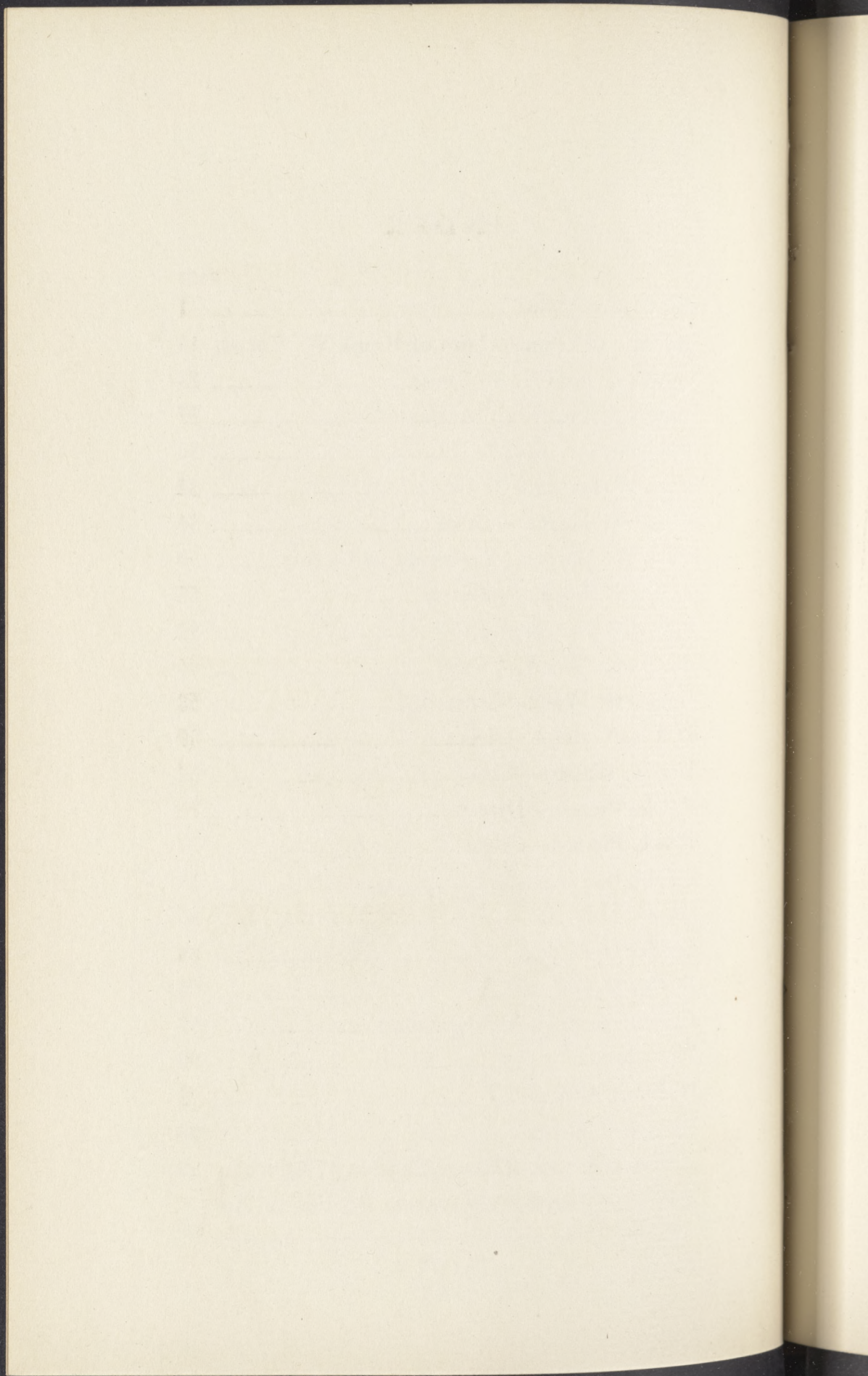


INDEX

	PAGE
Bill of Complaint.....	1
Answer and Counterclaim of Frank W. Harper	19
Answer of Fred T. Walters.....	23
Answer of Joseph C. Meano.....	27
Testimony.....	30
Frank W. Harper—Direct.....	32
Frank W. Harper—Cross.....	36
Frank W. Harper—Re-Direct and Cross.....	50
Frederick Brindley—Direct	52
Frederick Brindley—Cross	53
Arthur H. Wood—Direct.....	56
Arthur H. Wood—Cross.....	58
Fred T. Walters—Direct.....	59
Fred T. Walters—Cross.....	62
Ellis L. Pierson—Direct.....	72
Ellis L. Pierson—Cross.....	77
Exhibit D-1	15
Exhibit D-2	80
Exhibit D-3	85
Exhibit D-4	86
Vice Chancellor's Memorandum.....	87
Final Decree	90
Notice of Appeal.....	93
Petition of Appeal.....	94
Answer of Samuel Teitz to Petition of Appeal....	96
Answer of Joseph C. Meano to Petition of Appeal	97



New Jersey Court of Errors and Appeals

SAMUEL TEITZ,
Appellee,

v.

JOSEPH C. MEANO *et al.*,
Appellees,

and

FRANK W. HARPER,
Appellant.

ON APPEAL FROM 10
CHANCERY.

STATE OF THE CASE

20

BILL OF COMPLAINT

Filed February 4, 1929.

In Chancery of New Jersey

To the Honorable Edwin Robert Walker,

Chancellor of the State of New Jersey:

30

The complainant, Samuel Teitz, of the City of Trenton, in the County of Mercer and State of New Jersey, respectfully shows that:

1. On June 30, 1925, Joseph C. Meano, being indebted to complainant in the sum of \$20,000, executed to him a bond of that date, to secure that sum, payable on June 30, 1928, with interest at the rate

of six per centum per annum, payable semi-annually from the date of the bond, a copy whereof is hereto annexed, marked Schedule A, and made a part hereof.

2. To secure payment of the said bond, the said Joseph C. Meano executed to complainant a purchase money mortgage of even date with said bond, and thereby conveyed to him in fee certain lands and premises in said mortgage particularly described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond, which mortgage having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon, was on July 1, 1925, recorded in the Mercer County Clerk's office in Book 406 of Mortgages, on pages 384, etc. A copy of the said mortgage is hereto annexed marked Schedule B, and made a part hereof.

20

3. On August 21, 1926, the said Joseph C. Meano and Lillian Meano, his wife, conveyed the said mortgaged lands and premises in fee to one Fred T. Walters, by warranty deed, which deed was thereafter on August 24, 1926, recorded in the Mercer County Clerk's office in Book 593 of Deeds, pages 100, etc. A copy of said deed is hereto annexed, marked Schedule C, and made a part hereof.

30 4. The said deed from the said Joseph C. Meano and Lillian Meano, his wife, to said Fred T. Walters, contained a provision whereby the said Fred T. Walters assumed and undertook the payment of the mortgage hereinbefore referred to.

5. On September 30, 1927, the said Fred T. Walters and Martha Walters, his wife, conveyed the said lands and premises by warranty deed to one Frank

W. Harper, which deed was thereafter on October 3, 1927, recorded in the Mercer County Clerk's office in Book 618 of Deeds, pages 236, etc. A copy of said deed is hereto annexed, marked Schedule D, and made a part hereof.

6. The said deed from the said Fred T. Walters and Martha Walters, his wife, to Frank W. Harper, contained a provision whereby the said Frank W. Harper assumed and undertook the payment of the mortgage hereinbefore referred to. 10

7. Complainant, on the 15th day of August, 1928, brought suit in this court against the said Joseph C. Meano and Lillian Meano, his wife, and Fred T. Walters and Frank W. Harper, and others, to foreclose the aforesaid mortgage; and such proceedings were had in said suit that on the 3rd day of October, 1928, a final decree was entered therein in and by which said decree it was adjudged by the Chancellor 20 that there was then due to complainant on the aforesaid bond and mortgage the sum of \$20,286.67, being the sum of \$20,000 for principal remaining unpaid, and the sum of \$286.67 for interest on said principal remaining unpaid to the date of said decree, together with costs which were thereafter taxed at \$328.77.

8. On October 8, 1928, a writ of *feri facias* was issued out of this court, directed to the Sheriff of said County of Mercer, commanding him to sell the said mortgaged premises to make out of them the aforesaid amounts, together with lawful interest thereon from September 26, 1928, being the date of the Master's report; and on November 14, 1928, the said lands and premises were duly sold by said Sheriff to make out of them the aforesaid amounts, together with interest owing thereon, being in all the sum of 30

\$20,831.52, and also Sheriff's fees and costs amounting to \$345.92, making a total of \$21,177.44.

9. At the foreclosure sale the said land and premises were sold to complainant for the sum of \$12,500.00, which when deducted from the sum of \$21,177.44 (being the total amount owing, including interest, Sheriff's fees and costs) leaves a deficiency in the sum of \$8,677.44, due and unpaid on complainant's bond and mortgage, with interest thereon from November 28, 1928, the Sheriff having figured the interest up to that date.

10. On the 28th day of November, 1928, and before the commencement of this suit, the complainant demanded of the said Frank W. Harper, who had assumed the payment of said bond and mortgage, the sum of \$8,677.44, together with interest from November 28, 1928. The said Frank W. Harper failed and refused to pay any such sum or any part thereof, and has ever since failed and refused to pay the same to complainant.

11. On the 28th day of November, 1928, and before the commencement of this suit, the complainant demanded of the said Fred T. Walters, who had assumed the payment of said bond and mortgage, the sum of \$8,677.44, together with interest from November 28, 1928. The said Fred T. Walters failed and refused to pay any such sum or any part thereof, and has ever since failed and refused to pay the same to complainant.

12. On the 28th day of November, 1928, and before the commencement of this suit, the complainant demanded of the said Joseph C. Meano, the obligor upon said bond, the said sum of \$8,677.44, together with interest from November 28, 1928. The said

Joseph C. Meano failed and refused to pay any such sum or any part thereof, and has ever since failed and refused to pay the same to complainant.

13. On the 2nd day of February, 1929, before the commencement of this suit, complainant caused to be filed in the office of the Clerk of Common Pleas of Mercer County, a notice of his intention to institute this suit, as required by law, a copy of which notice is annexed hereto.

10

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

1. That Joseph C. Meano, Fred T. Walters and Frank W. Harper, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

2. That the defendants may be decreed to pay 20 complainant the aforesaid deficiency of \$8,677.44, with interest from the said November 28, 1928.

3. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises.

FORMAN & LEVY,
Solicitors for and of Counsel
with Complainant.

30

KNOW ALL MEN BY THESE PRESENTS: That I, Joseph C. Meano, of the City of Trenton, in the County of Mercer and State of New Jersey, am held and firmly bound unto SAMUEL TEITZ, of the City of Trenton, in the County of Mercer and State of

New Jersey, in the penal sum of FORTY THOUSAND DOLLARS, lawful money of the United States of America, to be paid to the said SAMUEL SEITZ, his executors, administrators or assigns: FOR WHICH PAYMENT well and truly to be made, I bind myself, my heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with my seal. Dated the thirtieth day of June One Thousand Nine Hundred and twenty-five.

- 10 THE CONDITION of the above obligation is such that if the above bounden JOSEPH C. MEANO, his heirs, executors or administrators, shall well and truly pay, or cause to be paid, unto the above named SAMUEL SEITZ, his executors, administrators or assigns, the just and full sum of TWENTY THOUSAND DOLLARS, on the thirtieth day of June which will be in the year one Thousand Nine Hundred and twenty-eight, and the interest thereon, to be computed from the date hereof, at and after the rate of
- 20 six per cent. per annum, and to be paid semi-annually without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force and virtue.

- AND IT IS HEREBY EXPRESSLY AGREED, that should any default be made in the payment of the said interest, or of any part thereof, on any day whereon the same is made payable as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or
- 30 lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable; and should the said interest remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent, or other municipal or governmental rate, charge imposition or lien, or any or either of them, remain unpaid and in arrear for the space of three months then and from thenceforth, that is to say,

after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of TWENTY THOUSAND DOLLARS with all arrearage of interest thereon, shall, at the option of the said SAMUEL TEITZ, or his legal representatives, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

10

Signed, sealed and delivered in the presence of } Joseph C. Meano [LS]

Erwin E. Marshall.

THIS INDENTURE, Made the thirtieth day of June, in the year of our Lord One Thousand Nine Hun- 20
dred and twenty-five, BETWEEN JOSEPH C. MEANO,
of the City of Trenton, in the County of Mercer and
State of New Jersey, party of the first part; AND
SAMUEL TEITZ, of the City of Trenton, in the County
of Mercer and State of New Jersey, party of the sec-
ond part;

WITNESSETH, That the said party of the first part,
for and in consideration of TWENTY THOUSAND
DOLLARS, lawful money of the United States of
America, to them in hand well and truly paid by 30
the said party of the second part, at or before the
sealing and delivery of these presents, the receipt
whereof is hereby acknowledged, and the said party
of the first part being therewith fully satisfied, con-
tented and paid, have given, granted, bargained,
sold, aliened, released, enfeoffed, conveyed and con-
firmed, and by these presents do give, grant, bargain,
sell, alien, release, enfeoff, convey and confirm unto

the said party of the second part, and to his heirs and assigns, forever, ALL that certain lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Trenton, in the County of Mercer and State of New Jersey, being known as Nos. 212-214 East Front Street and bounded and described as follows, to wit:—

- BEGINNING at a point in the northerly line of East Front Street said point being distant in an easterly direction 80.4 feet from the northeast corner of Montgomery and East Front Streets, and running thence (1) north 0 degrees 06' east forty-two feet, eight inches; thence (2) north 3 degrees 38' west sixty-three feet, six inches; thence (3) south 86 degrees 22' west thirty-one feet, seven inches; thence (4) south 3 degrees 34 minutes east seventy-one feet, five inches; thence (5) north 88 degrees 58' west 0 feet $\frac{5}{8}$ inches; thence (6) south 1 degree 51 minutes east thirty-two feet, $2\frac{1}{2}$ inches to a point in the northerly line of East Front Street; thence (7) along the northerly line of East Front Street, south 88 degrees 58' east twenty-nine feet $10\frac{1}{2}$ inches to the place of BEGINNING.

Being the same premises conveyed to the said Joseph C. Meano by Samuel Teitz and Bessie Teitz, his wife, by deed bearing even date herewith and to be recorded in the Mercer County Clerk's Office.

- This mortgage being given to secure part of the purchase price of said premises.

TOGETHER with all and singular the profits, privileges and advantages, with the appurtenances to the same belonging, or in anywise appertaining. ALSO, all the estate, right, title, interest, property, claim and demand whatsoever of the said party of the first part of, in and to the same, and of, in and to every part and parcel thereof: TO HAVE AND TO HOLD all and singular the above described tract or lot of land

and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

PROVIDED ALWAYS, and it is agreed by and between the parties to these presents, that if the said Joseph C. Meano, his heirs, executors, and administrators, do and shall well and truly pay, or cause to be paid, to the said party of the second part, or to his certain 10 attorney or attorneys, heirs, executors, administrators or assigns, the sum of TWENTY THOUSAND DOLLARS, in three years from the date hereof, with lawful interest for the same, at the rate of six per centum per annum, payable semi-annually, according to the condition of a certain bond bearing even date herewith, in the penal sum of FORTY THOUSAND DOLLARS, without any deduction or defalcation for taxes, assessments, or any other imposition whatsoever; then, and from thenceforth, these presents and 20 said obligation, and everything herein and therein contained, shall cease and be void; anything herein and therein contained to the contrary in any wise notwithstanding.

And the said party of the first part, JOSEPH C. MEANO, his heirs, executors and administrators, do covenant and grant to and with the said party of the second part, his heirs and assigns, that the said party of the first part heirs and assigns, shall not nor will claim or demand or be entitled to receive 30 any credit or credits on the interest payable hereon or on the moneys to secure payment of which this mortgage is made, for so much of the taxes assessed against said lands as is equal to the tax rate applied to the amount due on this mortgage or any part thereof; and that the said party of the second part, their heirs and assigns, shall and may, from time to time, and at all times after default shall be made in

the performance of the proviso or condition herein contained, peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy all and singular the above granted and bargained premises, with the appurtenances, without the let, suit, trouble, hindrance or denial of the said party of the first part, his heirs or assigns, or of any other person or persons whatsoever.

- AND it is also agreed by and between the parties
- 10 to these presents, that the said party of the first part shall and will keep the buildings erected and to be erected upon the lands above conveyed, insured against loss or damage by fire, in some safe and responsible Insurance Company or Companies, to an amount not less than Six Thousand Dollars, and assign the policy and certificate thereof to the said party of the second part as collateral security for the payment of the principal and interest aforesaid; and
- 20 in default thereof, it shall be lawful for the said party of the second part, to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, and payable on demand with legal interest.

All covenants herein shall bind the heirs and assigns of the respective parties hereto.

- IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal the day and
- 30 year first above written.

Signed, sealed and delivered in the presence of } Joseph C. Meano [LS]
Erwin E. Marshall.

STATE OF NEW JERSEY }
COUNTY OF MERCER } ss

BE IT REMEMBERED, that on this thirtieth day of June, in the year of our Lord One Thousand Nine Hundred and twenty-five, before me, the subscribed, a Master in Chancery of the State of New Jersey, personally appeared JOSEPH C. MEANO, who, I am satisfied, is the mortgagor mentioned in the within 10 Instrument, to whom I first made known the contents thereof, and thereupon *his* acknowledged that, he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

Erwin E. Marshall
M C C of N J

20

THIS INDENTURE, made this 21st day of August, in the year of our Lord one thousand nine hundred and twenty-six. BETWEEN Joseph C. Meano and Lillian Meano, his wife, of the City of Trenton, county of Mercer and State of New Jersey, party of the first part, and Fred T. Walters, of the City of Trenton, County of Mercer and State of New Jersey, party of the second part;

WITNESSETH, that the said party of the first part, in consideration of the sum of One dollar and other 30 good and valuable consideration, lawful money of the United States of America, to them the said party of the first part, in hand well and truly paid by the said party of the second part, before the sealing and delivery of these presents, the receipt whereof the said party of the first part do hereby acknowledge, have granted, bargained and sold, aliened, released, conveyed and confirmed, and by these presents do

grant, bargain, sell, alien, release, convey and confirm unto said party of the second part, his heirs and assigns;

ALL THAT CERTAIN lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Trenton, County of Mercer and State of New Jersey, being known as Nos. 212-214 East Front Street, and bounded and described as follows, to wit:

- 10 BEGINNING at a point in the northerly line of East Front Street, said point being distant in an easterly direction, 80.4 feet from the northeast corner of Montgomery and East Front Streets, and running thence (1) north, 0 degrees 06' east, forty-two feet eight inches, thence (2) north 3 degrees 38' west, sixty-three feet, six inches; thence (3) south 86 degrees 22' west, thirty-one feet, seven inches; thence (4) south 3 degrees 34 minutes east, seventy-five feet, five inches; thence (5) north 88 degrees 58' west, 0
- 20 feet, $\frac{5}{8}$ inches; thence (6) south 1 degree 51 minutes east, thirty-two feet, two and one-half inches to a point in the northerly line of East Front Street; thence (7) along the northerly line of East Front Street, south 88 degrees 58' east, twenty-nine feet, ten and one-half inches to the place of beginning.

- Being the same lands and premises which were conveyed to the said Joseph C. Meano, by Samuel Teitz and Bessie Teitz, his wife, by deed dated June 30, 1925, and recorded in the Office of the Clerk of
- 30 the County of Mercer, in Book 562 of Deeds, pages 187 &c.

This conveyance is made subject to two mortgage encumbrances now upon the said lands and premises, a first mortgage of Twenty-five thousand dollars, and a second mortgage of twenty thousand dollars, which the party of the second part hereby agrees to assume and pay as part of the consideration hereof.

TOGETHER with all and singular the buildings,

improvements, ways, woods, waters, water-courses, rights, liberties, privileges, hereditaments and appurtenances, to the same belonging or in anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and of every part and parcel thereof; and also, all the estate, right, title, interest, use, possession, property, claim and demand whatsoever, both in law and equity, of them the said party of the first part, in and to the said premises, with the appurtenances; 10

TO HAVE AND TO HOLD, said lot, tract or parcel of land, hereditaments and premises hereby granted, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his own proper use, benefit and behoof of him the said party of the second part, his heirs and assigns forever.

AND the said Joseph C. Meano, party aforesaid of the first part, for himself, his heirs, executors and administrators, does hereby covenant, promise and grant to and with the said Fred T. Walters, party of the second part, his heirs and assigns, that, at the time of the sealing and delivery hereof, he the said party of the first part is seized in his own right of an absolute and indefeasible estate of inheritance, in fee-simple, of and in all and singular the premises hereby granted, with the appurtenances, and has good right, full power and sufficient authority in the law to grant, bargain, sell and convey the same unto the said party of the second part, his heirs and assigns forever, according to the true intent and meaning of these presents; and also, that it shall and may be lawful for the said party of the second part, his heirs and assigns, at all times forever hereafter, peaceably and quietly to have, hold, use, occupy, possess and enjoy the said premises, with the appurtenances, and every part and parcel thereof, without 20 30

the lawful let, suit, eviction, interruption or disturbance of the said party of the first part, his heirs or assigns, or any other person or persons whomsoever lawfully claiming or to claim the same; and that the said premises are free and clear and freely and clearly acquitted and discharged of and from all former mortgages, judgments, executions, and of and from all other encumbrances whatever; except as aforesaid.

- 10 AND LASTLY, that he the said party of the first part, his heirs, all and singular, the said lot, tract or parcel of land, hereditaments and premises hereby granted, with the apurtenances unto the said party of the second part, his heirs and assigns, against him the said party of the first part, and his heirs and against all and every other person or persons, whomsoever lawfully claiming or to claim the same, shall and will warrant and forever defend, except as aforesaid.

- 20 IN WITNESS WHEREOF, the said party of the first part, have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of } Joseph C. Meano [LS]
 Lillian Meano [LS]
 Daniel A. Spair.

STATE OF NEW JERSEY }
 COUNTY OF MERCER } ss

30

BE IT KNOWN, that on the 21st day of August, in the year of our Lord one thousand nine hundred and twenty-six, before the subscriber, a Notary Public of the State of New Jersey, personally appeared Joseph C. Meano and Lillian Meano, his wife, who are, I am satisfied, the grantors mentioned in the foregoing deed of conveyance, and the contents thereof being by me first made known unto them,

they did thereupon acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

Daniel A. Spair

Notary Public of New Jersey

Recorded August 24th, 1926 at 12:00 Noon.

No. 4833.

THIS INDENTURE, made this 30th day of September, in the year of our Lord one thousand nine hundred and twenty-seven. 10

BETWEEN Fred. T. Walters and Martha Walters, his wife, of the City of Trenton, in the County of Mercer and State of New Jersey, party of the first part, and Frank W. Harper, of the Township of Lower Makefield, in the County of Bucks and State of Pennsylvania, party of the second part.

WITNESSETH, that the said party of the first part, in consideration of the sum of One dollar and other good and valuable consideration, lawful money of the United States of America, to them the said party of the first part, in hand well and truly paid by the said party of the second part, before the sealing and delivery of these presents, the receipt whereof the said party of the first part do hereby acknowledge, have granted, bargained and sold, aliened, released, conveyed and confirmed, and by these presents do grant, bargain and sell, alien, release, convey and confirm unto said party of the second part, his heirs and assigns. 20 30

ALL THAT CERTAIN lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Trenton, in the County of Mercer and State of New Jersey, being known as Nos. 212-214 East Front Street, Trenton, New Jersey and bounded and described as follows, to wit:—

BEGINNING at a point in northerly line of East Front Street, said point being distant in an easterly direction, 80.4 feet from the northeast corner of Montgomery and East Front Streets, and running; thence (1) north, 0 degrees six minutes east, forty-two (42) feet eight (8) inches; thence (2) north, three (3) degrees, thirty-eight (38) minutes west, sixty-three (63) feet six (6) inches; thence (3) south, eighty-six (86) degrees, twenty-two (22) minutes west, thirty-one (31) feet seven (7) inches; thence (4) south, three (3) degrees, thirty-four (34) minutes east, seventy-one (71) feet five (5) inches; thence (5) north, eighty-eight (88) degrees fifty-eight (58) minutes west, 0 feet, $\frac{5}{8}$ inches; thence (6) south one (1) degree fifty-one (51) minutes east, thirty-two (32) feet, two and one-half ($2\frac{1}{2}$) inches to a point in the northerly line of East Front Street; thence (7) along the northerly line of East Front Street, south, eighty-eight (88) degrees, fifty-eight (58) minutes east, twenty-nine (29) feet ten and one-half ($10\frac{1}{2}$) inches to the place of beginning.

Being the same lands and premises, which were conveyed to Fred T. Walters by Joseph C. Meano and Lillian Meano, his wife, by deed dated August 21, 1926, and recorded in the office of the Clerk of Mercer County in Book 593 of Deeds, pages 100 etc.

This conveyance is made subject to two mortgage encumbrances now upon said land and premises, a first mortgage of Twenty-five thousand dollars, (\$25,000.00) and a second mortgage of Twenty thousand dollars, (\$20,000.00), which the party of the second part hereby agrees to assume and pay as part of the consideration hereof.

TOGETHER with all and singular the buildings, improvements, ways, woods, waters, water-courses, rights, liberties, privileges, hereditaments and appurtenances, to the same belonging or in anywise appertaining; and the reversion and reversions, re-

mainder and remainders, rents, issues and profits thereof, and of every part and parcel thereof; and also, all the estate, right, title, interest, use, possession, property, claim and demand whatsoever, both in law and equity, of them the said party of the first part, in and to the said premises, with the appurtenances:

TO HAVE AND TO HOLD the said lot, tract, or parcel of land, hereditaments, and premises hereby granted, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs, and assigns, to his own proper use, benefit and behoof of him the said party of the second part, his heirs and assigns forever. 10

AND the said Fred T. Walters and Martha Walters, his wife, party aforesaid of the first part, for themselves, their heirs, executors and administrators, do hereby covenant, promise and grant to and with the said Frank W. Harper party of the second part, his heirs, and assigns—That, at the time of the sealing and delivery hereof, they the said party of the first part were seized in their own right of an absolute and indefeasible estate of inheritance, in fee-simple, of and in all and singular the premises hereby granted, with the appurtenances, and have good right, full power and sufficient authority in the law, to grant, bargain, sell and convey the same unto the said party of the second part, his heirs and assigns forever, according to the true intent and meaning of these presents; and also, that it shall and may be lawful for the said party of the second part, his heirs and assigns, at all times forever hereafter, peaceably and quietly to have, hold use, occupy, possess and enjoy the said premises, with the appurtenances, and every part and parcel thereof, without the lawful let, suit, eviction, interruption or disturbance of the said party of the first part, their heirs or assigns, or any other person or persons whomsoever lawfully claiming or to claim the same; and that the said 20 30

premises are free and clear and freely and clearly acquitted and discharged of and from all former mortgages, judgments, executions, and of and from all other encumbrances whatever: Except as aforesaid.

AND LASTLY, that they the said party of the first part, their heirs, all and singular, the said lot, tract or parcel of land, hereditaments and premises hereby granted, with the appurtenances unto the said party
 10 of the second part, his heirs and assigns, against them the said party of the first part, and their heirs and against all and every other person or persons whomsoever lawfully claiming or to claim the same, shall and will warrant and forever defend, except as aforesaid.

IN WITNESS WHEREOF, the said party of the first part, have hereunto set their hands and seals the day and year first above written.

20 Signed, sealed and delivered in the presence of } Fred T. Walters [LS]
 Martha Walters [LS]
 Ellis L. Pierson.

STATE OF NEW JERSEY }
 COUNTY OF MERCER } ss

30 BE IT KNOWN, that on the first day of October in the year of our Lord one thousand nine hundred and twenty-seven, before the subscriber, a Master in the Court of Chancery of the State of New Jersey, personally appeared Fred T. Walters and Martha Walters, his wife, who are, I am satisfied, the grantors mentioned in the foregoing Deed of Conveyance, and the contents thereof being by me first made known unto them, they did thereupon acknowledge that they signed, sealed and delivered the same as

their voluntary act and deed, for the uses and purposes therein expressed.

Ellis L. Pierson

M C C of N J

No. 5289. Recorded Oct. 3rd, 1927 at 10:15 A. M.

ANSWER AND COUNTER CLAIM OF

10

FRANK W. HARPER.

Filed February 11, 1929.

The answer of the defendant Frank W. Harper and the counterclaim of Frank W. Harper against the defendants Joseph C. Meano and Fred T. Walters:

20

This defendant Frank W. Harper, answering the bill of complaint, says that:

1. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraphs 1 and 2.

2. Paragraph 3 is admitted.

3. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 4.

30

4. Paragraphs 5, 6, 7 and 8 are admitted.

5. This defendant has no knowledge of information sufficient to form a belief as to the statements in paragraph 9.

6. Paragraph 10 is admitted.

7. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraphs 11 and 12.

8. On the date on which the deed of conveyance was made to this defendant by defendant Fred T. Walters, this defendant conveyed to said Fred T. Walters a tract of land situated on Princeton Avenue, in the Townships of Lawrence and Ewing, in the County of Mercer and State of New Jersey, then encumbered by two mortgages made by this defendant, one for \$25,000.00 and the other for \$5,000.00; the \$25,000.00 mortgage was then and now is held by the First-Mechanics National Bank of Trenton, and the other mortgage for \$5,000.00, was then and now is held by James J. McGoogan. These two mortgages said Fred T. Walters then assumed and agreed to pay as part payment of the purchase price of said Princeton Avenue premises, and at the same time this defendant took title to the Front Street property from said Fred T. Walters in exchange for the Princeton Avenue property, this defendant assumed and agreed to pay the mortgage encumbrances of \$45,000.00 set forth in the bill of complaint, in consideration of said defendant Fred T. Walters assuming and agreeing to pay said mortgages on the Princeton Avenue property.

30

9. The defendant Fred T. Walters has not kept his said agreement to assume and pay said mortgages of \$30,000.00 on the Princeton Avenue tract, and said First-Mechanics National Bank of Trenton has demanded payment of said Fred T. Walters of said mortgage of \$25,000.00, and said James J. McGoogan has procured a decree in foreclosure of said \$5,000.00 mortgage which has not yet been satisfied.

10. By reason of said Fred T. Walters having broken his said agreement to assume and pay said mortgages on the Princeton Avenue property, which agreement was made between this defendant and said Fred T. Walters, on the exchange of their said properties, this defendant's covenant contained in the conveyance by said Fred T. Walters to him of the Front Street property has been abrogated and is null and void.

10

11. By way of counterclaim against defendants Fred T. Walters and Joseph C. Meano, this defendant Frank W. Harper says that:

1. On September 30, 1927, defendant Fred T. Walters, and Martha Walters, his wife, conveyed to this defendant the premises described in the bill of complaint, situated on East Front Street, in Trenton, in this state, and in payment thereof, this defendant, with his wife Roberta Harper, at the same time conveyed to said Fred T. Walters, a tract of land, situate on Princeton Avenue, in the Townships of Ewing and Lawrence, in Mercer County, in this state, under an agreement of exchange between said Fred T. Walters and this defendant, and when this defendant assumed the payment of complainant's mortgage, said Fred T. Walters assumed and agreed to pay as part of the purchase price of said Princeton Avenue premises, a mortgage for \$25,000.00 then held by the First National Bank of Trenton, and a mortgage for \$5,000.00 held by James J. McGoogan, and both covering said Princeton Avenue premises.

20

30

2. In payment of part of the purchase price of the East Front Street premises, and in consideration of the assumption of said two mortgages of \$30,000.00 by said Fred T. Walters, this defendant agreed to assume and pay the complainant's mort-

22 *Answer and Counterclaim of Frank W. Harper*

gage of \$20,000.00, and the other mortgage of \$25,000.00 covering the Front Street property.

3. The First-Mechanics National Bank of Trenton now holds by assignment the said mortgage for \$25,000.00 covering the Princeton Avenue property, and this defendant has paid to said bank the interest thereon from June 1, 1928, to September 1, 1928, and said bank has refused to surrender this defendant's note for \$25,000.00 which it holds for a loan of that amount to this defendant, secured by said mortgage of \$25,000.00, and this defendant is held liable by said bank to the payment of said mortgage.

4. Said \$5,000.00 mortgage has been foreclosed and a writ of execution thereon is now in the hands of the Sheriff of Mercer County, unsatisfied, and the sale of said mortgaged premises under said writ has been adjourned from week to week at the request of said Fred T. Walters.

5. This defendant therefore prays that his covenant to assume and pay the complainant's said mortgage be abrogated and annulled, because of the failure of said Fred T. Walters to pay said mortgages covering said Princeton Avenue premises, and that the deficiency, if any, alleged to be due on complainant's mortgage, be paid by either said Fred T. Walters or the defendant Joseph C. Meano or both of them, and that thereupon said Fred T. Walters' covenant to assume and pay said mortgages of \$30,000.00 on the Princeton Avenue property be also abrogated and annulled.

JAMES J. MCGOOGAN,
Solicitor of Defendant
Frank W. Harper.

ANSWER TO COMPLAINANT'S BILL.
ANSWER TO ANSWER AND COUNTER-
CLAIM OF FRANK W. HARPER.

Filed March 14, 1929.

Answer of Fred T. Walters, one of the above
named defendants. 10

1. Defendant has no knowledge or information sufficient to form a belief as to paragraphs 1 and 2.
2. Defendant admits paragraphs 3, 4, 5, 6, 7 and 8.
3. Defendant has no knowledge or information sufficient to form a belief as to paragraphs 9 and 10.
4. Defendant admits paragraph 11, but alleges 20
that Frank W. Harper had assumed and agreed to pay the said mortgage and is primarily liable for the payment thereof, and further says prior to the filing of the complaint in this cause, he informed plaintiff, through his attorney, that Frank W. Harper had assumed and agreed to pay complainant's mortgage.
5. Defendant has no knowledge or information sufficient to form a belief as to paragraphs 12 and 13.

30

ANSWER TO FRANK W. HARPER.

8. Defendant admits the conveyance of the tract of land set forth in paragraph 8 and admits that the two mortgages were made by the defendant, Frank W. Harper, but denies that the two mortgages were in the sum of \$25,000.00 and \$5,000.00, respectively, but alleges the truth to be that the said tract of land

was conveyed "subject to two mortgage encumbrances, for \$27,500.00 and \$5,000.00, respectively, and all unpaid taxes and assessments." That thereafter the said Frank W. Harper discovered that there was due but the sum of \$25,000.00 on the \$27,500.00 mortgage. Defendant admits that the said \$25,000.00 mortgage is held by The First-Mechanics National Bank of Trenton, but denies that the \$5,000.00 mortgage was then and is now held

10 by James J. McGoogan. Defendant denies that he assumed and agreed to pay as part of the purchase price of the said Princeton Avenue premises, the mortgages in question, and admits that the said Frank W. Harper took title to the Front Street property in exchange for the Princeton Avenue property, and that the said Frank W. Harper assumed and agreed to pay the mortgage encumbrances of \$45,000.00 on the said Front Street property, and defendant further denies that by reason of the said Frank W.

20 Harper assuming and agreeing to pay the said mortgage encumbrances on the Front Street property that he assumed and agreed to pay the mortgage encumbrances on the Princeton Avenue property.

9. Defendant Fred T. Walters denies that he assumed and agreed to pay the said mortgage encumbrance of \$30,000.000 on the Princeton Avenue tract and further denies that The First-Mechanics National Bank of Trenton has demanded payment of

30 him of said \$25,000.00 mortgage. Defendant admits that the said James J. McGoogan obtained a decree of foreclosure on the said \$5,000.00 mortgage, but that the \$5,000.000 mortgage was then against the premises owned by Prospect Terrace, a corporation of the State of New Jersey, and that defendant had before the institution of said foreclosure suit, on April 5, 1928, conveyed said tract of land, by deed, to the said Prospect Terrace. Defendant denies that

he has broken his agreement and further alleges that he never agreed to assume and pay the said mortgages on the said Princeton Avenue property.

10. Defendant denies paragraph 10.

ANSWER TO COUNTERCLAIM OF FRANK
W. HARPER.

1. Defendant admits paragraph 1 of the counter-claim, except that defendant assumed and agreed to Avenue premises, a mortgage for \$25,000.00 then pay as part of the purchase price of said Princeton held by the First National Bank of Trenton and a mortgage for \$5,000.00 held by James J. McGoogan covering said Princeton Avenue premises. **10**

2. Defendant admits paragraph 2 of the counter-claim, except that he assumed and agreed to pay as part of the consideration the said two mortgages of \$30,000.00 covering the Princeton Avenue property. **20**

3. Defendant admits that The First-Mechanics National Bank of Trenton, now holds by assignment the said mortgage for \$25,000.00 covering the Princeton Avenue property, but as to all other matters and things set forth in said paragraph defendant has no knowledge or information sufficient to form a belief. **30**

4. Defendant admits paragraph 4 and further answering says that the adjournments have also been requested by Louis Rudner, and that at the time of foreclosure of said mortgage that the said James J. McGoogan was not then the owner of said mortgage, but that he had duly assigned the same to the First National Bank of Trenton and it to The First-Mechanics National Bank of Trenton, and neither of

said banks had authorized the said James J. McGoogan to foreclose the said mortgage, but since the final decree the defendant and Louis Rudner have paid on account of said decree the sum of \$1,806.49.

FURTHER DEFENSES.

1. That since the filing of the counterclaim and answer of the defendant, Frank W. Harper, defendant has learned that the said James J. McGoogan assigned the said \$5,000.00 mortgage to the First National Bank of Trenton, by deed of assignment, April 5, 1928, and it to The First-Mechanics National Bank of Trenton and ever since which time either one of said banks has been the owner of said mortgage, and that neither of said banks have ever demanded the payment of the said \$5,000.00 mortgage, and that neither of said banks have ever authorized the said James J. McGoogan to foreclose the same.

2. Defendant further answering says that the premises covered by the mortgage of The First-Mechanics National Bank in the sum of \$25,000.00 and the \$5,000.00 mortgage alleged to be now held by James J. McGoogan were conveyed by deed of this defendant and his wife, bearing date April 5, 1928, to Prospect Terrace, a corporation of the State of New Jersey, and which said deed is duly recorded in the Clerk's Office of the County of Mercer.

And this defendant humbly prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

ALEXANDER TRAPP,
*Solicitor and of Counsel for Fred
T. Walters, Defendant.*

Forman & Levy, Esqs.,
Counsellors at Law,
Trenton, N. J.

Gentlemen:

In reply to your letter of the 28th instant, addressed to Mr. Fred T. Walters, my client has instructed me to inform you that the mortgage in question was assumed by Mr. Frank Harper.

Thinking that this information might be of benefit to you, I am

Yours truly,

(Signed) Alexander Trapp

AT:M

ANSWER OF JOSEPH C. MEANO.

Filed March 2, 1929.

The defendant, Joseph C. Meano, answering the bill of the complainant, Samuel Teitz, says: 20

1. Paragraph 1 is admitted.
2. Paragraph 2 is admitted.
3. Paragraph 3 is admitted.
4. Paragraph 4 is admitted.
5. This defendant has no information sufficient to form a belief as to the matters set forth in paragraph 5, and therefore leaves the complainant to his proof. 30
6. This defendant has no information sufficient to form a belief as to the matters set forth in paragraph 6, and therefore leaves the complainant to his proof.
7. Paragraph 7 is admitted.

8. This defendant has no information sufficient to form a belief as to the matters set forth in paragraph 8, and therefore leaves the complainant to his proof.

9. This defendant has no information sufficient to form a belief as to the matters set forth in paragraph 9, and therefore leaves the complainant to his proof.

10. This defendant has no information sufficient to form a belief as to the matters set forth in paragraph 10, and therefore leaves the complainant to his proof.

11. This defendant has no information sufficient to form a belief as to the matters set forth in paragraph 11, and therefore leaves the complainant to his proof.

12. Paragraph 12 is admitted.

20

13. This defendant has no information sufficient to form a belief as to the matters set forth in paragraph 13, and therefore leaves the complainant to his proof.

DANIEL A. SPAIR,
*Solicitor for and of Counsel with
Defendant, Joseph C. Meano.*

30 ANSWER TO COUNTERCLAIM OF DEFENDANT, FRANK W. HARPER

Filed March 2, 1929.

The defendant, Joseph C. Meano, answering the counterclaim of the defendant, Frank W. Harper, says:

1. Paragraph 1 is denied.

2. Paragraph 2 is denied.

3. Paragraph 3 is denied.

4. Paragraph 4 is denied.

By way of separate defense, the defendant, Joseph C. Meano, says:

1. That when the defendant, Frank W. Harper, 10
purchased the property formerly owned by this de-
fendant, he expressly assumed and agreed and cove-
nanted to pay the mortgages according to the terms
specified in the said mortgages. This agreement and
covenant was an absolute and independent agreement
and covenant, and the fact that the defendant, Fred
Walters, assumed and covenanted to pay certain
mortgages on other properties conveyed to him by
the defendant, Frank W. Harper, does not make the
absolute and independent covenant a mutual one. 20
This defendant says that the defendant, Frank W.
Harper, is liable in the event that a deficiency is
proved on his absolute and independent covenant.

By way of separate defense, the defendant, Joseph C. Meano, says:

1. That the person primarily liable to pay the
deficiency, if any, on the said mortgage, is the last
owner of said property, in this case, the defendant, 30
Frank W. Harper; that the owner next in point of
time, in this case, the defendant, Fred T. Walters, is
scondarily liable, and this defendant is liable only
after judgment against them cannot be satisfied.

DANIEL A. SPAIR,
*Solicitor and of Counsel with De-
fendant, Joseph C. Meano.*

In Chancery of New Jersey

Between
SAMUEL TEITZ,
Complainant,
and
JOSEPH C. MEANO, *et al.*,
Defendants. } On Bill, &c.
TESTIMONY

10

Testimony taken in the above-entitled cause, at the State House, Trenton, New Jersey, on Wednesday, the twenty-fifth day of September, 1929, at eleven o'clock A. M.

Before HON. MALCOLM G. BUCHANAN, Vice Chancellor.

20

APPEARANCES:

Messrs. FORMAN & LEVY, by Mr. LEVY, for Complainant;

LOUIS JOSEPHSON, Esquire (representing Daniel A. Spair, Esquire), for defendant Joseph C. Meano;

30

JAMES J. MCGOOGAN, Esquire, for defendant Frank W. Harper;

ALEXANDER TRAPP, Esquire, for defendant Fred T. Walters.

(It is admitted that the bond and mortgage mentioned in the bill of complaint were duly made and executed; that the mortgage was

foreclosed, and that on the foreclosure the premises were sold for the sum of \$12,000.00, leaving a deficiency of \$8,677.24, with interest from November 28, 1928.

It is further admitted that the defendant Walters was a subsequent grantee from the original mortgagor, and that by his deed he assumed payment of the mortgage.

It is further admitted that the defendant Harper was a subsequent grantee, and that by 10 his deed he assumed the payment of the mortgage.

It is also admitted that there has been no payment on account of this bond and mortgage by any of these defendants other than the amount in the foreclosure sale.

Defendants also admit the filing of the notice of intention to institute suit.)

THE COURT: There is no issue with regard 20 to the complainant's case by anyone?

MR. MCGOOGAN: No, sir.

THE COURT: The complainant is entitled to a decree against the three defendants in the inverse order of alienation?

MR. TRAPP: That is right.

MR. JOSEPHSON: Yes, sir.

MR. MCGOOGAN: No; if I prove my case, if there was an agreement between Harper and Walters, if we prove that Mr. Walters 30 has not kept his agreement to assume the other mortgages on the other property, then I ask that the assumption in the Harper deed be abrogated and annulled.

THE COURT: How could you do that?

MR. MCGOOGAN: I ask that his assumption not inure to the benefit of the mortgagee.

FRANK W. HARPER, one of the defendants in this cause, being duly sworn on his own behalf, testifies as follows:

DIRECT EXAMINATION

BY MR. MCGOOGAN:

Q. You are one of the defendants, Mr. Harper, in this case, are you not?

A. Yes, sir.

10 Q. Now, when did you meet Mr. Walters to effect the exchange of the properties owned by him on Front Street, with you for the property owned by you on Princeton Avenue?

A. September 30, 1927.

Q. And where was the meeting held?

A. In your office.

Q. And who were present?

A. You, Mr. Walters, Mr. Brindley and myself.

20 Q. Do you recall Mr. Walters bringing to the conference the deed made by him and his wife to you for the Front Street property?

A. Yes, sir.

MR. MCGOOGAN: I offer in evidence the deed from Walters to Harper,—the deed set up in the bill of complaint.

Said deed is marked Exhibit DH-1.

THE COURT: The Front Street property is the original mortgaged premises, is it?

30

MR. MCGOOGAN: Yes, sir.

Q. I refer to deed marked Exhibit DH-1?

A. Yes, sir.

Q. And did you at that time have your deed ready, between you and your wife and him for the brick-yards property?

A. Yes, sir.

Q. When he showed this Exhibit DH-1 to me, as your attorney, was it read at all?

A. Yes, sir.

Q. What remarks were made about it at that time in his presence?

A. What remarks?

Q. Yes.

MR. TRAPP: That is objected to.

10

A. You made a remark about the assumption of the mortgage on the property, the \$45,000.00 mortgage.

Q. What was the remark, and what was said by Mr. Walters, if anything, in response to the remark?

A. I told him in our deed we didn't put the clause in about the assumption of the mortgages on the brickyard, and after some controversy between mostly you and Mr. Walters he agreed that if I could get the First National Bank of Trenton to withhold the mortgage on the brickyard for a year, he would assume the mortgages on my property. 20

Q. You refer to what as your property?

A. The brickyard.

Q. What did you do then? What did you say when he asked you to do that?

A. He said he would.

Q. Did you then in accordance with that get the bank to wait a year?

A. Yes. 30

Q. And the bank held a \$25,000.00 mortgage on your brickyard property?

A. Yes, sir.

Q. And I held a mortgage on the brickyard property for \$5,000.00?

A. Yes.

Q. What was said about that?

A. Well, you wanted yours paid in six months, and that Mr. Walters would do it.

Q. Did he first ask for a year on the second mortgage?

A. Yes, sir.

Q. And it was finally agreed to wait six months before calling in the second mortgage of \$5,000.00?

A. That's right.

Q. Was anything said at that conference, when
10 we talked about the assumption clause, about your deed that had been signed by you and your wife?

A. Yes, it had already been signed, and that there would be some trouble to get Mrs. Harper to sign it again, and we were anxious to get the thing through, and he said he would assume the mortgages.

Q. The settlement had been set for the first of October?

A. Yes.

20 Q. But you met the day before?

A. Yes.

Q. Who were anxious to put the deal through that day?

A. Mr. Brindley was anxious to put the deal through, the real estate agent.

Q. And was Mr. Walters anxious?

A. I guess they all were anxious.

Q. Now, this \$25,000.00 mortgage that the bank held on the brickyard property secured an obligation,
30 of course, did it not?

A. Yes, sir.

Q. What obligation did it secure?

A. Loans, to my bank.

Q. On your note?

A. Yes.

Q. Has that note of \$25,000.00 been paid?

A. No, sir.

Q. Who has paid the interest on that note since the thirtieth of September, 1927?

A. I paid it till the first of July of this year.

Q. Have you a bill the bank sent you for the current six months' interest?

A. No, sir.

THE COURT: Is there any dispute about that?

MR. TRAPP: No, sir.

10

Q. Since the thirtieth of December have you asked Mr. Walters to reimburse you?

A. Yes, sir.

Q. On how many occasions, and with what result?

A. Several occasions, but no result.

BY THE COURT:

Q. Well, what did he say?

A. I forget what he did say. I know I 20
didn't get any check for the interest.

Q. Well, I am interested in what he said, whether he promised to give you a check or whether he said he wouldn't give you a check, or whether he said if he wouldn't make this payment, on what ground he put it?

A. I think he said he didn't have it at the time I asked.

Q. Did he ever make any promise of reimburse- 30
ment in the future after you presented your bill?

MR. TRAPP: That is objected to as leading.

THE COURT: I will allow it.

A. He never give any special date.

Q. No, but what did he say when you told him

you had paid the interest to the bank when you asked him for it?

A. Why, he kept expecting to have some deals of his own to go through, and he would pay it at that time.

BY THE COURT:

Q. Did he say he would pay you later on or that he wouldn't pay you at all?

A. He said he would.

10

Q. Then, after this arrangement about the assumption of the mortgage on the brickyard property, the mortgage on the brickyard plant, was the deal finally closed on that date?

A. Yes, sir.

CROSS-EXAMINATION

BY MR. MCGOOGAN:

20 Q. When was it that you asked Mr. Walters to pay the interest on the \$25,000.00 mortgage?

A. I was around to see him every three months.

Q. And you have not been paid since July of this year?

A. Since July? I haven't been paid long before that. I paid the bank up till that time, but Walters didn't pay for a year before that.

BY THE COURT:

30 Q. Has he ever paid you anything on account of that?

A. Yes, he has paid something on account of the note transaction I had with him, a reduction made on the note every three months; that is, he would credit me with the amount he paid on this mortgage.

Q. He had an obligation of yours?

A. Yes, sir.

Q. What was that?

A. That was the difference in the sale price of the ultimate outcome of this transaction.

Q. What was it, a note?

A. Yes, sir.

Q. For how much originally?

A. \$2,200.00 originally. I made some cash payments besides.

Q. This note he had of yours, as I understand, he credited you on that note with the amount of the interest payments he was supposed to make to you on the \$25,000.00 mortgage? 10

A. Yes, sir.

Q. These payments you speak of, were they on the \$25,000.00 mortgage?

A. I was around to see him every three months, and—

Q. I want to know whether these payments you speak of were on that mortgage? 20

A. On the \$25,000.00 mortgage.

Q. At the time you entered into this agreement you alleged that the property was subject to mortgage encumbrance of \$25,000.00 and \$5,000.00, did you not?

A. The brickyard?

Q. Yes.

A. Yes, sir.

Q. This \$5,000.00 mortgage was held by Mr. McGoogan? 30

A. That's right.

Q. That mortgage was assigned to the First National Bank at the time of this transfer of property, was it not?

A. By Mr. McGoogan?

Q. Yes.

A. I don't know.

Q. The First National Bank held the first mortgage?

A. What?

Q. The First National Bank held the \$25,000.00 mortgage?

A. Yes, sir.

Q. What is the status of that property today, do you know?

A. Which property?

10 Q. The Princeton Avenue property. Does the bank still hold the \$25,000.00 mortgage?

A. Yes, sir.

Q. You have not been called upon to pay it, have you?

A. Yes, sir.

Q. Who holds the \$5,000.00 mortgage?

A. I think the bank holds that now, from the sale down at the Court House two or three weeks ago.

20 Q. In fact, the bank today holds the deed to that property, does it not?

A. I don't know.

Q. As a matter of fact, have you learned that the bank has made arrangements to purchase this property?

A. No.

Q. You have not?

A. No.

Q. Do you know when this property was conveyed to the Prospect Terrace?

30 A. Is that the name of the company originally—
The only conveyance I know of was on September 30, 1927.

Q. After that, and subsequent to the filing of the bill of foreclosure of the \$5,000.00 mortgage, did you know Prospect Terrace owned it?

A. No, I had nothing to do with that.

Q. You filed a bill to foreclose, didn't you, didn't Mr. McGoogan? Now, just give us the conversa-

tion in which you say Walters agreed to assume and pay these mortgages? When was it?

A. September 30th.

Q. What happened?

A. We all met in Mr. McGoogan's office to close the deal. I brought my deed in signed by my wife, and he brought his in signed, and after my turn Mr. McGoogan looked over his deed and saw where there was an assumption of mortgages, which didn't appear in mine. So, after some controversy as to an extension of time on the mortgages, he agreed to assume the mortgages on the brickyard. 10

Q. Was there anything said about the assumption of the mortgages before that day?

A. No.

Q. Anything said about that?

A. Not that I recall now.

Q. Was it in the agreement that Mr. Walters would assume that mortgage?

A. Nothing in the agreement of sale on his side. 20

Q. I show you what purports to be a deed, September 30, 1927, from Harper to Walters, and ask you if that is your signature?

A. Yes.

Q. Is that the deed you tendered at that time?

A. Yes, sir.

MR. TRAPP: I offer that in evidence.

Said deed is marked Exhibit DW-1.

THE COURT: Put the agreement of sale in evidence. 30

MR. MCGOOGAN: I offer the agreement of sale between Walters and Harper.

Said agreement of sale is marked Exhibit DH-2.

(It is admitted that is the original contract of sale between Harper and Walters on this exchange of properties.)

THE COURT: You admit that?

MR. TRAPP: Yes, sir.

MR. LEVY: That is objected to. There is nothing in the counter claim that has anything to do with that.

THE COURT: Your objection may be noted. I want to see it. Was there a settlement sheet?

10 MR. MCGOOGAN: Yes, sir (producing paper).

Q. You said at the time there might be some trouble to get Mrs. Harper to sign another deed. Is that right?

A. I think she was out of town, as I recall, for that day.

Q. There wasn't any particular hurry about the closing of this transaction, was there?

20 A. Well, all hands were anxious to have it settled. It meant redrafting of a new deed.

Q. Couldn't those words have been added to the deed which you were about to tender, and have Mrs. Harper reactnowledge it?

A. It isn't supposed to be after it's signed, as I understand it, and Mr. and Mrs. Walters had both signed the deed.

Q. I am speaking of your deed. If Mr. Walters had assumed to pay these mortgages, why wasn't it put in your deed? You had plenty of time.

30 A. It wasn't in accordance with the contract.

Q. Then, if the agreement was other than the contract and time was not of the essence of it, why didn't you delay it?

A. It was agreed to do it then.

Q. You say your wife was only out of town that day?

A. I think so?

Q. And if that had been the arrangement you could have had it in the deed?

A. They decided to go through with it that day.

Q. You could have had it in the deed the next day if Mr. Walters had agreed to assume the payment of these mortgages, you could have had it in the deed the next day, couldn't you?

A. Oh, I suppose so; you could put it in any time.

THE COURT: Hand the settlement sheet to 10
the witness.

BY THE COURT:

Q. Was there a statement of settlement made up on that day?

A. Yes, sir.

Q. Is that the sheet that contained the method in which it was settled at that time?

A. Yes, sir.

MR. MCGOOGAN: I offer these two sheets
in evidence. 20

Said settlement sheets are marked Exhibits
DH-3 and DH-4, respectively.

Q. The last time you saw Mr. Walters to collect interest, did he not inform you that the property was that of the Prospect Terrace and that he didn't own it?

A. I don't remember him saying anything about any other ownership.

Q. When did you last see Mr. Walters? 30

A. To ask for interest?

Q. To ask for anything?

A. Oh.

Q. When did you last see him?

A. Well, it was before the foreclosure of Mr. McGoogan's mortgage.

Q. And at that time did he not inform you that Prospect Terrace was the owner of the property?

A. That what?

Q. Prospect Terrace was the owner of the premises?

A. No; he always said he would pay.

Q. Who, the Prospect Terrace?

A. No, he said he himself would pay.

Q. You know him to be a member of the Prospect Terrace Corporation?

A. I think he belongs to several of them. I don't
10 know the names of them.

Q. When you called at his office you have heard business discussions there of the Prospect Terrace, have you not, Mr. Harper?

A. I couldn't say that.

FURTHER CROSS-EXAMINATION

BY MR. JOSEPHSON:

Q. The First National Bank held this first mort-
20 gage, didn't it, at the time?

A. Yes, sir.

Q. You had assigned it to them previously?

A. Yes.

Q. And Mr. McGoogan held the second mortgage?

A. Yes.

Q. And that was assigned previous to the exchange?

A. I don't know.

Q. Now, the bank now owns the property?
30

A. Not that I know of.

Q. Not that you know of?

A. No.

Q. Has the bank ever foreclosed on the first mortgage?

A. No, sir.

Q. It has not?

A. No.

Q. Has the bank ever asked you to pay the first mortgage?

A. Yes, sir.

Q. When?

A. Why, it was—I took it up with them at the time we made the transaction with Walters, and told them I practically promised Walters, or had promised Walters, in a year's time, and asked them not to ask for the money until that time, which they agreed to do.

10

Q. They agreed to that?

A. Yes, sir.

Q. You have not paid the bank the first mortgage yet, have you?

A. No.

Q. You have not made any payments on the first mortgage, have you?

A. No.

Q. So far as you know, the bank still has that mortgage?

20

A. Yes, sir.

Q. Do you know anything about the second mortgage?

A. No, sir! I was down at the sale.

Q. Who bought it?

A. The mortgage?

Q. Yes.

A. Yes, Mr. McGoogan—

Q. Who purchased it?

A. The bank, I believe, assumed that mortgage.

30

Q. Do you mean the bank bought the property from the sheriff?

A. I didn't think they bought the property; I thought they just assumed the mortgage.

BY THE COURT:

Q. What do you mean? Mr. McGoogan

held the mortgage, and he foreclosed it; how could the bank assume it?

MR. MCGOOGAN: May I explain it, your Honor? I don't think the witness knows.

THE COURT: Yes.

MR. MCGOOGAN: They took an assignment of my decree and paid the balance; I don't think Mr. Harper knows.

THE COURT: Was there a sale?

10

MR. MCGOOGAN: No, sir; it was just on the verge of a sale, and the bank said they would take it up.

Q. You have been engaged in the buying and exchange of real estate for a long time, have you not?

A. No, sir.

Q. How long?

A. Two years now, I have been connected with Brindley.

20 Q. Never bought and exchanged property before two years?

A. Well, I was in the brick business before that; that's how I come to get this property.

Q. And prior to this contract with Mr. Walters you had not bought and sold and exchanged real estate?

A. Before?

Q. Before your contract with Walters?

30 A. Well, I had some small dealings with material men.

Q. You have taken property subject to mortgages, have you not?

A. Yes, sir.

Q. And assumed and agreed to pay them?

A. Yes.

Q. You knew at the time you executed and delivered the deed to Mr. Walters, that if Mr. Walters

was to be held liable on the assumption clause, that should be in the deed; you knew that?

A. Well, if he agrees to it.

Q. If he agrees to it?

A. Yes.

Q. Then you say he did agree to it?

A. Agreed to assume the mortgage, yes.

Q. And you knew it should be in the deed, didn't you, from your previous experience?

A. If he says so, I take his word for it. 10

Q. Oh, you took his word for it?

A. Yes.

Q. You said that Mr. Walters has always said that he would pay, did you not?

A. He never said he wouldn't.

Q. He never said he would? He said he would have some deals and get some money and pay later on?

A. Yes.

Q. He never refused? 20

A. No.

FURTHER CROSS-EXAMINATION

BY MR. LEVY:

Q. Mr. Harper, did I understand you to say, that on the day that this exchange transaction took place between you and Mr. Walters, that you brought your deed to Mr. McGoogan's office on that day?

A. I think I brought it there.

Q. Well, did you bring the deed to Mr. McGoogan's office? 30

A. I really forget now who drew up the deed.

Q. You forget that?

A. Yes.

Q. I understood you to say on direct examination, that on the day this transaction was to take place, you came to Mr. McGoogan's office with the deed which you had previously had signed by your wife?

- A. It was there that day; I forget who brought it now.
- Q. Then you didn't say you brought it there?
- A. I forget.
- Q. Did I understand you to say, you took the deed home to have your wife sign it?
- A. Some time, I don't know when, now.
- Q. Did you take it home to have her sign it?
- A. I know she signed it.
- 10 Q. At your home?
- A. I don't know whether it was home, or whether she come to Mr. McGoogan's office, now.
- Q. Do you recall now, can you tell me now, whether or not you brought the deed to your home for her to sign, or whether she signed it home, or whether you brought it to Mr. McGoogan's office, or whether it was at Mr. McGoogan's office on that day?
- A. No, I can't say; I don't know whether she
- 20 signed it in his office or home.
- Q. You don't recall that now?
- A. No.
- Q. Do you recall when you signed the deed, with reference to the transaction in question; in other words, did you sign the deed on the date the transaction took place with Mr. Walters?
- A. I don't know whether I did, or the day before; I forget.
- Q. Was your wife with you when you signed the
- 30 deed?
- A. I don't remember that.
- Q. Where did you sign the deed?
- A. I forget that.
- Q. Did you read the deed when you signed it?
- A. I think so.
- Q. You don't recall whether you signed the deed on the day of the transaction, or the day prior to the transaction?

A. I don't recall it now.

Q. Do you know what day the transaction took place?

A. Yes, sir; on the 30th of September.

Q. I show you the deed which has been offered in evidence, and you notice that that was signed and acknowledged on the 30th of September; isn't that right?

THE COURT: It speaks for itself.

10

Q. Now, Mr. Harper, did I understand you correctly when you stated your wife was out of town?

A. I didn't say she was out of town.

Q. She was in town?

A. I am not sure whether she was in town or not.

Q. Now, Mr. Harper, in view of the fact that this deed was signed and acknowledged by you and your wife, right on the same date the transaction took place, what reason do you now give, if any, for this deed not having been redrafted with the assumption put in? 20

A. Well, according to my attorney, it was all right the way it was.

Q. You state your reason to be, not that your wife was not available on that day, but because your attorney advised you that the deed drawn as it was, was perfectly all right?

A. No.

Q. What reason do you give? 30

A. She was probably around town somewhere, or out of town; I don't know; I don't know what day it was signed; she might have signed it in the morning; I don't remember.

Q. Don't tell me what you don't know. I am asking you what reason do you give now for this deed not being redrafted and the assumption provision not being placed in it?

A. Not knowing where to get her at the time, and the attorney saying it was all right for it to go through with Mr. Walters assuming the mortgage, as he said he would.

Q. Mr. Harper, you say you spoke to Mr. Walters on a number of occasions with regard to the payment of interest on this \$25,000 obligation?

A. Yes.

Q. Did you ever demand from Mr. Walters the
10 payment of the principal prior to the beginning of this action by Mr. Teitz, and if so, when, if you recall?

A. At the time Mr. Teitz started the action I spoke to Mr. Walters; I knew I had got to raise the \$20,000 second mortgage, and that there might be a chance of the mortgage at the bank taking care of it.

Q. You never spoke to Mr. Walters before Teitz started this action?

A. About what?

Q. With regard to the principal?
20

A. I don't think so.

Q. You made no demand whatsoever of Mr. Walters, prior to the beginning of this action, for the payment of the principal?

A. I don't think I did.

Q. When did you, if any time, make any formal demand upon Mr. Walters to pay the principal of the \$25,000 mortgage?

A. I spoke to him after the year was up; this
30 action was brought before the year was up.

Q. Do you know that?

A. Yes, I remember speaking to Mr. McGoogan about it.

Q. You are willing to testify, under oath, of your own knowledge, now, that Mr. Teitz began his action within a year from September 30, 1927, the date of your transaction?

A. I am pretty sure of it.

Q. Positive?

A. I remember speaking to Mr. McGoogan about it.

THE COURT: The bill is filed February 4, 1929.

Q. Did you make any other demand of any other kind whatsoever, from Mr. Walters, with regard to the payment of the principal of \$25,000, except on 10 this one occasion; and if so, when, if you recall?

A. I told him the bank was pressing me, I think, a few times, for the money, and he said he couldn't do anything at the time, as I recall his answer.

Q. In other words, that is all you said to him; is that right?

A. Yes.

Q. And the only demand you ever made; is that right?

A. Every time I saw him on the street I would 20 ask him for it.

Q. Did Mr. Walters tell you he wasn't under any obligation to pay the principal of the mortgage unless he wanted to retain the land, or anything to that effect?

A. No, sir; he didn't say anything like that.

Q. As far as you know, did the bank or McGoogan's bank, ever demand from Mr. Walters the payment of the principal of this mortgage?

A. From Mr. Walters? 30

Q. Yes.

A. Not that I know of.

Q. In paragraph 9 of your answer, you allege that the First-Mechanics Bank demanded from Mr. Walters the payment of the principal of this mortgage; do you want us to understand, so far as you know, there was no demand ever made by the bank on

Mr. Walters to pay the principal of this mortgage; is that right?

A. I don't think so; they sent me the interest bill.

Q. As far as the \$5,000 second mortgage is concerned, there is no further liability on your part for the payment of that mortgage, is there?

A. No.

Q. You have been entirely released from that?

A. I understand so.

10

RE-DIRECT EXAMINATION

BY MR. MCGOOGAN:

Q. In response to Mr. Levy's recent questions, you referred to a suit started by Teitz; do you mean this suit, or the foreclosure suit? I want to refresh your recollection.

A. Yes, the foreclosure suit.

Q. You said Teitz started suit?

A. Before the year was up.

20

Q. Do you refer—

A. To the foreclosure suit, yes.

RE-CROSS-EXAMINATION

BY MR. LEVY:

Q. I understand you to say, that after the foreclosure suit was served on you for the Front Street property, you spoke to Mr. Walters about the \$25,000 mortgage on the Princeton Avenue property?

30

A. Not then; that was within the year. I told him I would get the bank to extend a year from the date of settlement; and this was before the year was up that he started the foreclosure suit on Front Street.

Q. When did you first speak to Mr. Walters with regard to the payment of the principal—

A. It was shortly after Mr. Teitz started this suit, or about the time the year was up.

Q. The year was up on September 30, 1928?

A. That's right.

Q. And this case was started in February, 1929?

A. So it's been said. I didn't mean that case, though.

Q. Between September 30, 1928, and until the beginning of this case in February, 1929, you never even once demanded any time from Mr. Walters, that he pay the principal of that \$25,000 mortgage; is that right?

10

A. Well, there was another suit started there by Mr. McGoogan—

Q. Answer the question I asked, "Yes" or "No."

A. From when was it?

Q. The year was up September 30, 1928?

A. Yes.

Q. This present action was started February, 1929?

A. I suppose it was.

Q. It was. I ask you whether or not you ever spoke to Mr. Walters about the payment of the principal of \$25,000 between September 30, 1928, and February, 1929, when this suit was started?

A. About when the year was up I spoke to him, I recall, one time, or just before or just after.

Q. You did speak to him then when the year was up; is that right?

A. Or between the time that Teitz started his suit and the year was up, which would only be a period of a month or two.

30

Q. How many months is it from the beginning of October to February?

A. I didn't mean that suit.

Q. Which suit did you mean?

A. The foreclosure suit.

Q. The foreclosure suit was started before the year was up?

A. Yes.

Walters said—he consented to pay the mortgage as quickly as he could, but he couldn't pay you on the day of settlement, but he would pay as quickly as he could. He asked you if you would extend it a year, and I think you compromised at about six months, which he agreed to pay it off.

BY THE COURT:

Q. That was on the \$5,000 mortgage?

A. Yes, that was on the \$5,000 mortgage. 10

Q. Go on.

A. Then you asked him about the assumption of the other mortgage; and he said if Mr. Harper could get the bank to leave the mortgage there a year, he would assume it, providing Mr. Harper would leave the mortgage there a year; and he said at that time he could re-finance the proposition and expected to have the thing sold; that is, as I recall the transaction. 20

Q. After the conversation were the deeds exchanged?

A. Yes; you had the Harper deed there. If I recall, Mrs. Harper signed the deed in the morning, and she went to Philadelphia, I think. She was competing in a tennis tournament, if I remember.

Q. Was there some question raised about coming back to sign a new deed?

A. No, we wanted to settle then. All the statement sheets had been figured as of that date, and it would cause some little delay and trouble to get it redrafted, and you thought it was all right. 30

CROSS-EXAMINATION

BY MR. LEVY:

Q. Are you connected in business with Mr. Harper at the present time?

A. Yes.

Q. Were you connected in business with him September 30, 1927?

A. I had been for thirty days, yes.

Q. You were?

A. Yes.

Q. What business is it?

A. Real estate, insurance and mortgages.

Q. And the name is the Brindley Real Estate

10 Company?

A. Yes.

Q. And all during this time you two have been engaged in this business?

A. Yes, sir.

Q. Is that right?

A. Yes.

Q. Were you there when Mrs. Harper signed the deed?

A. I was not.

20 Q. You don't know whether she signed the deed there or not, do you?

A. I am not sure; I know the deed was signed in the morning; I know we were going to make the changes in the deed and we couldn't get her because she was out of town; and we wanted the deal to go through because—

Q. Are you sure they were figured out as of that date, or October?

30 A. October 1st, but the settlement was made September 30th.

Q. If the settlement sheets were figured out as of October 1st, 1927, it wouldn't have made any difference whether it was redrafted and she signed it the next day?

A. I am not so sure of the deed and the settlement sheet; however, the settlement sheets were figured as of the date of the settlement.

BY THE COURT:

Q. Do you remember what day of the week it was that you had this conference?

A. No, sir.

Q. You don't remember that?

A. I don't recall; we had several a week; I don't recall.

Q. I show you the settlement sheet.

A. To October—

10

Q. Up to when is that made?

A. To October 1st; the settlement sheet was figured out as of October 1st.

Q. So, it apparently would not have made any difference if she had signed the deed the next day with the assumption provision in, would it?

A. I presume not.

Q. Well, it wouldn't?

A. I suppose not.

Q. Is the Brindley Real Estate Company a corporation?

20

A. A corporation.

Q. Or partnership?

A. A corporation.

Q. Was any suggestion made by anyone that in view of the fact that Mrs. Harper was not available to sign a new deed, that some assumption agreement be drawn and Mr. Walters sign it?

A. No.

Q. Before the deeds were delivered?

30

A. No, sir.

Q. Nothing like that said?

A. There was nothing said.

MR. MCGOOGAN: The defendant Harper rests on his counterclaim.

ARTHUR H. WOOD, a witness produced on behalf of the defendant Fred T. Walters, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TRAPP:

Q. Mr. Wood, you are connected with the First-Mechanics National Bank?

A. Yes, sir.

10 Q. What is your office there?

A. President.

Q. Prior to the amalgamation of the First National and the Mechanics National, you were president of the bank?

A. Chairman of the Executive Committee at that time.

Q. Have you knowledge of the First National Bank holding a mortgage of \$25,000 on the property on Princeton Avenue formerly owned by Frank
20 Harper?

A. May I refer to the records I have?

Q. Yes.

A. Answering your question, I might say that the memorandum I have here shows a first mortgage of \$20,000 and a second of \$5,000; is that what you mean?

Q. I refer to twenty-five.

A. Perhaps that is incorrect.

Q. Did you ever have a \$27,000 mortgage?

30 A. I don't remember twenty-seven, that is all I can give you. I was asked to come here and bring data with regard to certain five thousand dollars—I don't remember all these deals, and I didn't look them up to refresh my memory.

Q. Have you since learned whether the \$20,000 mortgage you speak of there, is the \$25,000 mortgage we have been referring to in this court room?

A. No, I haven't.

Q. How many mortgages did your bank hold against this property?

A. I am sorry I can't answer that, because I don't remember. I only brought sheets with reference to the \$5,000 mortgage.

Q. Did you, or any officials of your bank, ever demand payment of Fred T. Walters of the \$25,000, or was it made by either one of those banks?

A. I have never made a demand on Walters, no.

Q. Did you have a mortgage in the sum of \$5,000 covering the tract in question? 10

A. We had it in our possession one time.

Q. You held it how?

A. We held it because it was offered to us as collateral security, as additional security, to a loan made to James McGoogan. He asked us for a loan, and we didn't have any collateral, and he said that he would assign that to us; but the assignment to us was never recorded.

Q. You had a deed of assignment for the \$5,000 mortgage in your possession? 20

A. I believe so.

Q. Did you ever authorize the foreclosure of that \$5,000 mortgage while you held the deed of assignment?

MR. MCGOOGAN: I object to the question; I can't see how it is material.

THE COURT: How is it material?

MR. TRAPP: They charge us that we assumed this mortgage, and Mr. Harper said he didn't pay the mortgage. Mr. McGoogan turns around and alleges that he is the owner of this particular mortgage; and Mr. Harper said he didn't have it. Now, I want to show that he wasn't the owner of it, and that the mortgage had been assigned to the bank. 30

THE COURT: Mr. Wood said, as I understood him, that it was assigned as collateral, and Mr. McGoogan was the beneficial owner.

Q. Did you hold a deed of assignment?

10 THE COURT: Whatever it was in form, he said it was collateral; you can't go behind that. He said it was intended simply as collateral.

Q. Did you have any knowledge of the foreclosure of that mortgage, Mr. Wood?

THE COURT: Strike it out.

CROSS-EXAMINATION

BY MR. JOSEPHSON:

- 20 Q. Who owns this property now?
 A. I don't know.
 Q. Isn't it true, that the First-Mechanics National Bank has taken, or is about to take, a deed for this property?
 A. Not to my knowledge.
 Q. So far as you know, the bank doesn't own the property now?
 A. No.
 Q. The bank has not foreclosed the first mortgage of \$25,000?
 30 A. No.
 Q. Has the bank asked Mr. Walters to pay it?
 A. Not to my knowledge.

FURTHER CROSS-EXAMINATION

BY MR. MCGOOGAN:

Q. Do you know whether the transaction appears on your books as a loan to Harper of the \$25,000 secured by—

A. I think it does.

FURTHER CROSS-EXAMINATION

BY MR. LEVY:

Q. Has the bank demanded payment of this \$25,000?

A. Not recently. There has been demands from time to time on Harper to get his accounts straightened out; we have asked him to make payments of further additional securities in years past; no recent demand to my knowledge. 10

Q. You say "no recent demand"; can you give us, approximately, about when the last demand was made?

THE COURT: Why is that important?

MR. LEVY: To show no demands were made.

THE COURT: I don't think it is important.

Mr. Trapp presents the assignment produced by Mr. Wood, an assignment from James J. McGoogan to the First-Mechanics National Bank of Trenton, of the final decree in the suit brought by Mr. McGoogan against Prospect Terrace, to foreclose the \$5,000 mortgage which has been the subject of the evidence in this suit, and which decree was dated August 29, 1928; and the assignment is dated September 3, 1929. The amount due on the decree at the time of the assignment is \$3,432.32. 20 30

FRED T. WALTERS, one of the defendants in this cause, being duly sworn in his own behalf, testified as follows:

DIRECT EXAMINATION

BY MR. TRAPP:

Q. Mr. Walters, do you recall September 30,

1927, at the time of the exchange of the deeds for properties between yourself and Mr. Harper?

A. I do.

Q. Where did that take place?

A. Mr. McGoogan's office.

Q. Who was present?

A. I think Mr. McGoogan, Mr. Harper, Mr. Brindley, myself and Mr. Pierson was there as my attorney.

10

BY THE COURT:

Q. Ellis Pierson?

A. Ellis Pierson.

Q. At that time, did you assume, or agree to assume, payment of two mortgages, one in the sum of \$25,000, and the other in the sum of \$5,000, covering the Princeton Avenue tract of Mr. Harper, which was about to be conveyed to you?

20 A. I did not.

Q. Was there anything said at that time about your assuming and agreeing to pay the two mortgages of \$25,000 and \$5,000?

A. About the \$5,000 in which Mr. McGoogan said he wanted his money.

Q. Tell us what was said about the \$5,000 mortgage?

30 A. There was a lot talked about it. Mr. McGoogan said, "If you pay in \$1,100.00, I'll let that mortgage stay a year"; he said he wanted his money and he would let it stay a year.

Q. What else was said?

A. That's all that was said; nothing else was said.

Q. Was there anything else said about the mortgages at that time?

A. Nothing else was said.

Q. Have you, since that time, ever agreed to pay to Mr. Harper, or, since that time, have you ever

agreed to assume the payment of the \$25,000 and the \$5,000 mortgages?

A. I didn't the twenty-five; I did not.

BY THE COURT:

Q. How about the \$5,000 mortgage?

A. The five Mr. McGoogan said he wanted in a year. I said "I'll do the best I can with it."

Q. Did you assume the payment of that? 10

A. No.

Q. Mr. Trapp asked you whether you have agreed to assume either one of them, and you said "No, not the \$25,000 mortgage."

A. I didn't agree to pay either one of them, but he said if I would pay eleven hundred he would let it stay a year.

Q. Has there ever been a payment made by you—

A. No. 20

Q. Wait. Has there ever been a demand made on you by the First-Mechanics National Bank to pay the \$25,000 mortgage?

A. There has not.

Q. Has Frank Harper ever made a demand on you to pay the \$25,000 mortgage?

A. I don't remember whether he did; I don't remember.

Q. Has he ever made a demand upon you to pay the \$5,000 mortgage? 30

A. No, he didn't.

Q. When was the property conveyed by you and Mrs. Walters to the Prospect Terrace?

A. I think '27, September 30th,—I don't know what date.

Q. I show you a deed bearing date April 5, 1928, made by you to Prospect Terrace, and ask you if

that is the deed conveying the Princeton Avenue property to Prospect Terrace?

A. Yes, sir.

Q. April 5, 1928?

A. Yes, sir.

Q. Prospect Terrace continues to be the owner down to the present time?

A. So far. They have made arrangements—

10 BY THE COURT:

Q. Is it still the owner?

A. Yes, it is.

Q. At the present time is there an agreement between the First-Mechanics National Bank, through its officer, Edward C. Stokes, with the Prospect Terrace to take over the property in question?

A. Yes.

Q. When is the transaction to be consummated?

20 A. Just as soon as we get the papers ready.

Q. They are to take title?

A. They are to take title.

Q. They are to take title, subject to the present existing mortgages?

A. They are.

CROSS-EXAMINATION

BY MR. MCGOOGAN:

30 Q. Did you say, Mr. Walters, that Mr. Harper never made a demand upon you—

A. I didn't say that, no; I said, not that I know of.

Q. (Stenographer repeats the question)—for the payment of the \$25,000 mortgage?

A. I think after the suit started, after the suit started of Mr. Teitz, that Mr. Teitz started his suit.

BY THE COURT:

Q. The foreclosure suit?

A. The foreclosure suit, I think, he comes in and asks me if I own it, and I said the company owned it.

Q. Are you the company?

A. No, I'm only the officer.

Q. Do you refer to the Prospect Terrace?

A. Yes.

10

Q. Who is the Prospect Terrace?

A. Prosecutor English is in it, and Miss Doyle and myself.

Q. How many shares of the stock do you have?

A. I don't know.

Q. Do you know how many you own?

A. I don't know.

Q. Who are the company?

A. Who are the company?

Q. Yes.

20

A. What do you mean?

Q. Well, who controls the company?

A. Who controls the company?

Q. Yes.

A. I'm president of it.

Q. You own it, don't you?

A. No, they are stockholders into it.

Q. How much of the company do you own?

A. I don't know how many shares.

30

BY THE COURT:

Q. Do you own a majority of the stock?

A. I don't think so.

Q. Do you know?

A. No, I don't.

Q. Did Prosecutor English ever take any active interest in it?

A. No, he is the agent for it.

Q. And Miss Doyle and you are the only other stockholders.

A. Yes, sir.

BY THE COURT:

Q. Miss Doyle is an employee of yours?

A. Yes.

10 Q. She only holds one share?

A. I don't know what she holds.

Q. You have done all the business of this company since it was organized?

A. I have. Not all; Miss Doyle has done some.

Q. She does the clerical work?

A. Yes, she is secretary.

Q. Mr. English doesn't do any?

A. No.

20 Q. About the time Mr. Teitz started the foreclosure, Mr. Harper came and asked you to pay the mortgage?

A. Yes.

Q. What did you say?

A. I said Prospect owned it.

Q. What did you say in behalf of your company?

A. I didn't say anything.

Q. You didn't give him any answer to his demand?

A. No.

30 Q. Sure?

A. Sure.

Q. Weren't you authorized to speak for the company?

A. Yes, but I didn't say anything.

Q. Then, when he asked you to pay this \$25,000 mortgage, or make arrangements to pay it, you made no answer?

A. No.

Q. Because the Prospect Terrace Company owned the property?

A. Yes.

Q. Not only that, but he wrote you on December 22, 1928?

A. He might have.

Q. Did he?

A. He might have.

Q. Have you the letter he wrote you?

A. No.

10

Q. "Dear Mr. Walters: As the year has long since expired for the payment of the \$25,000 first mortgage on the brickyard, I must ask that you make arrangements to pay this off without delay. Very truly yours, Frank W. Harper."

A. I would say that's what it was.

Q. Then he did make several—

A. Not several, once, I think.

Q. But he has made demands on you?

A. That's the last time I heard of the mortgage. 20

BY THE COURT:

Q. You said he came to see you once?

A. That's when he gave me the letter, when he came to see me.

Q. You said he came to see you about the time Mr. Teitz commenced the foreclosure suit?

A. That's when it was.

Q. That couldn't have been, because the foreclosure suit was commenced quite some time prior to the date of that letter? 30

A. After.

Q. I said "prior." The foreclosure suit was commenced prior to September 30, 1928, and that letter is dated December 22nd?

A. That's the only time I know he asked me.

Q. I understood you to say he came to see you at the time the Teitz foreclosure suit was started, and asked you at that time; then he wrote this letter in December?

A. After. I think that's the only time.

Q. That is the only time, you say, he asked you to pay the principal of the \$25,000 mortgage?

A. As far as I know, yes, sir.

10 Q. How many times did he ask you to pay the interest on the \$25,000 mortgage?

A. I suppose a half a dozen times.

Q. What was your reply to those requests?

A. I paid the interest up to when the Prospect took it, and then I didn't pay it any more; we didn't have no funds to pay it.

Q. So when he asked you to pay, the reason you didn't was, that your company couldn't pay it?

A. The company couldn't pay it. I said there
20 might be some deals go through where the company could pay.

Q. Bringing you back to the 30th of September, when you met in my office, you say there was nothing said about the assumption by you of the \$25,000 mortgage?

A. No, sir.

Q. When you showed me the deed in which your lawyer had put a clause that Harper should assume the payment of the mortgages on the Front Street
30 property, didn't I raise some question about that, Mr. Walters?

A. No, sir, you didn't.

Q. Did you know it was in your deed?

A. Did I know? Mr. Pierson drew the deed.

BY THE COURT:

Q. Did you know it was in the deed?

A. Yes.

Q. Then, when you presented your deed to us, your lawyer had already put in over your signature and your wife's signature, an assumption clause that Harper should assume your mortgages?

A. Yes.

Q. You knew that?

A. Yes.

Q. When you saw Harper's deed, you and your lawyer read that deed and you found the assumption clause omitted from that deed. Do you have any 10
recollection of that?

A. No; Mr. Pierson took the deed; I didn't even see the deed.

Q. Did I look at your deed to Harper before—

A. I don't know.

Q. You are sure there was no question raised at that time about the assumption clause?

A. There was not.

Q. Did you instruct your lawyer to draw the deed? 20

A. I don't know.

Q. Don't know whether you did or not?

A. No.

Q. How could Mr. Pierson get the information, if he drew the deed?

A. I don't know.

Q. Did you take him the contract of exchange?

A. I ain't sure; I think he did do it.

Q. Did you instruct him?

A. I didn't instruct him to do anything; he was 30
my counsel.

Q. You were familiar with the contract of exchange?

A. Not so much.

Q. You weren't familiar with it?

A. No.

Q. You signed it?

A. I believe I did.

Q. You knew the terms of it, didn't you?

A. I believe I did.

Q. You knew that it didn't provide that either party should assume any mortgage?

A. I don't know.

BY THE COURT:

Q. You did at the time?

A. I don't know.

10

Q. You did know at the time?

A. I did at the time.

Q. Is there any doubt on that question?

A. No. I hadn't seen—

Q. You know it didn't provide for the assumption on either side?

A. No.

Q. You knew that at the time?

A. I don't believe I did.

Q. You said you did?

20

A. I don't believe I did.

Q. Of course, you knew what you signed? There is no doubt of what you signed, is there?

A. I knew it then. I don't remember how it was put in there. In most all property we make them assume the mortgage, if we can.

Q. It was in your deed at that time, that Mr. Harper should assume your mortgage, but at the same time you were to escape liability on his; you had that in your deed?

A. No; maybe my lawyer done it.

Q. Was it put in by mistake?

A. No.

Q. Was it put in deliberately?

A. I suppose it was, through my attorney.

Q. Why was it put in?

A. He was looking at it.

BY THE COURT:

Q. You knew the contract didn't provide that either side should assume a mortgage, and you knew on that day that the deed you were giving to Mr. Harper provided that he should assume the payment of the mortgage; and you knew that the other deed did not provide that you should assume the payment of a mortgage; why was that?

A. I suppose because the time I put up 10 \$2,000 cash I figured he assumed my mortgages, because the trade wasn't any too good, and I figured he was taking my liability off me.

Q. What do you mean?

A. He had a good deal, or I felt he did, and I felt he ought to take care of the mortgages.

Q. Did you say anything about it to him?

A. The deed was there. 20

Q. Did you say anything about it to him?

A. I don't think I did.

Q. Don't you know?

A. I don't think so.

Q. How did he know that you felt he ought to take care of these mortgages?

A. I guess when he read the deed.

Q. But you said nothing to him about it?

A. No, I don't believe I did.

Q. And you say nothing was said by any- 30 body at that meeting with respect to the fact that the deed you offered provided that Mr. Harper should assume the mortgage and Mr. Harper's deed did not have a provision that you should assume any mortgage?

A. Nothing was said, no, sir. Mr. Pierson was my counsel there.

Q. Weren't you very anxious to put the deal through that day?

A. I don't know that I was.

Q. You don't?

A. I don't know that I was; Mr. Brindley was anxious; he had \$2,000 coming.

Q. You know that Mr. Harper and his wife had signed the deed earlier in the morning in my office?

A. No.

10 Q. You know I had the deed ready for you?

A. No.

Q. You didn't know that?

A. No, sir.

Q. You saw their deed in my office, didn't you?

A. I suppose I did.

Q. You saw that there?

A. I suppose I did.

Q. Wasn't there some question about securing Mrs. Harper's signature to a new deed—

20 A. No, there wasn't.

Q. You are sure of that?

A. Yes.

Q. And that is entirely out of a clear sky?

A. Yes; Mr. Pierson was there closing the deal; I didn't have much to say.

Q. You say Mr. Pierson was there?

A. Yes.

Q. Are you sure Mr. Pierson was there at that time?

30 A. He took the papers with him, yes.

Q. Don't you understand he was there when the agreement was signed?

A. He might have been, I don't know.

Q. Was he in my office when the agreement was signed?

A. I won't be sure.

BY THE COURT:

Q. You have testified very positively that Mr. Pierson was there on this occasion at the closing of this title, and that he took care of your interests, and that you had very little to say, and that he did the talking, that he knew why the deed was made in this way. Do you now say you are not sure whether he was there or not?

A. I don't know.

10

Q. You now say you don't know?

A. I don't know whether it was on that settlement or on the agreement settlement, either one or the other.

Q. You say you are not sure whether he was there September 30th or not?

A. I won't say for sure; either that or when we signed the agreement.

Q. I am not asking you about that.

A. I don't know.

20

Q. You don't know whether he was there or not?

A. I don't know.

Q. You have testified positively that he was there on this settlement on September 30th, and you say now that you are not sure that he was there?

A. No, I'm not sure; my belief is he was there.

30

Q. You say you did promise to assume and pay my mortgage in a year?

A. You said you would leave it stay a year if I would pay the \$1,100.

Q. Didn't you ask me to keep it for a year and I gave you six months?

A. You gave me a year.

Q. On my mortgage?

A. Yes.

Q. Did you pay it in a year?

A. No.

Q. Neither you nor the Prospect Company paid that mortgage until September of this year?

A. That's true.

Q. That's right, isn't it?

A. That is true, but you had money paid, \$4,300,
10 during the time you started foreclosure.

Q. You made partial payments?

A. Yes.

Q. And that is the reason I waited so long?

A. Yes.

ELLIS L. PIERSON, a witness produced on behalf of complainant, being duly sworn, testified as follows:

20 DIRECT EXAMINATION

BY MR. LEVY:

Q. What is your name?

A. Ellis L. Pierson.

Q. What is your profession?

A. The practice of law.

THE COURT: The Court will take judicial notice of the fact that he is a solicitor of this Court.

30 Q. Did you represent Fred P. Walters, one of the defendants, on or about September 30th, 1927, on the occasion of the exchange of real estate with Frank Harper?

A. Yes.

Q. Do you know whether or not you drew the contract of exchange?

A. I did not draw it.

BY THE COURT:

Q. Do you know who did?

A. I don't know who did.

Q. Do you recall being present on September 30, 1927, at the office of James McGoogan, when settlement was made for the exchange of property of Mr. Walters, the Front Street property for Mr. Harper's Princeton Avenue property?

A. Yes. 10

Q. Were you present during the entire transaction?

A. Yes.

Q. Were you there all the time?

A. Yes.

Q. Will you tell us whether or not anything was said at that time with regard to Mr. Walters assuming payment of any mortgage of any kind on Mr. Harper's property, or anything you recall at the settlement that may throw some light on that question? 20

A. The only thing I recall in that regard is, that Mr. McGoogan said he had a mortgage on the property that Walters was purchasing, and he wanted to know how that was to be paid, and Walters said, "I'll pay it" within a certain period; I think he said within a year; but there was nothing said about any formal assumption of that mortgage. It was an informal request on Mr. McGoogan's part as to when he was to get his \$5,000 or \$6,000,—I 30 think it was \$5,000; and Walters verbally promised to pay him within the period stated.

BY THE COURT:

Q. Mr. Pierson, did you draw the deed from Walters to Harper?

A. No, I did not, no.

Q. You are sure of that?

A. Yes, I am.

Q. Then what did you mean when you say you represented Mr. Walters in the transaction; just how did you represent him?

A. Well, I examined the papers submitted to us at that time; I am not sure whether I examined the contract of sale before that or not, I don't think so.

10

Q. Before what?

A. Before the day of the meeting in Mr. McGoogan's office, which was September 30th, at the time of the settlement.

Q. Did you examine the title to the property?

A. Only superficially. No, I didn't.

Q. You had nothing to do with the transaction then, until that date, September 30th?

20

A. I think not. I think Walters spoke to me some time before that, that that was to be the day of settlement of the exchange of property, and he desired that I should attend the settlement with him.

Q. And did he give you the papers at that time?

A. I think I took the deed from Harper to Walters with me from that meeting.

Q. No, I mean before that.

A. No.

30

Q. You didn't draw the deed from Walters to Harper?

A. I did not.

Q. Didn't you see it before you went to the meeting?

A. I think not; Walters may have handed it to me just before we went to the meeting; I am not sure about that.

Q. Mr. Walters has testified that you han-

dled the whole thing for him; that he did not draw the deed. My recollection is, that he said you drew the deed.

A. I looked at the deed, I didn't draw it.

Q. The deed appears to have been executed before you, signed by you as a witness, and acknowledged before you by Mr. Walters and his wife; did you notice that?

A. Yes, now I recollect about this. I didn't draw the deed, and the deed was not signed by Mrs. Walters when we were in McGoogan's office, and Mr. and Mrs. Walters came to my office the day after our meeting in Mr. McGoogan's office, and the deed was there executed; and Mr. Harper on that day, or a day or so later—I think it was on that very day—came to my office and was handed this deed. What refreshes my recollection is, that the date of the acknowledgment is the 1st day of October, the day after our meeting at Mr. McGoogan's office.

Q. Then, I understood you to say you took from that meeting in Mr. McGoogan's office the executed deed from Harper to Walters?

A. Well, I'm not sure; I thought at first I did.

Q. But the deed from Walters to Harper, although not executed and acknowledged by Mrs. Walters, was in evidence present as a draft at least, at the time of the meeting in Mr. McGoogan's office?

A. Yes.

Q. You saw it at that time?

A. Yes.

Q. You knew that deed from Walters to Harper provided for the assumption by Harper of the payment of the mortgage?

A. Yes, I did.

Q. You knew also, that the deed from Harper to Walters, did not contain any such assumption?

A. Yes.

Q. And you knew that the contract of sale did not provide for the assumption by other parties?

A. I've forgotten; I suppose I did know it then.

10

Q. In view of that fact, that the contract of sale did not provide for the assumption of mortgages on either side, and the fact that the deed from Walters to Harper provided for the assumption, and the deed from Harper to Walters did not, you still say that nothing was said at that meeting about that condition?

20

A. I don't think there was, because I remember saying to Walters after the transaction had been completed, that I congratulated him about having a deed of his accepted by Mr. Harper with an assumption clause in, and having not to assume the assumption clause on the brickyard property; I remember speaking of that to Walters after the transaction occurred.

Q. Did you recall who was present at that settlement, outside of yourself and Mr. Walters?

30 A. Mr. McGoogan, Mr. Harper, Mr. Walters; I am not sure whether Mr. Brindley was there or not.

Q. And you say at that transaction no statement was made by Mr. Walters—that at that transaction Mr. Walters did not state that he was to assume the payment of the \$25,000 first mortgage; is that right?

A. He did not.

Q. Was he asked by anyone to assume the payment of that mortgage?

A. No, he was not.

CROSS-EXAMINATION

BY MR. MCGOOGAN:

Q. Don't you recall Mr. Walters asking Mr. Harper to try to get the bank to wait a year on the \$25,000 mortgage?

A. Yes, yes.

Q. And Mr. Harper agreed to get the bank to do that, did he not?

A. I don't know whether he agreed to get the bank not to do it, he agreed to try to get the bank not to do it. 10

Q. Now, you remember that?

A. Yes.

Q. What led up to that conversation about the \$25,000 mortgage?

Well, as I remember, Walters wanted to know when the mortgage was due and when it would be called.

Q. Is that what led up to the agreement, to get Harper to get the bank to wait a year? 20

A. I think so.

Q. Do you recall my reading the deed from Walters to Harper at all in your presence?

A. I don't know; you didn't read it aloud, I am sure.

Q. Do you recall my reading it?

A. I do not.

Q. Do you recall whether I examined it or not?

A. I don't recall.

Q. Do you recall whether I said to Mr. Walters that his deed contained an assumption of mortgages and Harper's did not, and raised the question about that— 30

A. No.

Q. And then the question came up about the paying off of the \$25,000?

A. No, I don't remember that that occurred.

Q. Are you positive that it did not occur?

A. This much I am positive of, that Walters did not agree to assume the mortgage on the Harper property.

Q. Was he asked to?

A. I think not; I am quite sure he was not.

Q. Are you sure there was no conversation about his assuming the mortgage of \$25,000?

A. That is my best recollection, that there was no
10 conversation about it.

Q. You think that is so?

A. Yes, I do.

Q. But there was a conversation about the \$5,000 second mortgage?

A. Yes.

Q. You say Walters verbally agreed to pay that?

A. Yes.

Q. Within a year?

A. Yes. Well, within a period, I think it was a
20 year.

Q. Do you recall his asking me to wait a year, and finally I compromised by saying I would wait six months, telling him my mortgage was due then and I wanted my money?

A. Yes, I remember there was a discussion between you and him about the time you wanted your money.

Q. You are not sure of the periods?

A. I am not sure of the periods, no.

30 Q. Do you recall anything about whether Mrs. Harper was available or not?

A. No.

Q. Do you recall the parties were anxious to put the deal through then and there without waiting another day?

A. Yes; but I also recall that the Walters' deed was not signed at that time by Mrs. Walters when

we were there; whether it was signed by Mr. Walters or not, I am not sure.

Q. You recall the parties were anxious to close?

A. Yes, they were anxious to close quickly; I don't know that they were anxious to close on that day.

Q. But they were anxious to close?

A. Yes.

Q. When did you first discover the reason for your congratulating Mr. Walters?

A. I knew it when I first looked at the paper; I am not sure whether that was at your office or not; I rather think it was. 10

Q. Then, when you examined the paper, when you examined both deeds in my office before the deal was consummated, you discovered that?

A. Yes.

Q. You discovered one contained an assumption and the other did not?

A. Yes.

Q. That was when you examined the deed? 20

A. Yes.

Q. In my office?

A. Yes.

Q. Then there was nothing said by you or me about that at that time?

A. I don't think so.

Q. Or any other time, was there?

A. I don't think so, while the deal was being consummated; you may have spoken about it later.

Q. But at that time nobody said anything about this clause being in one deed and not in the other? 30

A. No.

Q. You don't remember that?

A. No.

Q. Do you think your congratulations were given to Mr. Walters on your way out, on the street, when you left my office?

A. Oh, I don't know.

Q. You don't know where they were given?

A. No, I don't.

Q. Was it just after you left my office and on your way to your office?

A. I am not sure when or where it was.

Q. You have no recollection of that?

A. No, I am not sure; it was very shortly after leaving your office; whether it was that day I am not sure.

10 Q. Well, of course, having discovered this in my office, would you have waited a day or two before congratulating him?

A. Yes, because it didn't greatly surprise me; Walters was taking a property that had no income, and it didn't greatly surprise me that such an exchange took place.

CASE CLOSED.

20

ARGUMENT.

EXHIBIT D-2.

ARTICLES OF AGREEMENT

made the sixteenth day of September in the year One thousand nine hundred and twenty seven.

30 BETWEEN Fred. T. Walters, and Martha Walters, his wife, of the City of Trenton, County of Mercer and State of New Jersey. party of the first part, and Frank W. Harper, and Roberta A. Harper, his wife, of North Pennsylvania Avenue, Morrisville, Pennsylvania. party of the second part;

WITNESSETH as follows: The party of the first part, in consideration of One Dollar, paid by the

party of the second part, the receipt of which by the party of the first part is hereby acknowledged, and also in consideration of the conveyance by the party of the second part of the real property hereinafter mentioned, hereby agrees to grant and convey to the party of the second part, at a valuation for the purpose of this contract of Eighty Thousand (\$80,000) Dollars,

ALL that certain lot tract or parcel of land lying and being in the City of Trenton, County of Mercer and State of New Jersey, known and described as being 212 East Front Street, with a brick store and apartment house thereon erected. All tenancies of the house are monthly. 10

AND the party of the second part, in consideration of One Dollar paid by the party of the first part, the receipt of which by the party of the second part is hereby acknowledged, and also in consideration of the conveyance by the party of the first part of the real property hereinbefore mentioned, agrees to grant and convey to the party of the first part, at a valuation for the purposes of this contract of Sixty Five Thousand (\$65,000) Dollars, 20

ALL those certain lots tracts or parcels of land and premises situate and lying and being in the Township of Lawrence and part in the Township of Ewing, and the County of Mercer and State of New Jersey being approximately 57 acres in total and having a frontage of approximately 12 hundred feet on Princeton Avenue. To be more particularly described as to boundaries in deed that will be delivered by party of the second part to party of the first part, excepting lot No. 360. and lots 341 and 361 and public and private rights in Betts ave. and Oster ave. and rights of present tenants. 30

And the said party of the first part hereby agrees to pay the Brindley Realty Company, the agent a commission of $3\frac{1}{2}$ % of the sale price of their prop-

erty aforesaid, said commission to be paid in consideration of services rendered.

And the said party of the second part hereby agrees to pay the Brindley Realty Company, the agent a commission of 5% of the sale price of their property aforesaid, said commission to be paid in consideration of services rendered.

And the said party of the second part hereby gives the party of the first part the privilege of entering
 10 upon the premises to be conveyed by them to the party of the first part for the purpose of making improvements thereon.

Said premises which are to be conveyed by the party of the first part are to be conveyed subject to the following incumbrances: A first mortgage of Twenty Five Thousand Dollars (\$25,000) and a second mortgage of Twenty Thousand Dollars (\$20,000) making a total of Forty Five Thousand (\$45,000) Dollars.

20 The second mortgage will not mature for at least one and one-half years on the Front St. property.

Said premises which are to be conveyed by the party of the second part are to be conveyed subject to the following incumbrances: A first mortgage of Twenty Five Thousand Dollars (\$25,000) and a second mortgage of Five Thousand (\$5,000) making a total of Thirty Thousand Dollars (\$30,000)

The difference between the values of the respective premises, over and above incumbrances shall
 30 be deemed for the purposes of this contract to be No Dollars Dollars in favor of the party of the part, and the said party of the part agree to pay the same as follows:

Each party to furnish 20 yrs search.

Each of the parties to these presents hereby agrees to convey the property above described, as sold by that party, free from all incumbrances, except as above specified, and to execute, acknowledge and

deliver, or cause to be executed, acknowledged and delivered to the other party, or to the assigns of the other party (the deed to be drawn in each case at the cost of the vendor), a proper warranty deed containing full covenants, duly executed and acknowledged to convey and assure to the grantees an absolute fee of said premises.

Said deeds shall be delivered and exchanged on Saturday the first day of October at 2 o'clock P. M., at the office of Brindley Realty Company No. 222 10 East Hamber Street in the City of Trenton, N. J.

Each of the parties hereto assumes the risk of loss or damages by fire prior to the completion of this contract on the premises owned by them respectively. The rents of the said premises, taxes insurance premiums and interest on mortgage, if any, shall be adjusted, apportioned and allowed up to the day of taking title.

If there be water meters on the premises, the respective sellers shall furnish readings to dates not 20 more than thirty days prior to the time herein set for closing title and the unfixed meter charges for the intervening time shall be apportioned on the basis of such last readings.

All personal property appurtenant to or used in the operation of said premises is represented to be owned by the respective sellers and is included in this exchange.

This contract covers all right, title and interest of the respective sellers, of, in and to any lands lying 30 in the bed of any street, road or avenue, opened or proposed, in front of or adjoining the premises to be conveyed to the centre line thereof, or all right, title, and interest of the respective sellers in and to any awards made or to be made in lieu thereof, and the sellers will execute and deliver to the purchasers, on closing of title or thereafter, on demand, all proper

instruments for the conveyance of such title and the assignment and collection of such awards.

AND IT IS UNDERSTOOD that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

10 WITNESS

Interpretations made	Fred T Walters	(Seal)
before execution	Martha Walters	(Seal)
James McGoogan	Frank W. Harper	(LS)
Wm Brindley	Roberta A Harper	(LS)

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

20

BE IT REMEMBERED, That on this day of September, in the year of our Lord One thousand nine hundred and Twenty-seven, before me, the subscriber, a Notary Public of N J. personally appeared Fred T. Walters and Martha Walters, his wife, and Frank W. Harper and Roberta A. Harper, his wife, who, I am satisfied are the grantors mentioned in the within Instrument to whom I first made known the contents thereof, and thereupon they acknowledged

30 that, they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

Mary A. Flannery
Notary Public of N. J.

PURCHASER Frank W. Harper	
Deposit	
1st Mortgage.....	25,000.00
Interest From Aug. 5, 1927 Oct. 1, 1927.....	229.00
2nd Mortgage (or note).....	20,000.00
Interest From June 29, 1927 to date	306.67
Taxes From Jan 1, to Oct 1st.....	895.19
Int. on Tax.....	15.66
Rent	
Water Rent.....	
Revenue Stamp.....	
Other Adjustment.....	
	46,446.52
Equity	35,390.74
By Cash or Check.....	
	<u>81,837.26</u>

30

20

SELLER Fred T. Walters	
Price	80,000.00
Insurance Adjustment 2 Policies....	450.00
Insurance Adjustment.....	
Water Rent.....	
Note Interest.....	
Tax Adjustment.....	
Revenue Stamp.....	
Rent Miss Moon from Sept, 1 One half month.....	22.50
New Insurance New Policy \$25,000.....	1,125.00
Other Adjustment.....	
Refund on lot sold by Mr. Harper	200.00
Plate Glass Policy.....	26.47
Owners Liability Policy.....	13.29
	<u>81,837.26</u>
	81,837.26

10

EXHIBIT D-3.

Exhibit D-3

85

PURCHASER Fred. T. Walters

Deposit	
1st Mortgage.....	25,000.00
Interest From.....	375.00
2nd Mortgage (or note).....	5,000.00
Interest From.....	1,112.50
Interest on Taxes.....	6.47
Taxes	371.92
Rent	
Water Rent.....	
Revenue Stamp.....	
Other Adjustment.....	
	31,865.89
By Equity.	33,212.06
By Cash or Check Note.....	2,178.68

SELLER Frank W. Harper

Price	65,000.00
Insurance Adjustment.....	
Insurance Adjustment.....	77.95
Water Rent.....	
Note Interest.....	
Tax Adjustment.....	
Revenue Stamp.....	
Rent	
New Insurance.....	
Other Adjustment.....	
	65,077.95
To balance couities.....	

EXHIBIT D-4

Exhibit D-4

MEMORANDUM

ON FINAL HEARING

BUCHANAN, *V. C.* (Orally)

Complainant sues to recover deficiency on bond of defendant Meano, after foreclosure of mortgage. Defendant Walters was a subsequent grantee, and Harper a still later grantee, each of whom, by clause 10 in his deed, assumed payment of the mortgage debt.

Harper seeks to avoid liability on his assumption clause, setting up that Walters orally agreed to assume and pay the mortgage encumbrances on the premises conveyed by Harper to Walters; that Walters failed to perform this agreement; that by reason of such failure Harper is excused from liability on his covenant to assume and pay the mortgage encumbrances on the premises conveyed to Harper by Walters. 20

There is no question but that the original contract of sale did not provide for the assumption of the payment of the mortgages on either side. There is no question but that the deed from Walters to Harper, as actually exchanged, did provide that Harper assumed the payment of the mortgages, and the deed from Harper to Walters contained no similar provision.

It has been testified to by Mr. Harper and Mr. Brindley that there was an oral promise by Mr. 30 Walters to assume the payment of the mortgages on the property conveyed by Harper. It has been testified to just as positively by Mr. Walters and Mr. Pierson that there was no such promise by Mr. Walters. The burden of proof is, of course, upon the complainant, and upon weighing that testimony the burden is not sustained by the complainant.

Both witnesses on the part of the complainant are

interested. Both witnesses on the part of the defendant are interested. The weight to be accorded to them both, so far as I view it, is exactly the same. It perhaps even goes a little further than that. Mr. Pierson testified that he had in mind during the entire conversation and the entire conference the fact that the deed offered by Walters provided for the assumption by Harper of the mortgage and the Harper deed did not have such a provision, and that

10 after the transaction was closed he congratulated Mr. Walters upon having been successful in having that exchange of deeds made. I cannot recall the exact statement, but part of the testimony of Walters was to the same effect, that he knew that this clause was in the deed which he was offering, and that he thought it was only fair that the thing should go through in that way (as I recall what he said), because of something about a \$2,000.00 difference that he was turning over to Harper. That was not clearly

20 explained, but the pertinent part of it was that he knew this situation existed and he thought it was fair that it should be so; so that they both had that in mind during the whole conference. I think the explanation must be that Walters' conversation about his paying the mortgage or about when he would be called upon to pay the mortgage or mortgages, was interpreted by Mr. Brindley and Mr. Harper as a promise to pay and assume those mortgages. I cannot interpret them that way myself in view of the

30 positive denial of Mr. Walters and Mr. Pierson. Mr. Walters, of course, was interested concerning the time he would be called upon to pay both mortgages, because he knew if they were due he might be called upon to pay them at any time and if he did not pay them, of course, he would have to submit to foreclosure.

The promises he made to pay the \$5,000.00 mortgage I can only view, in the light of the testimony,

as a promise made by Mr. Walters to Mr. McGoogan not as the solicitor of Mr. Harper, but to Mr. McGoogan individually as the holder of a mortgage past due, who wanted his money and who finally agreed to give the further time of six months within which to pay it. And that was the contract,—if it was a contract,—it was between the mortgagee and the holder of the mortgaged premises, not between the grantor in the deed and the grantee.

The conclusion is not one at which I have arrived 10
with any enthusiasm, but it is the only conclusion
which I think is justified by the evidence before me.
It is a case where Walters “put one over” on Harper,
—(to use the vernacular),—but it does not appear
that there was any fraud. There was no duty incum-
bent upon Walters, no legal duty, no duty in equity,
for him to apprise Harper that the clause was in the
deed,—(as a matter of fact, from Harper’s testimony
and from Brindley’s testimony, they both were ap-
prised and knew what was in the deed). There was 20
no duty upon Mr. Pierson to bring it to their atten-
tion or to insist that the assumption clause be put in
the agreement. Both sides were represented by
counsel; neither counsel was assuming to act for
both.

It results that the defendant Harper must fail on
his counterclaim and his defence and that complain-
ant is entitled to decree against all three defendants
for the proven deficiency of \$8,677.44. The liability
of defendants, amongst themselves, is of course in 30
accordance with the universe order of alienation.

Costs and \$100.00 counsel fee will be awarded
complainant against Harper, and \$50.00 counsel fee
against Walters. No other allowances.

FINAL DECREE

Filed October 1, 1929.

This cause coming on to be heard in the presence of I. Herbert Levy, of the firm of Forman and Levy, solicitors for and of counsel with complainant; Louis Josephson, appearing for Daniel A. Spair, solicitor of the defendant, Joseph C. Meano; Alexander

10 Trapp, solicitor of the defendant, Fred T. Walters, and James J. McGoogan, solicitor of the defendant, Frank W. Harper, and the court having examined the pleadings and having taken proofs orally and in open court and having heard and considered the arguments of counsel thereon, and it appearing to the satisfaction of the court that the defendant, Joseph C. Meano, being indebted to the complainant in the sum of \$20,000, executed to him on June 30, 1925, a bond of that date, to secure that sum, payable

20 on the 30th day of June, 1928, with interest at the rate of 6% per annum, payable semi-annually from the date of the bond, which bond was secured by a purchase money mortgage given to said complainant by the defendant, Joseph C. Meano; that thereafter the said defendant, Joseph C. Meano, and Lillian Meano, his wife, conveyed the said mortgaged lands and premises to the defendant, Fred T. Walters, who assumed and undertook the payment of the said mortgage; that thereafter the said defendant, Fred

30 T. Walters, and Martha Walters, his wife, conveyed the said lands and premises to the defendant Frank W. Harper, who assumed and undertook the payment of said mortgage; that thereafter said complainant brought suit in this court against Frank W. Harper, Fred T. Walters and Joseph C. Meano, and others, to foreclose the aforesaid mortgage, and such proceedings were had in said case that the said lands and premises were sold by the Sheriff of the County

of Mercer, pursuant to the directions of a writ of *Fieri Facias* issued out of this court in said cause to make the sum of \$20,831.52 and also Sheriff's fees and costs amounting to \$345.92; that at the aforesaid sale a deficiency arose of \$8,677.44 with interest from the 28th day of November, 1928; that the said complainant has demanded of the defendants, Frank W. Harper, Fred T. Walters and Joseph C. Meano, the payment of said deficiency, but that said defendants and each of them have failed and refused to pay the same or any part thereof to said complainant; that no part of said deficiency of \$8,677.44 with interest thereon as aforesaid has been paid, but that the whole amount thereof remains due and owing to said complainant and that, as between said defendants, the defendant, Frank W. Harper, is primarily liable for said deficiency, the defendant, Fred T. Walters, is next liable, and the defendant, Joseph C. Meano, is last liable;

It is, on this first day of October, 1929, ORDERED, ADJUDGED and DECREED, that the defendants, Frank W. Harper, Fred T. Walters and Joseph C. Meano, pay to the complainant, Samuel Teitz, the sum of \$8,677.44, together with interest thereon from the 28th day of November, 1928, being the amount due to said complainant for said deficiency arising on the sale under foreclosure of the mortgaged lands and premises described in the bill of complaint herein, as aforesaid, and that the defendant, Frank W. Harper, pay to the complainant, Samuel Teitz, the costs of this suit to be taxed, including a counsel fee of One Hundred Dollars which is hereby allowed to said complainant; and that the defendant, Fred T. Walters, pay to the complainant, Samuel Teitz, a counsel fee of Fifty Dollars, which is hereby allowed to said complainant;

It is further ordered that in case the said defendants should fail to pay the said sum of \$8,677.44,

with interest as aforesaid; and the said defendant, Frank W. Harper, should fail to pay the said taxed costs, including a counsel fee of \$100.00 as aforesaid, and the said defendant, Fred T. Walters, should fail to pay a counsel fee of \$50.00 as aforesaid, within ten days after service upon the respective solicitors of said defendants of true but uncertified copies of this decree, and service upon the solicitor of the defendant, Frank W. Harper, of a true but uncertified
10 copy of the said taxed costs, execution issue against the goods and chattels, lands, tenements, hereditaments and real estate of said defendants to make said sums, according to the practice of this court.

IT IS FURTHER ORDERED, ADJUDGED and DECREED, that as between the said defendants, the defendant, Frank W. Harper, is primarily liable to pay the aforesaid sum of \$8,677.44, with interest from November 28, 1928, and the defendant, Fred T. Walters, is next liable, and the defendant, Joseph C.
20 Meano, is last liable for the payment of said sum; and that the defendant, Frank W. Harper, is solely liable to pay the taxed costs and a counsel fee of \$100.00 as aforesaid, and the defendant, Fred T. Walters, is solely liable to pay to complainant a counsel fee of \$50.00 as aforesaid:

IT IS FURTHER ORDERED that true but uncertified copies of this decree be served on the respective solicitors of said defendants, and a true but uncertified copy of the said taxed costs be served on the
30 solicitor of the defendant, Frank W. Harper, within five days after the date hereof.

Respectfully advised,

MALCOLM G. BUCHANAN,

V. C.

E. R. WALKER,
C.

AMENDED NOTICE OF APPEAL OF
FRANK W. HARPER.

Filed October 10, 1929.

The defendant Frank W. Harper hereby appeals from the final decree made by the Chancellor in the above-mentioned cause on October 1, 1929, on the advice of Vice Chancellor Malcolm G. Buchanan, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in all causes. 10

JAMES J. MCGOOGAN,
*Solicitor for and of Counsel with
Defendant Frank W. Harper.*

Dated, October 10, 1929.

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

JAMES J. MCGOOGAN,
*Of Counsel with Defendant
Frank W. Harper.*

Service of this notice is hereby acknowledged this 23d day of October, 1929.

FORMAN & LEVY,
Solicitors of Complainant.

DANIEL A. SPAIR, 30
*Solicitor of Defendant,
Joseph C. Meano.*

New Jersey Court of Errors and Appeals

Between
SAMUEL TEITZ,
Complainant-Appellee,
10 and
JOSEPH C. MEANO, *et al,*
Defendants-Appellants. } ON APPEAL FROM
THE COURT OF
CHANCERY. PETI-
TION OF FRANK
W. HARPER.

Filed October 23, 1929.

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

20 The petition of Frank W. Harper, the appellant
in the above entitled cause, respectfully shows that:

1. Petitioner finds himself aggrieved by a final
decree made in the Court of Chancery by His Honor
Edwin Robert Walker, Chancellor of the State of
New Jersey, bearing date October 1, 1929, in a cer-
tain cause in said Court of Chancery wherein the
said Samuel Teitz was complainant and Joseph C.
30 Meano, Fred T. Walters and appellant Frank W.
Harper, were defendants, in this respect, to wit, that
the said decree adjudges that appellant Frank W.
Harper pay to appellee Samuel Teitz \$8,677.44 with
interest from November 28, 1928, with costs to be
taxed, including a counsel fee of \$100.00, and that
appellant Frank W. Harper is primarily liable to
pay said sums.

2. Petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that it imposes on appellant Frank W. Harper the burden of such payments, contrary to law and equity, whereas the decree should have, in equity, relieved appellant Frank W. Harper from any and all liability to appellee.

3. Petitioner therefore prays that the said decree 10
of the said Chancellor may be, in the particulars aforesaid, 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.

JAMES J. MCGOOGAN,
Solicitor for and of Counsel with
Appellant Frank W. Harper.

Service of this petition of appeal is hereby acknowl- 20
egded this 23d day of October, 1929.

FORMAN & LEVY,
Solicitors and of Counsel
for Appellee.

DANIEL A. SPAIR,
Solicitor of Joseph C. Meano.

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

30

FRANK H. LAWTON, being duly sworn according to law, on his oath says:

1. I am a clerk in the office of James J. McGoo-
gan, solicitor of the appellant in this case, and on
the 23d day of October, 1929, between the hours of

96 *Answer of Samuel Teitz to Petition of Appeal*

10 o'clock in the morning and 4 o'clock in the afternoon, I served this petition of appeal on Alexander Trapp, Esq., solicitor of defendant Fred T. Walters by leaving a true copy thereof with the person in charge of his law office, in No. 148 East State Street, Trenton, N. J.

Subscribed and sworn to }
before me this 23d day } FRANK H. LAWTON.
10 of October, 1929. }

MABEL G. SHOEMAKER,
A Notary Public of New Jersey.

ANSWER TO PETITION OF APPEAL.

Filed November 19, 1929.

20 The answer of Samuel Teitz, the above named appellee, to the petition of appeal of Frank W. Harper, the above named appellant.

This 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 a decree was, on October 1, 1929, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance
30 and form of said decree, this appellee begs leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said decree is agreeable to equity; and he prays that the same may be affirmed with costs to be taxed in favor of this appellee.

FORMAN & LEVY,
*Solicitors for and of Counsel
with Appellee.*

ANSWER OF THE DEFENDANT, JOSEPH
C. MEANO.

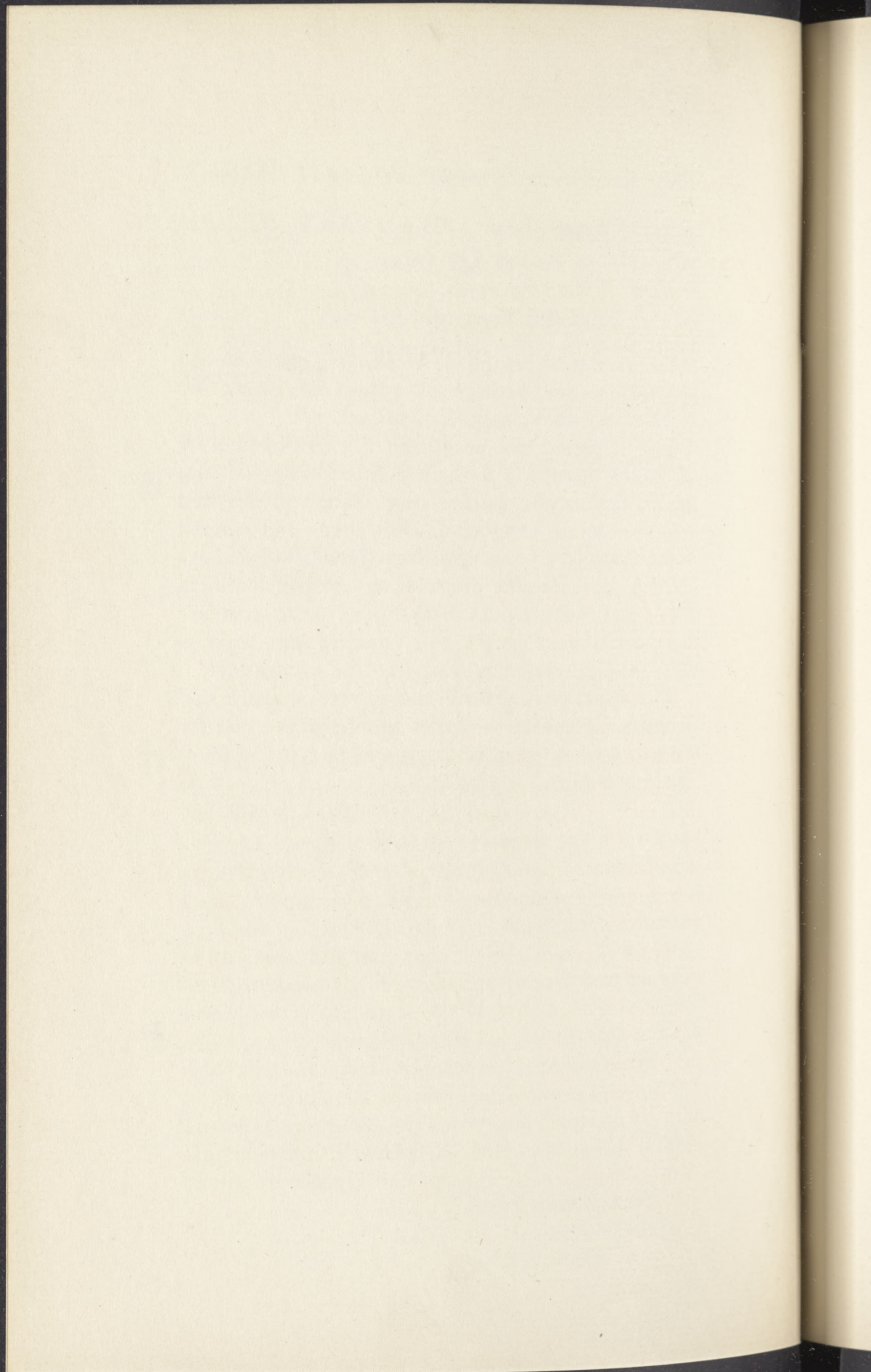
Filed November 25, 1929.

The answer of Joseph C. Meano, the above named appellee, to the petition of appeal of Frank W. Harper, the above named appellant.

This 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 a decree was on October 1, 1929, made and entered in the Court of Chancery of New Jersey in the above entitled cause, for the purposes in said petition mentioned and as therein set forth, but as to the substance and form of said decree, this appellee begs leave to refer thereto when the same shall be produced. 10

This appellee is advised and believes that the said decree is agreeable to equity and he prays that the same may be affirmed with costs to be taxed in favor of this appellee. 20

DANIEL A. SPAIR,
*Solicitor for and of Counsel with
Appellee, Joseph C. Meano.*



the payment of the \$5,000 second mortgage on the property that was conveyed by Harper to Walters.

This was a question of fact for the Vice-Chancellor to decide and his conclusion was that the promise to pay the \$5,000 mortgage was not made to Harper, but was made "to Mr. McGoogan, not as the solicitor of Mr. Harper, but to Mr. McGoogan individually as the holder of a mortgage past due who wanted his money." It was an arrangement made between the purchaser and the holder of the mortgage, and not an arrangement made between the purchaser and the seller, namely, Walters and Harper.

We submit without further argument that the conclusion of the Vice-Chancellor on the questions of facts was correct and that there is ample evidence in the case to justify his conclusion.

The third contention raised by the appellant is that the original contract of exchange entered into by Harper and Walters did not provide for either party to assume the payment of the mortgages on the respective properties and that the assumption provision set forth in the deed from Walters to Harper was without consideration and could not be enforced against Harper by either Walters or the appellee, Teitz, for the reason that the appellee, Teitz, has no greater rights against Harper than Walters has.

The reasons advanced by Harper for his accepting the deed from Walters with the assumption provision set forth therein are: first, Harper could not insert an assumption provision in the deed from himself and his wife to Walters owing to the fact that Mrs. Harper was not available on that day to re-acknowledge the deed with an assumption provision set forth therein; second, that Walters, according to

Harper, verbally assumed the mortgages on his, Harper's, property; third, that he was anxious to have the matter settled on that day; and fourth, that his attorney, Mr. McGoogan, told him it was all right.

The testimony, however, shows that Walters' deed was not signed by his wife at the time it was presented on September 30, 1927, at Mr. McGoogan's office, and that the transaction was completed on said date with the exception of the delivery of the Walters deed to Harper, which took place the next day. There was no testimony that Mrs. Harper would not have been available the next day to reacknowledge the Harper deed to Walters with an assumption provision therein, as delivery of the same could undoubtedly have taken place the next day, as was done with the Walters deed.

The testimony expressly shows that no request or any suggestion of any kind was made that Mr. Walters execute a separate written assumption agreement.

Harper does not raise any question of fraud or mistake. He admits that both he and his counsel, Mr. McGoogan, accepted the Walters deed with full knowledge of the fact that the assumption provision was therein set forth.

In the case of *Ludlun vs. Pinckard*, 304 Ill., at page 452, the Court said: "While the general rule is that if the grantee takes and claims title under a deed he takes it by the terms of the deed, yet in order that a grantee be held personally liable for the payment of an encumbrance against the property it must be shown in addition to having accepted the title to the property that he assented to the condition of the

deed relating to the personal assumption of the mortgage.”

In the case of *DeMaris vs. Rodgers*, 110 Minn., at page 51, the Court said: “There can be no question that if the defendant accepted the deed containing the assumption clause with knowledge of its presence and without protest or objection, it would be binding upon him though he had not previously agreed to pay the outstanding debt.”

In the case of *Follansbee vs. Johnson*, 28 Minn., at page 313, in discussing this question, the Court said: “Assuming that the grantor prepared the deed and inserted the clause, and that the clause was contrary to what had been agreed on, that alone would not be fraud to avoid the contract; for, if the grantee accepted the deed as prepared he was bound by it as fully as though it were drawn precisely as the parties agreed on.”

The settlement sheet that was offered in evidence as Exhibit D-3, shows that the \$20,000 mortgage on the property which was conveyed by Walters to Harper was deducted from the purchase price. A purchaser who assumed the mortgage on the land and deducted the amount thereof from the purchase price could not avoid payment of the mortgage on the ground that there was no consideration for the same. *People's Trust Co. vs. Dubell*, 165 N. Y. S. 813.

The contract that was offered in evidence over the objection of counsel for appellee, Teitz, shows that the transaction was to take place on October 1, 1927, and the testimony shows that the settlement, with the exception of the delivery of the deed from Walters to Harper, actually took place on September 30, 1927. The testimony of both Harper and Brindley shows that they were anxious to have the settle-

ment take place and were willing to have it take place on that date even though the Walters deed was not actually delivered until the next day. Walters' testimony (page 70, line 5, State of the Case) shows that he was not particularly anxious for the settlement to take place on that date, but that Brindley was for the reason that "he had \$2,000 coming." What Walters meant was that Harper had this money coming and the settlement sheet, Exhibit D-3, actually shows that \$2,178.68 was paid by cash or check. Walters was under no duty or obligation to pay the same before October 1, 1927, and his payment prior to the date of settlement fixed in the agreement was ample consideration for the assumption covenant in his deed to Harper, so it cannot be said that Harper did not receive any consideration.

The testimony shows that Walters' land was improved property having an income, whereas Harper's was unimproved property without any income, and that Walters, who was also making a cash payment, thought it only fair that Harper should accept the deed with the assumption covenant, and the acceptance of the same by Harper with full knowledge of the assumption covenant in the deed was an acceptance of Walters' offer to deliver a deed with an assumption covenant and all prior negotiations and contracts of the parties merged therein.

In the case of *Slocum vs. Bracey*, 55 Minn., at page 252, the Court said: "No rule of law is better settled than that where a deed has been executed and accepted as performance of an executory contract to convey real estate, the contract is *functus officio*, and the rights of the parties rest thereafter solely on the deed. This is so although the deed thus accepted varies from that stipulated for in the contract, as

where the vendee accepts a deed from a third party in lieu of the deed of his vendor."

The case of *Schaus vs. Henry*, 89 Law, 607, cited in appellant's brief, can be distinguished from the present case in that there was no consideration moving from the party who was to receive the benefit of the promise, and in the case of *Clyne vs. Helmes*, 61 Law, 358, in that the landlord did not receive any consideration from the third party to whom he is alleged to have made the promise to perform certain acts. The appellee, Teitz, in this case does not claim that he gave to the appellant any consideration for the assumption provision, but that there was consideration for the same between Harper and Walters and that the suit in Chancery was instituted against Harper, *et al.*, under the doctrine laid down in the case of *Green vs. Stone*, 54 Equity, 390, which doctrine is as follows: "The principle on which the mortgagee in such cases is entitled to enforce the obligation of the grantee is, that by the acceptance of a deed containing an assumption of the mortgage debt, the grantee becomes the principal debtor—the liability of the grantor as between the parties being that of a surety only; and by a well-settled doctrine of equity the mortgagee as a creditor may, by way of subrogation, have the benefit of all collateral obligations which a person standing in the situation of a surety for another holds for his indemnity."

There are a number of cases in New Jersey, such as *Bull vs. Tidsworth*, 29 Equity, page 73, where a grantee has been relieved from liability when the assumption provision was set forth in the deed by reason of fraud or without the knowledge or assent of the grantee, but counsel has been unable to find any cases where the grantee has been able to avoid liability where the deed was accepted with knowl-

edge that the assumption provision was set forth therein, provided, of course, there was no break in the chain of assumptions.

Counsel for appellee further contends that the answer and counterclaim filed by Harper only raises one issue, viz.: that Walters had assumed the payment of the mortgages on the Harper property and had failed to carry out his assumption agreement; consequently, Harper was under no duty to Walters or Teitz to fulfill the assumption agreement set forth in the deed from Walters to Harper. At the trial of the case, Harper introduced an additional defense which was not set forth in his pleadings, namely, that the contract of exchange between Walters and Harper did not require either party to assume the payment of the respective mortgages and that the covenant of assumption set forth in the deed from Walters to Harper was without consideration, thereby precluding Walters from enforcing the same, and that Teitz could not enforce the same if Walters was precluded from doing so.

Every material allegation must be put in issue by the pleadings so that the parties may be duly apprised of the essential inquiry and may be enabled to collect testimony and prepare their defense accordingly. The rule is well settled that the parties are confined to the issues made by the pleadings.

Counsel for Teitz at the trial objected when the original contract of exchange was offered in evidence and the objection was noted of record. (Page 40, line 3, State of Case.)

While the admission in evidence of the original contract of exchange did not cause the appellees any harm in the Court of Chancery, nevertheless the original contract is the foundation of one of the points now raised by the appellant, namely, that it

did not obligate either party to assume any mortgages and that Harper's assumption therefore was without consideration. Had this not been admitted in evidence, the Vice-Chancellor's determination of the issue would have been the same and it would now have been impossible for the appellant to raise, on appeal, the question of lack of consideration for the assumption covenant.

It is respectfully submitted that the decree of the Court of Chancery be affirmed.

FORMAN & LEVY,
Solicitors for and of Counsel with
Appellee, Samuel Teitz.

ALEXANDER TRAPP,
Solicitor for and of Counsel with
Appellee, Fred T. Walters.

DANIEL A. SPAIR,
Solicitor for and of Counsel with
Appellee, Joseph C. Meano.

New Jersey Court of Errors and Appeals

SAMUEL TEITZ, <div style="text-align: right; padding-right: 20px;"><i>Appellee,</i></div> <div style="text-align: center; padding: 0 20px;">v.</div> JOSEPH C. MEANO <i>et al.</i> , <div style="text-align: right; padding-right: 20px;"><i>Appellees,</i></div> <div style="text-align: center; padding: 0 20px;">and</div> FRANK W. HARPER, <div style="text-align: right; padding-right: 20px;"><i>Appellant.</i></div>	}	ON APPEAL FROM CHANCERY. BRIEF FOR APPELLANT.
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Joseph C. Meano took title from Samuel Teitz to an apartment house on Front Street, in Trenton, and gave to Teitz a purchase money mortgage securing Meano's bond for \$20,000.00. Meano conveyed the premises to Fred T. Walters, who assumed in the deed the payment of that mortgage and another for \$25,000.00.

Frank W. Harper owned a tract of land near Trenton, at one time a brick yard, on which were two mortgages, one for \$25,000.00 held by the First National Bank of Trenton, and the other for \$5,000.00 held by James J. McGoogan.

Harper and Walters agreed to exchange these respective properties, and an agreement of exchange (Exhibit D-2) was executed.

This agreement contained no provision that either grantee should assume the mortgages on his grantor's land, nor was there any contemporaneous verbal agreement to that effect.

The parties met in McGoogan's office to effect the exchange of deeds. In the deed from Walters to

Harper there had been inserted by the scrivener, without the consent of Harper, a provision that Harper should assume and pay the mortgages on Walter's property. There was no such clause in Harper's deed to Walters as prepared by Harper's attorney.

Later Teitz foreclosed the \$20,000.00 mortgage on Harper's Front Street property. The price fetched at the sheriff's sale was \$12,000.00 and there was accordingly a deficiency of \$8,677.24, to recover which Teitz filed in Chancery his bill against Harper, Walters and Meano, alleging that Meano was liable as obligor on the bond for the deficit, and that Harper and Walters were also liable under the assumption clauses in their title deeds.

Walters did not thereafter pay the interest on the mortgage for \$25,000.00 on the brick yard, but Harper paid it, and the bank mortgagee held Harper's note for \$25,000.00, the mortgage being collateral security for the note.

Walters did not pay the McGoogan mortgage in full within the agreed space of one year, and not until after the deficiency bill was filed and shortly before the final hearing.

Harper contended below that there was a verbal agreement on the exchange of deeds, to the effect that Walters agreed to assume and pay the two mortgages on the brick yard, if the two mortgagees granted Walters a period of grace, which was done. Harper's testimony to that effect was supported by the witness Brindley, while Walters denied in toto, and his attorney, Ellis L. Pierson, Esq., denied in part, that such a verbal agreement was made, and the court below found that Harper had not sustained the burden of proof.

The proof that Harper sought to establish was, first, that there was a verbal assumption of the brick yard mortgages which had not been fulfilled when

the suit for deficiency was filed, and second, that there was no consideration for Harper's assumption agreement, and consequently, if he established either contention the mortgagee Teitz had no legal or equitable right to recover from Harper on the assumption agreement, because the mortgagee was not privy to the agreement to assume and pay, and should look to the original obligor on the bond and Walters.

Exhibit D-1 is the deed from Walters to Harper, and a copy of it is annexed to the bill of complaint. It is copied in the State of the Case, and the assumption agreement begins on line 27, page 16.

The bill was filed against Meano, Harper and Walters, and Meano has answered the petition of appeal, but Walters has not.

There was some conflict of testimony on the question of the verbal agreement that Harper contended was made by Walters just before title under the exchange contract passed, but appellant contends that the burden of proof was fully borne by Harper and his witness Brindley, by the failure of Walters to testify positively in denial, and by the fact that Harper kept his promise to have the bank and McGoogan forbear foreclosure for the periods of grace which Walters sought at the exchange.

Harper testified that Walters had agreed at the exchange conference, to get a period of grace of one year on the Front Street mortgage, but it appeared (page 50, line 12, Case) that Teitz demanded payment of his mortgage before that year expired.

Harper's contention that an agreement to assume and pay is sustained by appellant's witness Ellis L. Pierson (page 78, line 13, of Case) where he testified that Walters agreed at the exchange conference to pay the McGoogan mortgage in a year, although he says that "there was nothing said about any formal assumption of that mortgage." Appellant's contention here is that an agreement to pay is tantamount

to an agreement to assume and pay. 41 C. J., p. 721, sec. 767.

Again, on page 76, line 17, of the Case, Mr. Pierson said, in answer to the Vice Chancellor's question, "I don't think there was" anything said at that meeting about that condition.

But, Mr. Pierson (page 73, line 21, and on page 78, line 13, of the Case, said that Walters did agree to pay the McGoogan mortgage within a year.

Harper and Walters having already agreed, in a binding and enforceable written agreement of exchange, to make conveyances, one to the other, with no provision in it that either should assume payment of the other's mortgage debts, the provision in Walters' deed to Harper, gratuitously inserted by Walters, with no reciprocal obligation in Harper's deed to Walters, created a situation where Harper is held by the decree to pay the debt of others, namely, Meano, the obligor on the bond, and Walters, who assumed payment of the mortgage in the deed from Meano to Walters.

Such a promise to pay the debt of another, must be supported by consideration. *Schaus v. Henry*, 89 L. 607; *Glyne v. Helmes*, 61 L. 358.

If, therefore, there was no consideration between Harper and Walters for the mortgage assumption agreement, Teitz, the third party, cannot enforce the alleged agreement of Harper to assume.

The decree in Chancery thrusts on Harper the inequitable burden of paying not only the deficiency decree for the Front Street property mortgage, but also leaves him as the principal debtor to the bank on the \$25,000.00 mortgage on the brick yard, and Walters gets out free.

If Walters had sued Harper on the covenant to assume, Harper's defense to such an action would have been good, on the ground that there was no consideration for the promise, and accordingly the

mortgagee's right to recover from Harper rose no higher than that of Walters. Therefore the defense of *nudum pactum* in a suit brought by Walters against Harper is equally good in the pending case.

It is obvious that Harper received nothing for his assumption agreement from Walters, or any one else. All that Harper and Walters were obliged to do, under the exchange agreement, was to convey their respective properties to the other. Neither could have lawfully imposed any liability on the other beyond those reciprocal obligations contained in the contract of exchange.

The testimony of Mr. Pierson clearly proves, with that of Harper and Brindley, that there was an oral agreement by Walters to pay one of the two Harper mortgages, that held by McGoogan. Therefore, if an agreement to pay is equivalent to one to assume and pay, there was, at the beginning of the deficiency suit, a failure by Walters to keep his promise to pay the McGoogan mortgage, and consequently, Teitz had no legal or equitable right to sue Harper on the covenant to assume, because as between Harper and Walters there was a discharge of their mutual undertakings at least in so far as Walters' failure to pay the McGoogan mortgage is concerned. This situation is fully covered by the cases cited below.

Failure of consideration releases grantee from an agreement to assume a mortgage debt. 41 C. J. 727, sec. 774.

Parol proof is admissible, where a third party not privy to the contract of assumption, seeks to take advantage of its terms. *Nebraska University v. Smith*, 113 Nebr. 208, 202 N. W. 625.

"If the liability of the subsequent purchaser to his grantor to indemnify him against the mortgage debt, be extinguished as between themselves by a reconveyance before bill for foreclosure filed, the contract of indemnity being thereby put an end to by the act

of those who were parties to it, the mortgagee will not be entitled to a decree for a deficiency against such purchaser, founded on such a stipulation in his deed." *Crowell v. Hospital*, 27 E. 650.

"Mortgagee held not entitled to recover deficiency remaining after foreclosure of mortgage, from grantees of mortgagor, by virtue of grantees' retention out of purchase price of amount of money representing mortgage, where there was no legal assumption of mortgage debt by grantees." *Friedman v. Zuckerman*, 145 Atl. 541.

"The contract being with the grantor for his indemnity, may be released or discharged by him at any time before the mortgagee proceeds to enforce his rights against the grantee; but if at the time suit is brought by him, the obligation of the grantee to pay the mortgage debt is in existence undischarged, his remedy against the grantee is complete." *Green v. Stone*, 54 Eq. at page 390.

"1. A covenant by a grantee of mortgaged premises to assume and pay the mortgage debt contained in his deed of conveyance, is a contract with his grantor, only for the indemnity of the latter, and may be released and discharged by him.

"2. After a release by the grantor of the covenant to assume and pay the mortgage debt, if before bill filed, the mortgagee cannot have the benefit of the grantee's contract of assumption, to found on it a decree against the latter for a deficiency, unless, before the release was executed, the mortgagee had acquired an equitable right in the contract, or the release be impeached as being made in fraud of creditors." *Youngs v. Trustees*, 31 Eq. 290.

It is respectfully submitted that the decree of the Court of Chancery be reversed.

JAMES J. MCGOOGAN,
Solicitor and of Counsel with
Appellant, Frank W. Harper.



