An examination of the instrument in question, however, indicates that payment of the money was not regarded by the parties to the instrument as a consideration. In other words, nothing is consideration which is not regarded as consideration by the parties, and the mere fact that the promisor suffers a legal detriment or does something he is not obliged to do in reliance upon the promise does not constitute a consideration for the promise where that act was not regarded as consideration by the parties.

4. In the case of Fire Insurance Association vs. Wickham, 141 United States 564, a vessel had been lost together with its cargo. There was no dispute as to the amount of insurance due upon

the one, but there was a dispute as to the liability for the other. The insurer paid the amount due on one five days after proof of loss was furnished, although it was not required to pay until sixty days had elapsed and upon payment obtained from the owner of the vessel a receipt in full. The validity of the receipt was subsequently attacked and Mr. Justice Brown, speaking for the United States Supreme Court says, at page 579:

"But assuming that the receipts upon their faces show a complete settlement of the entire claim for one-half the total amount, what was the consideration for the release of the other half? The only one that is put forward for that purpose is that payment was made five days after proofs of loss were furnished, or fifty-five days before anything was actually due by the terms of the policy. That pre-payment of part of a claim may be a good consideration for the release of the residue is not disputed; but it is subject to the qualification that nothing can be treated as a consideration that is not intended as such by the parties. Thus in *Philpot vs. Gruninger*, 14 Wall. 570, 577, it is stated that "nothing is consideration that is not regarded as such by both parties." To constitute a valid agreement there must be a meeting of minds upon every feature and element of such agreement of which the consideration is one. The mere presence of some incident to a contract which might, under certain circumstances, be upheld as a consideration for a promise, does not necessarily make it the consideration for the promise in that contract. To give it that effect it must have been offered by one party and accepted by the other as one element of the contract. In *Kilpatrick vs. Muirhead*, 16 Penn. St. 117, 126, it was said that "consideration,

like every other part of a contract, must be the result of agreement. The parties must understand and be influenced to the particular action by something of value or convenience and inconvenience recognized by all of them as the moving cause. That which is a mere fortuitous result flowing accidentally from an arrangement, but in no degree prompting the actors to it, is not to be esteemed a legal consideration."

In the case of *Ellis vs. Clark*, 110 Mass. 389, the plaintiff was the owner of a certain lot upon which were growing a number of trees. He entered into an oral arrangement with a third party to sell him the trees at a certain price. Under the laws of the State of Massachusetts such an agreement, in order to be valid, must be in writing. The said third party commenced to go upon the land preparatory to removing the trees and was stopped by the plaintiff, who insisted that before he would permit the third party to remove the trees the third party would have to produce a promissory note for the price of the trees, endorsed by the defendant. The proofs further showed that the third party called upon the defendant and requested him to sign the note. There was no testimony that the third party had explained to the defendant that his signature on the note was required in order to be permitted to remove the trees. On this state of facts the Lower Court non-suited the plaintiff and on appeal the Massachusetts Supreme Court upheld the Lower Court on the ground that the defendant not having considered or been informed that his signature was necessary for the removal of the trees, the permission to remove the trees was no consideration for the defendant's signature to the note.

Mr. Justice Gray, speaking for the Court, says:

"The defendant, as the jury were rightly instructed, having put his name on the note after it had been delivered to the plaintiff, and not as part of the original contract, could not be held liable without proof of some new and independent consideration. That consideration need not be a benefit to the defendant. Any loss or disadvantage to the plaintiff, by giving up some right against a third person, or agreeing to abandon ordelay enforcing some right against him, would be sufficient. But the consideration or motive of the promise must be known to the promisor. The minds of the parties must meet and agree upon the terms of the whole contract, including the promise on the one side and the consideration for it on the other. An agreement between the plaintiff and Paul, by which the former agreed to forbear to sue the latter, would not be a consideration for the defendant's promise, if not made at his request or communicated to him at or before the time of the making of his promise."

5. A consideration of these cases leads to the conclusion that the consideration invoked to support a contract must be that contemplated by the offer and acceptance and that consideration does not dispense with offer and acceptance. Applying this proposition to the case at bar the paying out of the money was not regarded by any of the parties as the consideration for the alleged postponement and this was the only act which the complainant did after receiving the instrument in question.

## POINT TWO.

Under this point will be considered:

Ground "D" namely: That the Court below erred in striking out paragraph two of the second separate defense of the second count of the Bill of Complaint on the ground that the same was frivolous. The said paragraph reads as follows: "This defendant further says that he received no consideration therefor nor did the complainant nor anyone on its behalf pay any consideration therefor."

**I. Even if we assume that all the facts as alleged in all the pleadings and affidavits establish a valuable consideration, nevertheless there is also established by the same pleadings and affidavits such a substantial lack or failure of consideration as invalidates the appellant's promise to subordinate his mortgage.**

1. One of the affidavits on behalf of the appellee sets up that the loan was made to the mortgagors on condition that the appellant would subordinate his mortgage, (Case, page 35, line 35). The mortgage itself contains no such statement, nor is this statement contained in the alleged postponement. Apparently this is an attempt to set forth a valuable consideration on the theory that a promise may be binding where executed in pursuance of a previous understanding. This principle is illustrated in the case of Faust vs. Rodelheim, 77 N. J. Law, 740, where the defendant had agreed to become surety on a lease and then after the lease was made, signed an agreement as surety.

That case, however, is different from the case at Bar in that in that case there was a previous promise on the part of the defendant to become surety and there was the further element in that case that the lease was not delivered until after the defendant had signed the agreement as surety. In the case at Bar, however, there was no such previous understanding with the appellant that he would sign the instrument, and we have the further element that in the case at Bar the bond and mortgage were already delivered before the alleged postponement was signed.

2. Further, the Bill of Complaint itself sets forth that the loan was granted on November 8th, 1926, (Case, page 23, lines 9-17), and one of the affidavits on behalf of the complainant sets forth that the money was paid on a different date (later), (Case, page 37, line 12), so that there is a conflict in the testimony as to when the loan was made and this conflict furnishes sufficient evidence to sustain the appellant's answer of lack of consideration.

3. But if we assume that the paying over of the money constitutes a consideration, nevertheless there has been such a substantial failure of the consideration as to render the instrument unenforceable as against the appellant. Obviously the most important consideration as alleged for the execution of the postponement is the inducement to the acceptance of the bond and mortgage. If the bond and mortgage had already been accepted this consideration fails, and appellant respectfully urges and argues as a matter of law that the agreement to subordinate the mortgage and the agreement on the part of the complainant to ac-

cept the second mortgage are mutual, dependent covenants or considerations and upon the failure of a material mutual dependent covenant or consideration on the part of the promisee, the promisor is released or discharged from his promise.

This has been the rule ever since the case of *Boone vs. Eyre*, 1 H. Bl. 273. Note one. Cited in the case of *Duke of St. Albans vs. Schor*. In that case Lord Mansfield said:

“Where mutual covenants go to the whole of the consideration on both sides they are mutual conditions, the one precedent to the other; but where they go to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant and shall not plead it as a condition precedent.”

In the case at Bar it would be impossible for the appellant to have a remedy for the breach of the covenant to accept the bond and mortgage, nor could he be paid for its breach in damages. This covenant, therefore is, in accordance with this rule, a mutual condition.

Of course at the time the alleged postponement was made its performance was impossible on the part of the complainant, as it had already accepted the second mortgage.

4. Appellant urges and argues as a matter of law that where the consideration is impossible, it is no consideration and will not support an agreement and that a promise to do that which it is legally impossible for the promisor to do will not constitute a consideration.

5. The learned Vice-Chancellor, in his rather brief, but well written opinion, in discussing the

contention that the acceptance of the second mortgage did not constitute a consideration for the alleged postponement because the second mortgage was accepted before the alleged postponement was delivered, says:

“The fallacy of this is too obvious for serious consideration.”

The appellant, however, respectfully urges and argues that if this contention is given serious consideration the only logical conclusion at which we can arrive is that the acceptance of the second mortgage was past consideration. The mortgage was actually delivered before the postponement was executed and the complainant, immediately upon the acceptance of the mortgage, regarded the mortgagors as indebted to it. Certainly if it regarded the owner as indebted to it on November 8th, it must have been under an obligation to advance the money. Otherwise there is no theory upon which the owner could be indebted to it at that time.

6. The learned Vice-Chancellor further says:

“The complainant’s mortgage came into validity not by the recording but by the payment of the consideration and its obligation to advance the money was conditioned upon procuring the postponement of the defendant’s mortgage.”

Appellant again respectfully urges and argues as a matter of law that a mortgage comes into being as a valid instrument immediately upon its delivery and that upon the acceptance of the mortgage by the mortgagee there is an obligation on the part of the mortgagee to advance the money, particularly when there is nothing said about the

condition in the mortgage itself. To follow the reasoning of the learned Vice-Chancellor to its logical conclusion would be to hold that a mortgage is a nullity until the consideration is paid. Of course recording a nullity would not be constructive notice and following this reasoning further, a mortgage to secure future advances, although immediately recorded, would not be constructive notice before the consideration was actually advanced. That this is not the law is too elementary to require citation.

The appellant therefor respectfully submits that the alleged postponement is invalid because unsupported by consideration; that even if we assume that consideration is alleged there was ample proof rebutting it and further, that it is improper to strike out an answer on facts developed for the first time on hearing of the motion to strike out and for these reasons that the learned Vice-Chancellor erred in striking out the parts of his answer as hereinbefore set forth and asks that this court, reverse the decree advised by the learned Vice-Chancellor.

JOSEPH ZEMEL,  
Solicitor for and of Counsel with  
Defendant-Appellant.

JOSEPH ZEMEL,  
Of Counsel.

83 83 MAY.T.1928

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

## New Jersey Court of Errors and Appeals

TROJAN BUILDING AND LOAN  
ASSOCIATION,  
*Complainant-Appellee,*

*vs.*

PHILMAR CONSTRUCTION CORPO-  
RATION, *et als.,*  
*Defendants,*

*and*

FRANK MELFI,  
*Defendant-Appellant.*

*On Appeal  
from the  
Court of  
Chancery.*

### BRIEF OF COMPLAINANT-APPELLEE.

#### Statement.

This is an appeal from an order, advised by Vice-Chancellor Backes, and made and entered on February 14, 1928 (p. 47, State of Case), striking out parts of the answer filed by the defendant-appellant in a foreclosure suit. Complainant is foreclosing a first mortgage of \$5,000 and a second mortgage of \$2,500. The first mortgage of \$5,000 is not disputed. So much of the defendant-appellant's answer as charges that his mortgage of \$1,000 is prior to complainant's second mortgage of \$2,500 was stricken out as sham and frivolous and it is from that determination that this appeal is taken.

#### Facts.

Complainant is foreclosing a first and second mortgage. The first mortgage of \$5,000 is not disputed. The second mortgage of \$2,500 was given November 8, 1926, and duly recorded. At

that time there was of record a prior mortgage of \$1,000 held by the defendant-appellant, who on November 24, 1926, executed to complainant an instrument postponing the lien of his mortgage to that of complainant's second mortgage of \$2,500, and thereupon the complainant, in reliance upon said postponement, advanced the mortgage money to the mortgagors.

The defendant-appellant filed an answer in substance setting up, among other things: (1) that he denies that he postponed the lien of his mortgage to the lien of complainant's second mortgage of \$2,500, (2) that the lien of his mortgage of \$1,000 is superior to the lien of complainant's second mortgage of \$2,500, (3) that complainant's mortgage of \$2,500 is not the mortgage to which he postponed the lien of his mortgage, (4) that the instrument of postponement was executed without any consideration and that complainant did not rely thereon, and (5) that he did not receive any consideration for said postponement. Allegations above designated as 1, 2, 3 and 4 were stricken out as sham and allegation above designated as 5 was stricken out as frivolous upon motion of complainant which was contested.

It is to be noted that the opinion of Vice-Chancellor Backes (p. 45, State of Case) states that complainant's mortgage of \$2,500 was given November 8, 1923, (instead of November 8, 1926) and that the postponement was made on November 25, 1923, (instead of November 24, 1926). These are evidently clerical errors as the parties are in accord on the dates. Furthermore, it is to be noted that the error in dates does not affect the substance or merits of the respective arguments of counsel. It is also to be noted that after the said parts of the defendant-appellant's

answer were stricken out and the order, from which this appeal is taken, was entered, that the defendant-appellant consented to have this cause referred to a Master to report among other things, upon the order and priority of the encumbrances, the defendant-appellant reserving, nevertheless, his right of appeal from the order striking out portions of his answer. The Master to whom the said matter was referred filed his report, wherein he reported that the complainant's second mortgage of \$2,500 was superior to defendant-appellant's mortgage of \$1,000; final decree was entered thereon and a *fi. fa.* issued to the Sheriff of Essex to sell the premises in question and the premises are in the process of sale at present.

#### Argument.

The stricken portions of the defendant-appellant's answer allege in substance (1) that he denies that he postponed the lien of his mortgage to the lien of complainant's second mortgage of \$2,500, (2) that the lien of his mortgage of \$1,000 is superior to the lien of complainant's second mortgage of \$2,500, (3) that complainant's mortgage of \$2,500 is not the mortgage to which he postponed the lien of his mortgage, (4) that the instrument of postponement was executed without any consideration and that complainant did not rely thereon, and (5) that he did not receive any consideration for said postponement. Allegations above-designated as 1, 2, 3 and 4 were stricken out as sham and allegation above-noted as 5 was stricken out as frivolous.

The allegations contained in the answer and above-designated as 1, 2, 3 and 4 raised only

issues of fact. On the argument of said motion complainant read and filed affidavits establishing by direct and positive proof, among other things, the following facts: that the mortgage of \$2,500 was given to complainant on November 8, 1926, with the distinct understanding and agreement that no money would be advanced by the complainant to the mortgagors unless and until complainant first received a postponement from the defendant-appellant of the lien of his mortgage of \$1,000, same having been made and recorded prior to November 8, 1926, (see complainant's affidavit, p. 35, par. 10, State of Case); that thereafter the defendant-appellant executed the postponement to complainant in consideration of the payment of the proceeds of the said mortgage of \$2,500 to the mortgagors; that in reliance upon the said postponement of mortgage executed and delivered by defendant-appellant, complainant paid and advanced \$2,500 to the mortgagors, (see complainant's affidavit, p. 36, par. 11, and p. 37, par. 13, State of Case). The instrument of postponement describes the mortgages involved with certainty and recites that the complainant refuses to make the loan without the postponement, (see complainant's affidavit, pp. 38-41, State of Case). The defendant-appellant does not deny these facts in his proof; he in fact, admits them (pp. 42-44, State of Case). His contention is that complainant's mortgage of \$2,500 was already executed and of record at the time that the defendant-appellant executed the postponement, and that complainant was therefore bound to make the loan and that therefore there was no consideration for the postponement. This contention is inconsistent with the facts above recited, proved by direct and positive proof and undenied. Complainant's said mortgage of \$2,500 came into validity not by

recording but by payment of the consideration and its obligation to advance the money was conditioned upon procuring the postponement of the defendant-appellant's mortgage. The postponement of the defendant-appellant's mortgage to complainant's mortgage was the inducement to the complainant to make the loan, and parting with the money, relying on the postponement, constituted the consideration.

That the defendant-appellant received no money is no defense and was properly stricken out as frivolous. It is fundamental that the consideration for an agreement, promise or conveyance may be the payment of money to a third party or person other than the promisor. Such an agreement, promise or conveyance is supported by a sufficient and valuable consideration where a third person is expressly benefited by such promise, agreement or conveyance. No citations are necessary on this point.

The defendant-appellant contends that the said portions of his answer should not have been stricken out because the issue of consideration was first presented upon the motion and not in the pleadings. Suffice it to say that the defendant-appellant filed an answer and that he set up therein lack of consideration for said postponement. The facts developed on the motion to strike out were presented squarely by the issues raised in the pleadings. Furthermore, assuming that the consideration for the postponement had to be pleaded by the complainant, the defendant waived any objection to the sufficiency of the bill of complaint by filing an answer and raising squarely the issue involving the allegation omitted by the complainant (see 13 L. R. A. 711 and ~~11 L. R. A. 398~~).

*21 R.C.L page 492 paragraph 56*

Complainant-appellee respectfully submits that the order appealed from should be affirmed.

NELSON & OFFEN,  
Solicitors for Complainant-Appellee.

SAMUEL H. NELSON,  
Of Counsel with Complainant-Appellee.

INDEX

Complainant-Appellee	1
Complainant-Appellant	2
Complainant-Appellee	3
Complainant-Appellant	4
Complainant-Appellee	5
Complainant-Appellant	6
Complainant-Appellee	7
Complainant-Appellant	8
Complainant-Appellee	9
Complainant-Appellant	10
Complainant-Appellee	11
Complainant-Appellant	12
Complainant-Appellee	13
Complainant-Appellant	14
Complainant-Appellee	15
Complainant-Appellant	16
Complainant-Appellee	17
Complainant-Appellant	18
Complainant-Appellee	19
Complainant-Appellant	20
Complainant-Appellee	21
Complainant-Appellant	22
Complainant-Appellee	23
Complainant-Appellant	24
Complainant-Appellee	25
Complainant-Appellant	26
Complainant-Appellee	27
Complainant-Appellant	28
Complainant-Appellee	29
Complainant-Appellant	30
Complainant-Appellee	31
Complainant-Appellant	32
Complainant-Appellee	33
Complainant-Appellant	34
Complainant-Appellee	35
Complainant-Appellant	36
Complainant-Appellee	37
Complainant-Appellant	38
Complainant-Appellee	39
Complainant-Appellant	40
Complainant-Appellee	41
Complainant-Appellant	42
Complainant-Appellee	43
Complainant-Appellant	44
Complainant-Appellee	45
Complainant-Appellant	46
Complainant-Appellee	47
Complainant-Appellant	48
Complainant-Appellee	49
Complainant-Appellant	50
Complainant-Appellee	51
Complainant-Appellant	52
Complainant-Appellee	53
Complainant-Appellant	54
Complainant-Appellee	55
Complainant-Appellant	56
Complainant-Appellee	57
Complainant-Appellant	58
Complainant-Appellee	59
Complainant-Appellant	60
Complainant-Appellee	61
Complainant-Appellant	62
Complainant-Appellee	63
Complainant-Appellant	64
Complainant-Appellee	65
Complainant-Appellant	66
Complainant-Appellee	67
Complainant-Appellant	68
Complainant-Appellee	69
Complainant-Appellant	70
Complainant-Appellee	71
Complainant-Appellant	72
Complainant-Appellee	73
Complainant-Appellant	74
Complainant-Appellee	75
Complainant-Appellant	76
Complainant-Appellee	77
Complainant-Appellant	78
Complainant-Appellee	79
Complainant-Appellant	80
Complainant-Appellee	81
Complainant-Appellant	82
Complainant-Appellee	83
Complainant-Appellant	84
Complainant-Appellee	85
Complainant-Appellant	86
Complainant-Appellee	87
Complainant-Appellant	88
Complainant-Appellee	89
Complainant-Appellant	90
Complainant-Appellee	91
Complainant-Appellant	92
Complainant-Appellee	93
Complainant-Appellant	94
Complainant-Appellee	95
Complainant-Appellant	96
Complainant-Appellee	97
Complainant-Appellant	98
Complainant-Appellee	99
Complainant-Appellant	100