

INDEX

	PAGE
Notice of Appeal to Court of Errors and Appeals	1
Amended Notice of Appeal to Court of Errors and Appeals	2
Petition of Appeal	3
Bill of Complaint	5
Answer and Counterclaim	15
Replication to Answer and Counterclaim of Defendant Antonio Marrano	21
Decree <i>Pro Confesso</i>	22
Order of Reference	24
Final Decree	25
Testimony	29
Court's Conclusions	88
Stipulation	103

TESTIMONY FOR COMPLAINANT.

Vincenzo Testa:	
Direct	31, 52
Cross	39
Mitchell Cahn:	
Direct	39
Bertha Horn:	
Direct	70
Otto A. Thie:	
Direct	71

TESTIMONY FOR DEFENDANT.

Antonio Marrano:	
Direct	81
Cross	83

COMPLAINANT'S EXHIBITS.

	Offered Page	Printed Page
C-1.—Bond, Testa to New City Building & Loan Association ..	30	104
C-2.—Mortgage, Testa to New City Building & Loan Association ..	31	108
C-3.—Application for Loan by Vin- cenzo Testa	31	116
C-4.—Application for Second Mort- gage by Vincenzo Testa	32	118
C-4A.—Check, New City B. & L. Assn. to Mitchell Cahn, April 29, 1927	42	119
C-5.—Check, New City B. & L. Assn. to J. J. Reitman, April 29, 1927	42	120
C-6.—Check, New City B. & L. Assn. to J. J. Reitman, April 29, 1927	42	121
C-7.—Check, New City B. & L. Assn. to Maurice R. Seiden, April 29, 1927	42	122
C-8.—Abstract of B. & L. Pass Book of Defendant Testa	50	123
C-9.—Statement of Payments sent to Defendant Testa	55	124
C-10.—Certificate of Tax and Water Search of City of Jersey City ..	63	125

DEFENDANT'S EXHIBITS.

D-1.—Bond, Vincenzo Testa to Antonio Marrano, February 2, 1926	82	126
D-2.—Mortgage, Testa to Marrano, February 2, 1926	82	127

Notice of Appeal to Court of Errors
and Appeals.

(Filed December 31, 1930.)

In Chancery of New Jersey

10

Between

NEW CITY BUILDING AND LOAN
ASSOCIATION, a corporation of
the State of New Jersey,

Complainant,

On Bill, &c.

and

20

VINCENZO TESTA, *et al.*,
Defendants.

The complainant, New City Building and Loan Association, hereby appeals from the final decree made and entered herein on the 30th day of July, 1930, by the Chancellor, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

30

MITCHELL CAHN,
Solicitor and of counsel
with complainant.

Dated December 30, 1930.

Jersey City, N. J.

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

40

BENJ. GROSS,
Of Counsel with Complainant.

**Amended Notice of Appeal to Court of
Errors and Appeals.**

(Filed January 7, 1931.)

IN CHANCERY OF NEW JERSEY.

10

Between

NEW CITY BUILDING AND LOAN
ASSOCIATION, a corporation of
the State of New Jersey,

Complainant,

and

VINCENZO TESTA, *et al.,*

Defendants.

} On Bill, etc.

20

The complainant, New City Building and Loan Association, hereby appeals from the final decree made and entered herein on the Thirtieth day of July, 1930, by the Chancellor on the advice of Vice Chancellor John J. Fallon, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

30

MITCHELL CAHN,
Solicitor and of counsel
with complainant.

Dated January 6th, 1931.

Jersey City, N. J.

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

BENJ. GROSS,
Of Counsel with Complainant.

40

Petition of Appeal.

(Filed January 10, 1931.)

**NEW JERSEY COURT OF ERRORS AND
APPEALS.**

Between

NEW CITY BUILDING AND LOAN
ASSOCIATION, a corporation of
New Jersey,

Complainant-Appellant,

and

VINCENZO TESTA, *et ux., et al.,*
Defendant-Respondent.

On Appeal from
The Court of
Chancery.

10

20

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

The petition of New City Building and Loan Association, a corporation of New Jersey, appellant in the above entitled cause, respectfully shows that:

1. Petitioner shows itself aggrieved by the final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey on the advice of the Honorable John J. Fallon, Vice-Chancellor, dated July 30th, 1930, in a certain cause in the said Court of Chancery wherein the said New City Building and Loan Association is complainant and Vincenzo Testa and Antonio Marrano and others are defendants, and petitioner appeals from the whole of the said decree upon the ground that the same is erroneous in the following respects.

30

a. That the said decree adjudged that a certain

40

Petition of Appeal.

mortgage held by the defendant Antonio Marrano was superior in lien upon the lands which it covered, to the mortgage held by the complainant.

10 b. That the said decree adjudged that the complainant herein was not entitled to a subrogation to the rights of certain mortgagees whose mortgages the said complainant had paid off and which mortgages had theretofore been prior in lien to that of the mortgage of the defendant Antonio Marrano.

20 c. That the said decree did not adjudge that the mortgage of the petitioner herein was prior in lien and paramount to the mortgage of the defendant Antonio Marrano.

d. That the said decree was based on certain proofs which were illegally admitted into evidence.

e. That the Court of Chancery refused to admit certain evidence, to wit, the testimony of the witness Otto A. Thie, to be admitted into evidence.

30 2. Whereas, the said decree should have been in favor of the petitioner, complainant-appellant, instead of in favor of the defendant Antonio Marrano.

Petitioner therefore prays that the said decree may be wholly reversed, set aside and for nothing holden and that a decree may be entered herein in favor of the petitioner and against the defendant Antonio Marrano, and that petitioner may have such other relief in the premises as to this Court shall seem proper.

MITCHELL CAHN,
Solicitor of Petitioner.

Bill of Complaint.

(Filed October 1, 1929.)

IN CHANCERY OF NEW JERSEY.

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

10

The complainant, New City Building and Loan Association, a domestic corporation having its principal office in the Town of West New York, County of Hudson and State of New Jersey, respectfully shows that:

AS AND FOR A FIRST CAUSE OF ACTION.

1. On April 28th, 1927, Vincenzo Testa and Maria Testa, his wife, being indebted to the complainant in the sum of Ten thousand dollars (\$10,000.00), executed to complainant a bond of that date, to secure that sum, payable in installments of Fifty dollars (\$50.00) per month during the continuance of complainant as such Association, or until the fifty (50) shares owned by the said Vincenzo Testa and Maria Testa, his wife, in said Association and assigned as collateral security for the payment of said money, should have matured, with interest on the sum of Ten thousand dollars (\$10,000.00) at the rate of six per cent. per annum, payable monthly, amounting to the further sum of Fifty dollars (\$50.00) per month, in all amounting to the sum of One hundred dollars (\$100.00) per month, the first payment to be made on or before the Fourth Tuesday of each and every month thereafter, and also to pay to complainant or to its successors or assigns, during the period aforesaid, all fines, forfeitures and other payments that might become due and payable from and might be charged or imposed upon the said Vincenzo Testa and Maria Testa, his wife, or their

20

30

40

Bill of Complaint.

assigns, as holders of such shares, pursuant to the constitution of said Association and the by-laws, rules and regulations thereof.

10 2. The said bond contained an agreement that should any default be made in the payment of said interest or installment on said shares, or any part thereof, on any date whereon the same was payable, and should the same remain unpaid and in arrears for the space of thirty days, then the whole principal sum with all arrearage of interest thereon, should, at the option of complainant, its successors or assigns, become and be due immediately.

20 3. To secure payment of the aforesaid bond, said Vincenzo Testa and Maria Testa, his wife, executed to complainant a mortgage of even date with said bond, and thereby conveyed to it in fee the lands hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond, which mortgage, having been first duly acknowledged, and the certificate of acknowledgment duly endorsed thereon, was on April 30th, 30 1927, recorded in the Register's office of said County of Hudson in Book 1434 of mortgages for said County on page 452.

40 4. The mortgaged premises are described as follows: All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Jersey City in the County of Hudson and State of New Jersey, and which are known on a certain map of property belonging to Cornelius Van Vorst, deceased, made for him by Joseph F. Budes, Surveyor, bearing date October 24, 1850, and filed in the office of

Bill of Complaint.

the Clerk (now Register) of the County of Hudson on October 29, 1850, and lots #77 and #78 and which are also known on a certain other map made by order of the Mayor and Common Council of Hudson City, 1859 as lots #12 and #13 in block 30, which are also known on a certain other map of 9-10-11-12th Wards of Jersey City, made for the Mayor and Alderman of Jersey City 1871 as lots #77 and #78 in block 786, said lots being bounded and described as follows, viz.: Beginning at a point on the westerly side of Palisade Avenue, distant Two hundred and seventy-five feet southerly from the southwesterly corner of Palisade Avenue and Congress (late Warren Street) and running (1) southerly along the said Palisade Avenue Fifty (50) feet, thence (2) westerly at right angles to Palisade Avenue One hundred feet (100') to the center line of the block thence (3) Northerly along said center line and parallel with Palisade Avenue, Fifty (50) feet, thence (4) Easterly and again at right angles to Palisade Avenue One hundred (100) feet to the point or place of beginning. Be the said several distances and dimensions more or less.

10

20

Being known as and by street #575-577 Palisade Avenue.

30

5. On February 2nd, 1926, the said Vincenzo Testa executed a mortgage in the sum of Three thousand dollars to Antonio Marrano, which mortgage was on February 6th, 1926, recorded in the Register's office of the County of Hudson in book 1353 of mortgages for said county at page 265. That said mortgage was intended to be subordinated to the lien and effect of complainant's mortgage.

40

Any interest which the said Antonio Marrano

Bill of Complaint.

may have in said lands is subject to the lien of complainant's mortgage.

10 6. That on April 28th, 1927, the said Vincenzo Testa and Marie Testa, his wife, mortgaged the said lands and premises hereinabove described to Joseph Brauer, which mortgage was recorded on April 30th, 1927, in the Register's office of the County of Hudson in Book 1434 of mortgages for said County at page 449.

Any interest which the said Joseph Brauer may have in said lands is subject to the lien of complainant's mortgage.

20 7. That on December 23rd, 1927, Direct Finance Company, a corporation, obtained a judgment against the said defendant, Vincenzo Testa and one Louis Sordillo in the sum of Two hundred and eight dollars and sixty-five cents (\$208.65), which judgment was docketed in the Hudson Common Pleas Court in book 36 of judgments at page 422.

Any interest which the said Direct Finance Company may have against the said premises is subject to the lien of complainant's mortgage.

30 8. That on April 6th, 1929, Ralph Schroeder, individually and as next friend of Robert Schroeder, an infant, recovered a judgment against the said defendant, Vincenzo Testa in the sum of One hundred and twelve dollars and ten cents (\$112.10), which judgment was docketed in the Hudson Common Pleas Court in book 38 of judgments at page 613.

40 Any interest which the said Ralph Schroeder, individually and as next friend of Robert Schroeder, an infant, may have against the said premises is subject to the lien of complainant's mortgage.

Bill of Complaint.

9. On March 26th, 1929, said Vincenzo Testa and Maria Testa, his wife, made default in the payment of said monthly installments and payments of interest due upon said bond and mortgage and the same have remained unpaid and in arrears for the space of thirty days thereafter, and no part thereof has yet been paid. Complainant has elected that the whole principal sum, with all unpaid interest shall now be due. 10

10. There is due on account of the principal of complainant's said bond and mortgage the sum of Eight thousand eight hundred and twenty-six dollars (\$8,826.00) with interest thereon from March 26th, 1929.

11. There is due to complainant Fifteen dollars (\$15.00) for fines charged on account of said loan for non-payment of dues and interest. 20

12. The said Vincenzo Testa and Maria Testa, his wife, have always been in possession of the mortgaged premises.

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

1. That Vincenzo Testa and Maria Testa, his wife, Antonio Marrano, Joseph Brauer, Direct Finance Company and Ralph Schroeder, individually and as next friend of Robert Schroeder, an infant, who are the defendants to this suit may answer this bill of complaint and each statement therein made. 30

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

3. That the defendants, or one of them, may be decreed to pay to complainant the amount so 40

Bill of Complaint.

found due, with interest and costs, by a short day to be appointed by this court, and that, in default of such payment, they and each of them be debarred and foreclosed of all equity of redemption in said lands, or

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

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

20 AS AND FOR A SECOND CAUSE OF ACTION, COMPLAINANT SHOWS THAT:

1. On February 2nd, 1926, one Vincenzo Testa, became seized in fee simple of certain premises, which Deed was recorded in the Register's office of the County of Hudson on February 6th, 1926 in book 1590 at page 500 of Deeds, and which premises are more particularly described as follows: All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, and which are known on a certain map of property belonging to Cornelius Van Vorst, deceased, made for him by Joseph F. Budge, Surveyor, bearing date October 24, 1850, and filed in the office of the Clerk (now Register) of the County of Hudson on October 29, 1850, as lots #77 and #78 and which are also known on a certain other map made by order of the Mayor and Common Council of Hudson City, 1859 as lots #12 and #13 in block 30, which are also known on a certain

30

40

Bill of Complaint.

other map of 9-10-11-12th Wards of Jersey City, made for the Mayor and Alderman of Jersey City 1871 as lots #77 and #78 in block 786, said lots being bounded and described as follows: viz.:

Beginning at a point on the westerly side of Palisade Avenue, distant Two hundred and seventy five feet southerly from the southwesterly corner of Palisade Avenue and Congress (late Warren Street) and running (1) southerly along the said Palisade Avenue Fifty (50) feet, thence (2) westerly at right angles to Palisade Avenue One hundred (100) feet to the center line of the block thence (3) northerly along said center line and parallel with Palisade Avenue, Fifty (50) feet, thence (4) easterly and again at right angles to Palisade Avenue One hundred (100) feet to the point or place of beginning. Be the said several distances and dimensions more or less.

Being known as and by street #575-577 Palisade Avenue.

2. That the said premises were conveyed to the said Vincenzo Testa subject to a first mortgage in the sum of Nine thousand dollars (\$9,000.00), which mortgage was a lien against the premises in question and which mortgage was held by the New Jersey Title Guarantee and Trust Company by assignment dated February 19th, 1926 and recorded February 19th, 1926 in Book 166 at page 484 of Assignments, in the Register's office of the County of Hudson; a second mortgage in the sum of Two thousand dollars (\$2,000.00), the principal of which was reduced to One thousand dollars (\$1,000.00) which was a lien against the premises and which mortgage was held by the New Jersey Title Guarantee and Trust Company by assignment dated February 19th, 1926 and recorded

Bill of Complaint.

February 19th, 1926, in book 166 at page 484 of assignments in the Register's office of the County of Hudson; subject also to a third purchase money mortgage in the sum of One thousand dollars (\$1,000) which mortgage was a lien against the
10 said premises and was held by Unity Realty Corporation, Inc., which mortgage was dated February 2nd, 1926 and was recorded in the Register's office on February 4th, 1926 in book 1341 of mortgages at page 576, for said County of Hudson; also a fourth purchase money mortgage in the sum of Three thousand dollars (\$3,000) which was a lien against the premises and which mortgage was dated February 2nd, 1926 and recorded February
20 6th, 1926 in the Hudson County Register's office in book 1353 of mortgages at page 265, and which mortgage was held by Antonio Marrano.

3. That on April 28th, 1927, the said New City Building and Loan Association loaned the said Vincenzo Testa the sum of Ten thousand dollars (\$10,000.00) on the bond of said Vincenzo Testa and Maria Testa, his wife, to be secured by a first mortgage on the premises in question, which mortgage was duly executed by the said Vincenzo Testa and Maria Testa, his wife, and which mortgage
30 was recorded on April 30th, 1927 in book 1343 of mortgages at page 452, and that at the time that the said loan was granted to the said Vincenzo Testa and Maria Testa, his wife, by the said New City Building and Loan Association, it was agreed that the proceeds of the said loan should be used to pay off any and all liens against the premises in question to the end that the said mortgage given by the said Vincenzo Testa and Maria Testa, his
40 wife, to the said New City Building and Loan Association, should be a first lien against the premises.

Bill of Complaint.

4. That on or about April 30th, 1927, the said New City Building and Loan Association, for and in behalf of the said Vincenzo Testa and Maria Testa, his wife, paid off the first mortgage in the sum of Nine thousand dollars (\$9,000.00) and the second mortgage which was reduced to One thousand dollars (\$1,000.00) held by Unity Realty Corporation, Inc., and that at the time for payment of said prior liens the said Antonio Marrano agreed to subordinate his said mortgage to the lien and effect of complainant's mortgage.

10

5. That the said Antonio Marrano refuses to surrender the said bond and mortgage for cancellation.

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

20

1. That the said Antonio Marrano who is the defendant in this second cause of action may answer this bill of complaint and each statement therein made.

2. That the said defendant, Antonio Marrano may be ordered and decreed to surrender the said bond and mortgage properly endorsed for cancellation to complainant or in the alternative that the said defendant, Antonio Marrano may be ordered and decreed to subordinate the lien and effect of his said mortgage to the lien and effect of complainant's mortgage.

30

3. That the said mortgage may be decreed to be cancelled of record, and shall be no longer a lien upon the premises therein described, against the said complainant, or in the alternative that the said mortgage may be decreed to be subordinate in lien and effect to the lien and effect of complainant's mortgage.

40

Bill of Complaint.

10 4. That an account be taken of the monies expended by the complainant to pay the liens which were superior to the mortgage of the defendant, Antonio Marrano and that it be decreed that the amount so found due on complainant's bond and mortgage be prior in lien and effect to the mortgage of the said defendant, Antonio Marrano.

5. That the said defendant, Antonio Marrano and all persons claiming by, from or under him may be debarred and perpetually enjoined from setting up his said mortgage against the premises therein described as a lien prior in effect to the lien of complainant's mortgage.

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

MITCHELL CAHN,
Solicitor for and of Counsel
with Complainant.

30

40

Answer and Counterclaim.

(Filed November 26, 1929.)

IN CHANCERY OF NEW JERSEY.

Between

NEW CITY BUILDING AND LOAN
ASSOCIATION, a New Jersey Cor-
poration,*Complainant,*

and

VINCENZO TESTA, *et ux., et al.,**Defendants.*

On Bill, &c.

10

The answer of the defendant, Antonio Marrano.
This defendant, Antonio Marrano, answering the
bill of complaint, says that:

20

DEFENSE TO FIRST CAUSE OF ACTION.

1. This defendant has no knowledge or infor-
mation sufficient to form a belief as to the state-
ments in paragraphs 1, 2, 3, 6, 7, 8, 9, 10 and 11.

2. This defendant admits the contents of para-
graph 5, except so much as states "That said mort-
gage was intended to be subordinated to the lien
and effect of complainant's mortgage.

30

DEFENSE TO SECOND CAUSE OF ACTION.

1. Paragraphs 1 and 2 are admitted.

2. This defendant has no knowledge or infor-
mation sufficient to form a belief as to the state-
ments in paragraphs 3 and 4, except so much of
paragraph 4 which states that this defendant
agreed to subordinate his said mortgage to the lien

40

Answer and Counterclaim.

and effect of complainant's mortgage, which statement this defendant denies.

10 By way of counterclaim against the complainant, New City Building and Loan Association, and the defendants, Vincenzo Testa and Maria Testa, his wife, Joseph Brauer, Direct Finance Co. and Ralph Schroeder, individually and as next friend of Robert Schroeder, an infant, the defendant, Antonio Marrano, says:

20 1. On February 2, 1926, Vincenzo Testa, being indebted to Antonio Marrano in the sum of Three thousand (\$3,000.00) dollars, executed to him a bond of that date, to secure that sum, payable on the 2nd day of February, 1931, with interest at the rate of six per cent., payable semi-annually from the date of the bond.

30 2. To secure payment of the bond, said Vincenzo Testa executed to said Antonio Marrano, a mortgage of even date with the bond; and thereby conveyed to him in fee, the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage, having been first duly acknowledged and the certificate of acknowledgement duly endorsed thereon was recorded in the Register's Office of Hudson County, in Book 1353 of Mortgages, page 265.

3. The mortgaged premises are described as follows:

40 ALL the two tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, and

Answer and Counterclaim.

which are known on a certain map of property belonging to Cornelius Van Vorst, deceased, made for him by Joseph F. Bridges, Surveyor, bears date October 24th, 1850, and filed in the office of the Clerk (now Register) of the County of Hudson on the 29th day of October, 1850, as lots numbered seventy-seven (77) and seventy-eight (78) and which are also known on a certain other map made by order of the Mayor and Common Council of Hudson City, 1859, as lots numbered twelve (12) and thirteen (13), in block thirty (30) and which are also known on a certain other map of the Ninth, Tenth, Eleventh and Twelfth Wards of Jersey City, made for the Mayor and Alderman of Jersey City, 1871, as lots numbered seventy-seven (77) and seventy-eight (78) in block numbered seven hundred eighty-six (786), said lots being bounded and described as follows, viz.:

BEGINNING at a point on the westerly side of Palisade Avenue distant two hundred seventy-five (275) feet southerly from the southwesterly corner of Palisade Avenue and Congress Street (late Warren Street); and running (1) southerly along said Palisade Avenue fifty (50) feet, thence (2) westerly at right angles to Palisade Avenue one hundred (100) feet to the centre line of the block; thence (3) northerly along said centre line and parallel with Palisade Avenue fifty (50) feet; thence (4) easterly and again at right angles to Palisade Avenue one hundred (100) feet to the point or place of beginning.

Be the said several distances and dimensions more or less.

4. On April 28, 1927, the said Vincenzo Testa and Maria Testa, his wife, executed a mortgage in

Answer and Counterclaim.

the sum of \$10,000.00, to the New City Building and Loan Association, which mortgage was on April 30, 1927, recorded in the Register's Office of Hudson County in Book 1434 of Mortgages for said County, on page 452.

10 Any interest which the said New City Building and Loan Association may have in said lands is subject to the lien of complainant's mortgage.

5. On April 28, 1927, said Vincenzo Testa and Maria Testa, his wife, mortgaged the said lands and premises above described to Joseph Brauer, which mortgage was recorded on April 30, 1927, in the Register's Office of the County of Hudson in Book 1434 of Mortgages for said County on page 449.

20 Any interest which the said Joseph Brauer may have in said lands is subject to the lien of complainant's mortgage.

6. On December 23, 1927, Direct Finance Co., a corporation, obtained a judgment against said defendants, Vincenzo Testa and one Louis Sordillo, in the sum of \$208.65, which judgment was docketed in the Hudson Common Pleas Court in Book 36, of Judgments, page 422.

30 Any interest which the said Direct Finance Co. may have in said lands is subject to the lien of complainant's mortgage.

7. On April 6, 1929, Ralph Schroeder, individually and as next friend of Robert Schroeder, an infant, recovered a judgment against the said defendant, Vincenzo Testa, in the sum of \$112.10, which judgment was docketed in the Hudson Common Pleas Court in Book 38 of Judgments, page 613.

40 Any interest which the said Ralph Schroeder, in-

Answer and Counterclaim.

dividually and as next friend of Robert Schroeder, an infant, may have in said lands is subject to the lien of complainant's mortgage.

8. Both bond and mortgage contained an agreement that if any installment or interest should remain unpaid for 30 days after the same shall fall due, then the whole principal sum, with all unpaid interest, should, at the option of the mortgagee, his representatives or assigns, become immediately due. 10

9. On February 2, 1929, one-half year's interest fell due on this defendant's bond and mortgage, and remained unpaid for more than 30 days thereafter, and no part thereof has yet been paid. Complainant has elected that the whole principal sum, with all unpaid interest shall now be due. 20

10. Said Vincenzo Testa is married, and his wife's name is Maria. Any claim or interest she may have, by way of inchoate right of dower, or otherwise, is subject to this defendant's mortgage.

11. Said Vincenzo Testa has always been in possession of the mortgaged premises.

12. The whole amount of principal, with interest thereon, from August 2nd, 1928, is due upon complainant's bond and mortgage. 30

This defendant, therefore, prays:

1. That the said complainant, New City Building and Loan Association, and the said defendants, Vincenzo Testa and Maria Testa, his wife, Joseph Brauer, Direct Finance Co. and Ralph Schroeder, individually and as next friend of Robert Schroeder, an infant, may answer this counterclaim and each statement herein made. 40

Answer and Counterclaim.

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

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

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

20

ALFRED E. MODARELLI,
Solicitor of Defendant,
Antonio Marrano.

.....
Of Counsel.

30

40

Decree Pro Confesso.

formation sufficient to form a belief as to the allegations contained in paragraph Twelve.

MITCHELL CAHN,
Solicitor for and of Counsel
with Complainant.

10

Decree Pro Confesso.

(Filed January 9th, 1930.)

IN CHANCERY OF NEW JERSEY.

20	Between NEW CITY BUILDING AND LOAN ASSOCIATION, a New Jersey Cor- poration, <div style="text-align: right;"><i>Complainant,</i></div> <div style="text-align: center;">and</div> VINCENZO TESTA, <i>et ux., et al.,</i> <div style="text-align: right;"><i>Defendants.</i></div>	} On Bill to Foreclose.
----	---	----------------------------

30 This cause being opened to the court by Mitchell Cahn, solicitor of the complainant, and it appearing that subpoenas calling upon the defendants to answer the complainant's bill of complaint filed herein have been duly issued and returned served upon the defendants Vincenzo Testa and Maria Testa, his wife, Antonio Marrano, Joseph Brauer, Direct Finance Company and Ralph Schroeder, individually and as next friend of Robert Schroeder, an infant.

40 And it appearing that the said defendants, Vincenzo Testa and Maria Testa, his wife, Joseph Brauer, Direct Finance Company and Ralph

Decree Pro Confesso.

Schroeder, individually and as next friend of Robert Schroeder, an infant, have not, nor has any of them filed an answer to said bill of complaint within the time limited by law and said order, but have wholly failed and neglected so to do;

10

And it further appearing that the defendant, Antonio Marrano, who holds a mortgage on the mortgaged premises described in the bill of complaint herein, has filed an Answer and Counterclaim;

It is, thereupon, on this 9th day of January, Nineteen hundred and thirty, on motion of Mitchell Cahn, solicitor of the complainant, ORDERED that the said complainant's bill of complaint be and the same is hereby taken as confessed against the said defendants, Vincenzo Testa and Maria Testa, his wife, Joseph Brauer, Direct Finance Company and Ralph Schroeder, individually and as next friend of Robert Schroeder, an infant, to the end that such decree may be made against them as the court shall deem equitable and just.

20

E. R. WALKER,

C.

A true copy.

30

FERD GARRETSON,
Clerk.

40

Order of Reference.

(Filed January 14, 1930.)

IN CHANCERY OF NEW JERSEY.

10	Between NEW CITY BUILDING AND LOAN ASSOCIATION, a New Jersey Cor- poration, <div style="text-align: right; padding-right: 10px;"><i>Complainant,</i></div> and VINCENZO TESTA, <i>et ux., et al.,</i> <div style="text-align: right; padding-right: 10px;"><i>Defendants.</i></div>	} On Bill, etc.
----	---	-----------------

20 This matter being opened to the court by Mitchell Cahn, solicitor of the complainant, and it appearing that due notice of this application has been given to Alfred E. Modarelli, solicitor of Antonio Marrano, the answering defendant, and, a decree *pro confesso* having been duly entered against all the other defendants, and no good reason being shown to the contrary;

30 It is, on this 14th day of January, Nineteen hundred and thirty, on motion of Mitchell Cahn, solicitor of the complainant, ORDERED that the above entitled cause be referred to Hon. J. J. Fallon, one of the Vice Chancellors of this court, to hear the same for the Chancellor, and to report thereon to him and to advise what order or decree should be made therein.

E. R. WALKER,
C.

Respectfully advised.

40

C.

Final Decree.

The undersigned, solicitor of the defendant, Antonio Marrano, hereby consents to the above Order of Reference.

ALFRED E. MODARELLI,
Solicitor of Defendant,
Antonio Marrano

10

A true copy.

FERD GARRETSON,
Clerk.

Final Decree.

(Filed July 30, 1930.)

IN CHANCERY OF NEW JERSEY.

20

Between

NEW CITY BUILDING AND LOAN
ASSOCIATION, a New Jersey Cor-
poration,

Complainant,

and

VINCENZO TESTA, *et ux., et al.,*
Defendants.

On Bill, &c.
75-382

30

This matter coming on to be heard at the Chan-
cery Chambers in the City of Jersey City, County
of Hudson and State of New Jersey, in the pres-
ence of Mitchell Cahn, Esq., solicitor for and of
counsel with the complainant Alfred E. Modarelli,
Esq., solicitor of the defendant, and counterclaim-
ant, Antonio Marrano; and it appearing that none
of the other defendants, to wit, Vincenzo Testa and
Maria Testa, his wife, Joseph Brauer, Direct

40

Final Decree.

Finance Co. and Ralph Schroeder, individually and as next friend of Robert Schroeder an infant, have filed any answer or appeared herein and taken any steps or other proceedings herein, and are in default herein; and the court having considered the bill of complaint herein and the answer and counterclaim of the defendant, Antonio Marrano, and the court having considered all of the proofs, and all of the arguments of counsel and the court having concluded that the bill of complaint herein should be dismissed and that the foreclosure proceedings herein should be prosecuted on the counterclaim of the defendant, Antonio Marrano, it is on this 30th day of July, 1930, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey

ORDERED, ADJUDGED and DECREED that the bill of complaint herein be and hereby is dismissed. And it is further

ORDERED, ADJUDGED and DECREED that the defendant, Antonio Marrano, is entitled to have the sum of \$3,000.00, with lawful interest thereon from the 2nd day of February, 1927, together with his taxed costs in this suit, raised and paid out of the mortgaged premises described in the counterclaim herein. And it is further

ORDERED, ADJUDGED and DECREED that the complainant is secondly entitled to have the sum of \$9,590.50 with lawful interest thereon from the first day of July, 1930, together with its taxed costs of this suit, raised and paid out of the mortgaged premises described in the counterclaim. And it is further

ORDERED, ADJUDGED and DECREED, that the said mortgaged premises be sold to raise and satisfy the

Final Decree.

said debt, interest and costs firstly of the defendant, Antonio Marrano, and secondly of the complainant; and that a writ of *feri facias* do issue for that purpose out of this court directed to Samuel Herman, one of the Special Masters of this court, commanding him to make sale according to law 10
of the said mortgaged premises to satisfy firstly the said debt, interest and costs of the defendant, Antonio Marrano, and secondly to satisfy the said debt, interest and costs of the complainant; and that the said Special Master pay the amounts aforesaid firstly to the defendant, Antonio Marrano, or to his solicitor and secondly to the complainant or to its solicitor; and that in case more money should be raised by the sale than shall be sufficient 20
to answer such payment, such surplus moneys be brought into this court and deposited with the Clerk to abide the further order of this court; and the said Special Master is to make return to this court of his proceedings by virtue of the said writ. And it is further

ORDERED that the lien of the mortgage of the defendant and counterclaimant, Antonio Marrano, is prior, paramount and senior to the lien of the mortgage of the complainant. And it is further 30

ORDERED, ADJUDGED and DECREED, that the complainant, New City Building & Loan Association, a corporation of New Jersey, and the defendants, Vincenzo Testa and Maria Testa, his wife, Joseph Brauer, Direct Finance Company and Ralph Schroeder, individually and as next friend of Robert Schroeder, an infant, stand absolutely, debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises, when sold as aforesaid by virtue of this de- 40

Final Decree.

cree, in favor of the counterclaimant, Antonio Marrano. And it is further

10 ORDERED that the sum of Three Hundred Fifty Dollars be allowed and paid to the solicitor of the counterclaimant, Antonio Marrano, and that the same be included in the taxed bill of costs and collected with the other items of said bill.

E. R. WALKER,
C.

Respectfully advised,

JOHN J. FALLON,
V. C.

20 I consent to the form of the above decree.

MITCHELL CAHN,
Solicitor of Complainant.

30

40

Testimony.

IN CHANCERY OF NEW JERSEY.

Between NEW CITY BUILDING AND LOAN ASSOCIATION, a New Jersey Cor- poration, <div style="text-align: right; padding-right: 20px;"><i>Complainant,</i></div> <div style="text-align: center; padding: 5px 0;">and</div> <div style="text-align: left; padding-left: 20px;"><i>VINCENZO TESTA, et al.,</i></div> <div style="text-align: right; padding-right: 20px;"><i>Defendants.</i></div>	}	On Bill, etc.	10
---	---	---------------	----

Final Hearing before Hon. JOHN J. FALLON, Vice-Chancellor.

Chancery Chambers, Jersey City,
June 10, 1930.

20

APPEARANCES:

MR. MITCHELL CAHN, for Complainant.
 MR. ALFRED E. MODARELLI, for Defendant
 Antonio Marrano.

COMPLAINANT'S CASE.

Mr. Cahn: I want to introduce a stipulation of facts as to the amount due signed by Mr. Modarelli, on the bond and mortgage. 30

The Court: Suppose you read into the record the pertinent parts of the stipulation.

Mr. Cahn: The solicitor for the defendant, Antonio Marrano, agrees that the amount due to the complainant on its bond and mortgage is \$9,590.50 computed as follows: Original amount of loan \$10,000. Interest from March, 1929, to June, 1930, inclusive, \$800.00. Fines \$15.00, or a total of \$10,- 40
815.00, from which is to be deducted the following

Testimony.

10 credits. Payment on 50 shares from April, 1927, to March, 1929, inclusive, \$1,150.00. Profits earned \$74.50, or a total credit of \$1,224.50, leaving a balance of \$9,590.50. The solicitor for the defendant Antonio Marrano also admits that the defendants Vincenzo Testa and Maria Testa, the owners of the property sought to be foreclosed, have defaulted in the terms and conditions of complainant's bond and mortgage, and that the complainant has a right to demand the full amount of its mortgage, interest and fines to date.

The Court: I will file the stipulation.

Mr. Cahn: I want to introduce in evidence the original bond.

20 The Court: Dictate into the record what it is.

Mr. Cahn: Bond of Vincenzo Testa and Maria Testa, to New City Building & Loan Association in the penal sum of \$20,000, dated April 28, 1927, conditioned for the payment of \$10,000 to the complainant by payment of dues on 50 shares of the capital stock of complainant's association together with interest on the sum of \$10,000 monthly.

The Court: Let it be marked.

(Bond marked Exhibit C-1 in evidence.)

30 Mr. Cahn: Mortgage of Vincenzo Testa and Maria Testa to the complainant in the sum of \$10,000 providing for payments of \$50.00 per month on 50 shares of complainant's stock, and interest from April 1, 1927, to be computed monthly at the rate of six per cent. per annum. The mortgage is dated April 28, 1927, acknowledged April 28, 1927, and recorded in the Hudson County Register's Office on April 30, 1927, in Book 1434 of Mortgages on page 452.

40 The Court: Let it be marked.

Vincenzo Testa, direct.

(Mortgage marked Exhibit C-2 in evidence.)

Mr. Cahn: I will call Mr. Testa.

VINCENZO TESTA, being sworn.

10

Mr. Cahn: This witness does not quite understand English and I will ask Judge Modarelli to act as interpreter.

The Court: All right. You will waive Mr. Modarelli being sworn?

Mr. Cahn: Yes, sir.

Direct examination by Mr. Cahn:

Q. I show you a paper on the top of which is New City Building & Loan Association, and ask you whether you signed that paper? A. Yes, I signed it.

20

Q. Is that your signature? A. Yes.

Q. And do you know what you signed at that time?

The Court: I won't let him say that. I will overrule that question. He signed that paper.

Mr. Cahn: I offer that in evidence.

The Court: If you want to show he can't read English, it is a different thing.

30

Mr. Cahn: I want to introduce the application, and Judge Modarelli wasn't quite sure or certain—

The Court: All right.

Mr. Cahn: I offer the application.

(Application marked Exhibit C-3 in evidence.)

Q. I show you another paper which is an application for a second mortgage. Did you sign that paper? A. I signed it.

40

Vincenzo Testa, direct.

Mr. Cahn: I offer it in evidence.

Mr. Modarelli: I don't know what use it is in this case.

The Court: How is it material?

10

Mr. Cahn: The amounts paid out by the complainant is more than the complainant's mortgage.

The Court: You are not concerned about that. I will overrule it.

20

Mr. Cahn: Your Honor my second reason for offering it in evidence is to show the intention of the mortgagor at that time. This is an application for a second mortgage which was executed around the time of the application for the building and loan mortgage.

The Court: You are for the complainant, are you?

Mr. Cahn: Yes, sir.

The Court: I will permit it subject to the objection of Mr. Modarelli.

(Application marked Exhibit C-4 in evidence.)

30

Q. Mr. Testa, at the time you received the money from the building and loan association, what kind of a mortgage were you to give them? A. At the time I applied for the mortgage there was a \$9,000 first mortgage, and a \$1,000 second and a \$1,000 third, and a \$3,000 fourth.

Q. Were you to give them—

The Court: That question starts off wrong. I will overrule that question.

By Mr. Cahn:

40

Q. Did you agree to give the building and loan association a first, second or third mortgage?

Vincenzo Testa, direct.

The Court: I will overrule that question.
Ask him to tell what was said by the parties.

By Mr. Cahn:

Q. To whom did you apply to for this building and loan mortgage? A. Mr. Cahn. 10

Q. And who brought it up to my office? A. Mr. Boggio, a painter.

Q. And did he explain to you what kind of a mortgage the building and loan association would have to have at that time?

The Court: Ask him what was said at the time.

By Mr. Cahn:

Q. Do you remember what was said in my office between you and Mr. Boggio and myself with reference to the building and loan mortgage? A. I don't remember what was said at that time. 20

Q. Do you remember who was to pay off the mortgages at that time?

The Court: Let him tell what was said and then we will know. If he don't remember what was said how would he know what was to be paid off? 30

By Mr. Cahn:

Q. Do you know who was to pay off the mortgages?

The Court: I will overrule that question.

By Mr. Cahn:

Q. Do you know what was to happen to the money you were to get from the building and loan association? A. That was to pay off debts on the property. 40

Vincenzo Testa, direct.

Q. What debts were there to pay off? A. I left it in the lawyer's hands. He made the search. I don't understand those things. It is not my work.

By the Court:

10 Q. Did you ask him to pay the mortgages? A. Yes.

Q. Who did you ask, and what did you say? A. When I made the mortgage I thought he was to pay off all the debts on the property.

Q. Why do you say you thought? Was there any talk about it? A. He didn't tell me who he was going to pay off. I thought he was going to pay them off.

20 Q. Was there any conversation between you and Mr. Cahn as to what was to be done with the money from the building and loan association? A. When we closed the mortgage Mr. Cahn took all the money and made all the payments and told me nothing.

30 Q. Did you have any talk with Mr. Cahn when you were making the application for the loan as to what disposition was to be made of the loan moneys when they were received by you? A. No. I didn't tell him who he was to pay off and who wasn't. He understood all the debts were to be paid off.

By Mr. Cahn:

Q. Did you get any moneys that were left over after certain debts were paid off? A. I think he gave me a check for \$115.00, if I remember right.

40 The Court: I might say to you in looking over some papers which were submitted to me it looks like \$1,600.00 was taken out for

Vincenzo Testa, direct.

commissions or bonuses, or something of the sort.

Mr. Cahn: I will explain that. It was building and loan premiums.

The Court: You will have to explain it to me in order to warrant that. I don't know what per cent. it is, but it is a big per cent. 10

By Mr. Cahn:

Q. Have you with you the cancelled mortgages that were sent to you by me under date of May 3, 1927? A. No, I haven't them any more.

Q. What did you do with these cancelled mortgages? A. When Mr. Cahn paid the mortgages off I don't know what happened to them. 20

By the Court:

Q. Did you ever see the cancelled mortgages? A. He must have paid them off because I wasn't bothered any more.

Q. I am asking you did you ever see the papers. Did you ever see those mortgages after you made the application to the building and loan association for the mortgage loan? A. Yes, he sent me some papers. I don't know whether they were mortgages or not. 30

Q. What became of them? A. I gave the bill to Mr. Marrano, and the rest I don't know where they are.

By Mr. Cahn:

Q. Do you remember the exact amount you owed on the first mortgage to Doctor Reitman?

The Court: He says you took care of the whole business. How would he know? That exact amount includes interest? 40

Vincenzo Testa, direct.

Mr. Cahn: Yes, sir.

The Court: I don't mind your asking him if he can answer it.

10 (Witness.) A. I don't know because I left it to Mr. Cahn.

By Mr. Cahn:

Q. Do you know how much premium you paid to the New City Building & Loan Association for your mortgage? (The Interpreter.) He don't understand premium.

20 The Court: My recollection of the pleadings is that he didn't handle a dollar of it. The money was handled by Mr. Cahn. If that is so he didn't pay anything. Mr. Cahn must have deducted it.

By Mr. Cahn:

Q. Do you know how much was deducted for premium on the building and loan mortgage? A. I didn't pay one cent through my hands, and I don't know what was paid for anything.

30 Q. Did Mr. Boggio at any time tell you how much premium you were to pay to the building and loan association for your mortgage? A. Never told me anything.

Q. What mortgages were on your property at the time you made the application for the building and loan mortgage? A. I think there were four mortgages.

Q. And how much was the first mortgage? A. About \$9,000. I don't know exactly.

Q. How much was the second mortgage? A. I think about \$1,000, but I don't know accurately.

40 Q. And how much was the third mortgage? A. About \$3,000, I think.

Vincenzo Testa, direct.

Q. And how much was the fourth mortgage? A. I didn't know there was any other mortgage.

By the Court:

Q. When you bought the property you gave a mortgage to Marrano? A. Yes, sir. 10

Q. Wasn't that the fourth mortgage? A. I think it was.

Q. How much was that? A. \$3,000.

By Mr. Cahn:

Q. Then the total of mortgages on the property at the time you gave the mortgage to the building and loan association was about \$16,000? A. Nobody asked me what the mortgages were at that time. 20

By the Court:

Q. He is asking you now if you recall that the aggregate amount of mortgages on your property was about \$16,000? A. He says altogether there was \$13,000. \$9,000 first, \$1,000 on another mortgage, and \$3,000 to Mr. Marrano.

Q. Wasn't there a \$3,000 mortgage to what's the name of the third mortgagee? 30

Mr. Modarelli: If I might correct that, your Honor, the third mortgage is \$1,000.

The Court: To whom?

Mr. Modarelli: To the realty company from whom he purchased the property.

The Court: So there would be an aggregate of \$14,000 instead of \$16,000, wouldn't it, Mr. Cahn?

Mr. Cahn: There would be \$14,000.

By Mr. Cahn: 40

Q. You say you didn't speak to anybody about

Vincenzo Testa, direct.

the mortgages at the time you made the application for the building and loan association mortgage? A. I can't remember exactly what happened three or four years ago.

10 *By the Court:*

Q. In your dealings with Mr. Cahn did you have the benefit of an Italian interpreter? A. I asked him at the time that I signed the papers to give me an interpreter, but there was none there.

Q. So you didn't have an Italian interpreter? A. I was even asking for Mr. Boggio. Even Mr. Boggio wasn't there.

By Mr. Cahn:

20 Q. Wasn't Mr. Boggio in my office when you made the application for the mortgage? A. The first time, yes.

Q. Didn't Mr. Boggio get the insurance policies for you on the property at the time the building and loan mortgage was made? A. I don't remember that. All I remember when I signed the bond and mortgage there was no interpreter there, and I asked for one but Boggio was not there.

30 Q. Isn't it true that Mr. Boggio brought you up to my office for this mortgage? A. Yes.

Q. And at that time didn't Mr. Boggio explain to you how much it would cost for your mortgage?

A. Never said anything to me about that.

Q. Then why didn't you complain about only receiving \$115.00 from me if—

The Court: There is no proof he only received \$115.00.

40 Mr. Cahn: I asked him why he didn't complain.

The Court: All right.

Mitchell Cahn, direct.

(Witness.) A. Because I had faith in you believing that the money I had obtained was enough to pay all the mortgages.

By Mr. Cahn:

Q. At the time that you gave the mortgage to the building and loan association were your taxes fully paid? A. There was some balance, I think. 10

Q. Was the water bill paid at the time you got the building and loan mortgage? A. No, there was some to be paid.

Q. Were your insurance policies paid for at the time you took the building and loan mortgage? A. There was insurance on. I don't remember the details because I left it all to Mr. Cahn. This is the first time I ever owned any property, and I don't know much about real estate. 20

Mr. Cahn: That's all.

Cross examination by Mr. Modarelli:

Q. You can't read or write English, can you, Mr. Testa? A. No.

Mr. Modarelli: That's all.

Mr. Cahn: I will take the stand myself. 30

The Court: All right.

MITCHELL CAHN, being sworn.

Mr. Cahn: Mr. David Boggio, a licensed real estate man—

The Court: How do you know he was a licensed real estate man?

Mr. Cahn: He showed me at the time his certificate, because I asked him whether he was entitled to any commissions. 40

Mitchell Cahn, direct.

The Court: I am not going to permit you to testify as to whether he was a licensed real estate agent or entitled to receive commissions.

10

Mr. Cahn: Mr. Boggio came up to my office with Mr. Testa. Mr. Boggio told me that Mr. Testa wanted to get a building and loan mortgage.

The Court: He told you in the English language?

Mr. Cahn: Yes, sir.

The Court: And Mr. Testa was there present, was he?

20

Mr. Cahn: Yes, Mr. Testa was present. And I asked him how much of a building and loan mortgage Mr. Testa would need. He told me a \$10,000 building and loan mortgage and a \$4,000 second mortgage in order to pay off all the encumbrances on the property. I then told Mr. Boggio that he would have to have Mr. Testa file an application with the building and loan association. At the time I did not have any blanks of the complainant and took a blank of the Kismet Building and Loan Association and filled the same out in my own handwriting from the information given to me by Mr. Boggio who received it from Mr. Testa who was talking in Italian at the time.

30

The Court: How do you know that? Do you understand the Italian language?

Mr. Cahn: No, sir.

The Court: You said he received it from Mr. Testa. If you don't understand the Italian language how can you truly say that?

40

Mr. Cahn: I can't truly say that, but

Mitchell Cahn, direct.

whatever information was imparted to me by Mr. Boggio in Mr. Testa's presence was written down on the application.

The Court: You mean whatever Mr. Boggio stated to you was written down on the application?

10

Mr. Cahn: Yes, sir. And in pursuance of the application I went with the building and loan committee to appraise the property.

The Court: Before you get to that, you had Mr. Testa sign the application?

Mr. Cahn: Yes, sir.

The Court: Didn't it occur to you it would be well for you to know he was fully aware of what he was signing?

20

Mr. Cahn: Except that Mr. Boggio was his friend, and not my friend.

The Court: How do you know he was a friend or not? You are saying a lot here.

Mr. Cahn: I never knew Mr. Boggio or Mr. Testa.

The Court: Why are you saying he was a friend?

Mr. Cahn: Because they were both of Italian extraction.

30

The Court: Did you know whether he was aware of the contents before he signed it?

Mr. Cahn: I took it for granted, sir.

The Court: You may find trouble in this case for taking things for granted.

Mr. Cahn: I asked Mr. Boggio to tell Mr. Testa that the premium on the building and loan mortgage would be five per cent., or \$500.00, and Mr. Boggio said something to Mr. Testa in Italian, and Mr. Testa said "All right," indicating his consent at the time.

40

Mitchell Cahn, direct.

10 The Court: I will strike all that line of testimony out. You know better than that. If you were examining a witness you would be on your feet objecting. You can testify as to conversations with Mr. Boggio, but don't try to tell us what Mr. Testa indicated by his answers or remarks when you don't understand the Italian language.

Mr. Cahn: When the bond and mortgage was executed a check for \$10,000 was made payable to me as trustee for the New City Building & Loan Association. I will offer the check in evidence.

(Checked marked Exhibit C-4A in evidence.)

20 Mr. Cahn: I then paid two checks to Doctor Reitman—one in the sum of \$6,000 dated April 29, 1927 drawn on the West New York Trust Company check #22, which I will offer in evidence.

The Court: Let it be marked.

(Check marked Exhibit C-5 in evidence.)

30 Mr. Cahn: And another check for \$3,785.00, dated April 29, 1927 drawn on the West New York Trust Company check #21, which I offer in evidence.

(Check marked Exhibit C-6 in evidence.)

Mr. Cahn: I paid out to Maurice R. Seiden, attorney for the third mortgagee the sum of \$1,114.24 on April 29, 1927 voucher #23, which I will offer in evidence.

(Check marked Exhibit C-7 in evidence.)

40 The Court: Why did you pay these moneys out? What authority had you to do that? So far as I glean you hadn't a word to say to Mr. Testa himself.

Mitchell Cahn, direct.

Mr. Cahn: Mr. Testa was in my office with Mr. Boggio. I didn't understand Italian, and of course he couldn't understand my English. Mr. Boggio acted as a go-between.

The Court: Mr. Boggio you knew to be a broker? 10

Mr. Cahn: Yes.

The Court: Didn't it occur to you you ought to be a little careful in dealing with a man who couldn't understand the English language and was executing papers such as he was executing? That he should have somebody present to rely on so he thoroughly understood what he was doing?

Mr. Cahn: I satisfied myself through Mr. Boggio. 20

The Court: How did you satisfy yourself as to the acknowledgment on the mortgage?

Mr. Cahn: Why, Mr. Boggio was present at the time the mortgage loan was closed, and Mr. Testa signed this bond and mortgage in my presence, and I turned around to Mr. Testa and I proved the date of the acknowledgment to the extent of asking him "Do you understand what you sign?" 30

The Court: What did he say?

Mr. Cahn: He nodded his head.

The Court: You are after telling me he couldn't understand English.

Mr. Cahn: He apparently understood my question.

The Court: This certificate says—"Be it remembered that on this 28th day of April, 1927, before me a Master in Chancery of New Jersey, personally appeared Vincenzo Testa and Marie Testa, his wife, whom I am 40

Mitchell Cahn, direct.

10 satisfied are the mortgagors in the within mortgage named, and I having first made known to them the contents thereof they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed." Do you mean to say in view of your statement he couldn't understand English that Mr. Testa understood what he was signing?

Mr. Cahn: I have no hesitancy in saying he knew what he was signing.

The Court: Demonstrate that by testimony.

20 Mr. Cahn: What the proofs show I can demonstrate. Mr. Boggio was in the room with Mr. and Mrs. Testa. The bond and mortgage had already been prepared when Mr. Testa and Mrs. Testa and Mr. Boggio arrived. I looked over the abstract to secure the principal amounts of the mortgages to be paid off, and in their presence I 'phoned to Doctor Reitman at Montgomery 2629 who gave me the figures over the telephone of \$6,000 and \$3,785.00. I also
30 'phoned to Maurice H. Seiden at Montgomery 2196, who represented the third mortgagee, and he gave me the figures of \$975.00, and interest from August 1, 1926, or a balance of eight months and twenty-eight days amounting to \$39.24, and demanded a counsel fee of \$100.00 because he had already commenced foreclosure proceedings. I argued with Mr. Seiden in Mr. Testa's behalf
40 in order to try to get Mr. Seiden to accept a smaller fee. It was finally settled for \$1,114.24 which represented the three items.

Mitchell Cahn, direct.

The Court: It seems to have been settled by you but not Mr. Testa. You were dealing with his money and you were generously giving out \$100.00 to a lawyer named Seiden. Why did you do that?

Mr. Cahn: That was all done in the presence of the defendants. 10

The Court: And the defendants couldn't speak English and didn't know what you were talking about.

Mr. Cahn: Mr. Boggio was there and could speak English and could also speak the Italian language.

The Court: You are not conversant with the Italian language? 20

Mr. Cahn: No, but I could make some conversation with Mr. Testa. When it came to the second mortgage he understood what bonus he was to pay for the second mortgage.

The Court: Why do you say that?

Mr. Cahn: He couldn't understand English to carry on a conversation but he could understand figures and terms.

The Court: I will strike that out. You have previously sworn he couldn't understand English. 30

Mr. Cahn: But he indicated to me he understood.

The Court: I will strike that out about what he understood. You know as a lawyer that is not good testimony. No lawyer should deal with people of that kind unless they have somebody there to make them fairly understand what they are doing. 40

Mr. Cahn: This is off the record.

Mitchell Cahn, direct.

The Court: No, it is not, because it is an important matter.

Mr. Cahn: I am an attorney confronted—

The Court: I am not going to let you argue the matter at this time.

10

Mr. Cahn: After the bond and mortgage was executed I recorded—

The Court: You say they were executed, but up to now I am not satisfied they were executed within the purview of the law.

Mr. Cahn: I took the acknowledgment of the defendants Vincenzo Testa and Maria Testa.

The Court: By what means? What did you say to them?

20

Mr. Cahn: I said to them in the presence of Mr. Boggio, as near as I can recollect, "This is a bond and mortgage to the New City Building & Loan Association for the payment of \$10,000. You are to pay fifty a month on the shares and fifty a month interest, and that you have any time during the month within which to pay it at the office of Lehr & Haines, which was the office of the building and loan association." I also told them that if the building and loan association makes sufficient profits the mortgage would be paid off in about ten and a half years. If they did not make sufficient profits it would take about eleven years within which to pay it.

30

The Court: Does the mortgage say anything about that?

Mr. Cahn: No, sir. That was explaining the terms of the mortgage.

40

The Court: If the mortgage does not say

Mitchell Cahn, direct.

anything about such matter why did you undertake to say that?

Mr. Cahn: Because that is our general rule in explaining the mortgages to the layman. As a rule it is paid off in about ten and a half to eleven years. 10

The Court: You know he doesn't pay the mortgage off? He pays on shares?

Mr. Cahn: Yes, technically it is.

The Court: And knowing it to be the fact you say you explained to him that under the terms of the mortgage it would be paid off in about ten and a half years if enough moneys were made to pay it off?

Mr. Cahn: I am telling what actually took place at the time the building and loan mortgage was closed. 20

The Court: Didn't you know it was your duty to explain to him the mortgage he was to execute or else to read it to him in its entirety?

Mr. Cahn: I did explain the mortgage as fully as it appeared to me necessary to explain it to him.

The Court: You took it upon yourself to tell him so much of the mortgage you thought was proper and keep to yourself the rest of it? 30

Mr. Cahn: Well, I now enter an objection to that particular question because that doesn't seem to be the subject matter of the suit.

The Court: The subject matter of the suit is in part your conduct in taking the acknowledgment to the mortgage. Up to now you have not satisfied me he knew what he 40

Mitchell Cahn, direct.

10 was signing. I am convinced of that partly because of what you are testifying to. You are here to prove a bond and mortgage upon which you say there was due at one time an item of \$10,000. It is up to you to prove it. I am trying to find out from you, with an idea of proving it, what he did.

Mr. Cahn: Mr. Modarelli signed a stipulation as to the amount due.

20 The Court: Mr. Modarelli is not representing Mr. Testa. The reason I am concerned is because of a memorandum submitted to me in which it appears that \$1,100.00 commissions or something like that was deducted, and \$500.00 for a so-called premium. If it is the business of a building and loan association to deduct approximately fifteen or sixteen hundred dollars from a \$10,000 loan woe betide the person who deals with a building and loan association.

30 Mr. Cahn: I have testified that the building and loan association had deducted \$500.00 for premium. In addition to that I have deducted the amounts of principal and interest due on the mortgages as represented by Exhibits C-5, C-6 and C-7.

The Court: According to the figures I have made a note of as you went along I find, including the \$500.00 premium you say was deducted for the building and loan association, you paid out \$11,299.24 out of a possible \$10,000 mortgage loan. That does not include your fees for services.

40 Mr. Cahn: No, sir; because at the same time the defendant Testa signed an application for a second mortgage of \$4,000 and I succeeded in securing—

Mitchell Cahn, direct.

The Court: I will overrule that unless you can show it. He can't read English. The paper you are handing to me will not prove he did.

Mr. Cahn: At the time the application was made by the defendant Testa to the New City Building & Loan Association Mr. Boggio, who acted as interpreter, after a conversation with Mr. Testa in Italian, told me that the building and loan mortgage— 10

The Court: I will strike out what he told you. You don't know anything about the truth of what he told you. You are after telling me you never met either one of them before.

Mr. Cahn: I am testifying to what happened in my office when the applications were made. I am not vouching for the truth of it. 20

The Court: I am only looking for the truth. A very slipshod way you handled it, I don't mind telling you that. In dealing with foreigners you ought to be very particular. I had occasion to deal with foreigners in my practice and I was very careful.

Mr. Cahn: That is the reason I had them sign the applications so there would be no misunderstanding. 30

The Court: The man couldn't read English.

Mr. Cahn: If it please the court it was apparently explained to him.

The Court: Why do you say apparently? As a witness don't you know you should not use that word apparently? 40

Mitchell Cahn, direct.

Mr. Cahn: Except Mr. Boggio spoke to Mr. Testa in Italian.

The Court: They were friendly, and they came together?

Mr. Cahn: Yes.

10 The Court: Up to now you haven't indicated Mr. Testa understood a word of English.

Mr. Cahn: I offer in evidence the defendant Testa's building and loan book No. 430 calling for 60 shares of Series No. 8, indicating payments of fifth monthly dues and fifty interest from April, 1927, to May 3, 1929.

(Marked Exhibit C-8 in evidence.)

20 Mr. Cahn: At the time that the application for the New City Building & Loan Association was signed the defendant Testa signed Exhibit C-4.

The Court: I will overrule that until you prove he knew the contents of it.

Mr. Cahn: I saw it signed.

30 The Court: I won't let you say he signed it unless he knew the subject-matter of what he signed, because if your purpose in offering it and testifying to it is not for that purpose then it is immaterial. A naked piece of paper with nothing connected to it doesn't mean anything to the court.

40 Mr. Cahn: I never saw the property of the defendant Testa until after he had signed the application. I had no knowledge of the dimensions of the ground or dimensions of the building or as to what materials the building was constructed of of what improvements were contained in the building nor did I know the amount of the first mort-

Mitchell Cahn, direct.

gage or the amount of the second mortgage or the installments on the second mortgage, or when the interest was due on the second mortgage. Nor did I know the amount of the third mortgage or when the interest was due. Nor did I know the original amount of the second mortgage or know the annual rental until the information was imparted to me by the defendant Testa through Mr. Boggio. 10

The Court: I will strike out that it was imparted by the defendant. I will leave it stand that it was imparted to you by Mr. Boggio. Where is Mr. Boggio? Is he in court.

Mr. Cahn: No, sir, he isn't subpoenaed. He originally lived at 115 Dodd Street. We tried to serve him there and they told me he moved. 20

The Court: Who told you that?

Mr. Cahn: My clerk.

The Court: You are testifying to what somebody told you. I will strike that out. It was your duty to have Mr. Boggio here.

Mr. Cahn: It was impossible to get him here. 30

The Court: I will strike that out because you have not shown a diligent effort was made to get him here.

Mr. Cahn: If that is the case I ask for a continuance.

The Court: I will grant no continuance in this case.

Mr. Cahn: Then I ask for an exception.

The Court: You don't need an exception. Have you closed your case? 40

Vincenzo Testa, direct.

Mr. Cahn: No, sir. I want to recall Mr. Testa without an interpreter, if it please the court.

10 The Court: I will not allow you to question him without an interpreter because you said he does not understand English.

Mr. Cahn: If the witness does not understand the questions propounded by counsel then he can have an interpreter.

20 The Court: I will refuse to let the witness be examined that way for two reasons, because he said through an interpreter he does not understand the English language, and second you have sworn he cannot understand the English language.

Mr. Cahn: All right, Mr. Modarelli, you can act as interpreter.

VINCENZO TESTA, recalled.

Direct examination by Mr. Cahn:

30 Q. At the time you signed the building and loan mortgage did you know what the terms of the mortgage were?

The Court: I will overrule the question as calling for a conclusion. There is the mortgage. Take it and show it to him. I will determine whether he knew what it was.

By Mr. Cahn:

40 Q. When you signed this mortgage did you know what you were signing? A. I knew it was a mortgage, but I don't know what was in it.

Vincenzo Testa, direct.

By the Court:

Q. Who told you it was a mortgage? A. (Witness points to Mr. Cahn.)

Q. What else did he tell you? A. I don't know what else because I asked him for an interpreter and Boggio wasn't there when I signed the mortgage. 10

By Mr. Cahn:

Q. Was your wife in my office at the time the mortgage was signed? A. Yés.

Q. And who else was there at the time the mortgage was signed? A. There was two or three others outside. I don't know who they were.

Q. Was your son present with you at the time the mortgage was signed? A. No. 20

The Court: You yourself have sworn that only he and his wife and Boggio were present. He said Boggio was not present.

Mr. Cahn: I am testing his credibility.

Q. Did you talk to anybody about this mortgage before you came to court?

The Court: I will overrule that as being immaterial. 30

By Mr. Cahn:

Q. Did you talk to anybody before you came to court?

The Court: I will overrule that as being immaterial.

By Mr. Cahn:

Q. You say you did not know what you signed at the time you signed the mortgage? A. I knew I was signing a mortgage to pay off the debts. 40

Vincenzo Testa, direct.

Q. Did you know how much the mortgage was at the time you signed it? A. I don't remember with precision.

Q. About how much was the mortgage, do you remember? A. Is this the first or second?

10 Q. The first mortgage? A. I don't remember with precision, because I left it to Mr. Cahn.

By the Court:

Q. Did Mr. Cahn explain to you how much the mortgages were you signed? A. I don't remember.

By Mr. Cahn:

20 Q. Do you remember how much money you needed to pay off your mortgages? A. According to the figures I made I figured it was enough to pay all the mortgages.

Q. What was enough to pay all the mortgages? A. I thought I had a nine first, one second, a three and a one, and I thought the fourteen thousand was enough.

Q. But this is only ten thousand, the mortgage we are calling your attention to? A. Yes, sir. That is all I had, a second for four.

30 Q. Where did you get the second, the four? A. I don't remember the exact date, but I think the same day written on the mortgage.

Q. Who got that for you? A. Mr. Cahn.

Q. What was the name of the man you got the mortgage loan from, if you know? A. I don't know his second name, but Joe something.

40 Q. Did you get \$14,000 that day from Mr. Cahn, or did he account to you for \$14,000—a mortgage of ten thousand and four thousand? A. He paid everything. I don't know what I got.

Vincenzo Testa, direct.

Q. Did he give you a statement of account showing what he did? A. I got some kind of a paper.

Q. Is that a copy of the paper you received? A. I can't read this.

Q. Did you get \$14,000 from me on or about May 3, 1927? A. Yes.

10

The Court: Will you swear it is an exact copy?

Mr. Cahn: Yes.

The Court: Have it marked.

(Marked Exhibit C-9 in evidence.)

By Mr. Cahn:

Q. How much a month did you pay to the building and loan association? A. One hundred.

20

Q. And what was that being paid to the building and loan association for? A. For interest and installments.

Q. And who told you you were to pay one hundred dollars for interest and installments each month? A. Mr. Cahn told me.

By the Court:

Q. In English? A. He told me in English because there was nobody else there.

30

By Mr. Cahn:

Q. And did you understand what the one hundred dollars was for at that time? A. Yes, I understood that.

Q. When Mr. Boggio was with you in my office did Mr. Boggio tell you in Italian the amount of the building and loan mortgage? A. He said Boggio told him he didn't know what the thing would cost him so he didn't know what the amount of the mortgages would be.

40

Vincenzo Testa, direct.

Q. I show you Exhibit C-4. Did Mr. Boggio tell you what was in that paper? A. If I remember rightly I didn't sign these papers until I got the bond and mortgage (meaning the application).

10 Q. And when did you sign these papers? A. I don't remember.

Q. Did you tell Mr. Boggio when you were at my office the address of your property? A. Yes.

Q. What address did you give him? A. I was up in Mr. Cahn's office on Sixteenth Street the first time.

Q. What address did you give Mr. Boggio of the property you wanted to get a mortgage on? A. 575 and 577 Palisade Avenue.

20 Q. Did you tell Mr. Boggio the size of your lot? A. No, they came there and saw it themselves.

Q. What is the size of your lot? A. About 50 x 100.

Q. Did you tell Mr. Boggio how many families were in the house? A. It is a two family. Anybody could see that.

By the Court:

Q. Did you tell him that? A. Yes.

30 *By Mr. Cahn:*

Q. Did you tell Boggio how many garages you had there? A. Yes.

Q. How many garages did you tell him you had? A. Three.

Q. Did you tell Mr. Boggio what material the house was made of? A. Yes.

Q. And what did you tell Mr. Boggio the house was made of? A. Frame.

40 Q. Did you tell Mr. Boggio what improvements you had in your house? A. Yes, I told him.

Vincenzo Testa, direct.

Q. Did you tell Mr. Boggio you had steam heat in your house? A. Yes.

Q. Did you tell Mr. Boggio you had hot water in your house? A. Yes.

Q. Did you tell Mr. Boggio you had electricity in your house? A. Yes. 10

Q. Did you tell Mr. Boggio the amount of your first mortgage? A. Yes, I might have told him. I don't know with precision.

Q. Did you tell Mr. Boggio who held the first mortgage? A. I think so.

Q. Did you tell Mr. Boggio the amount of the second mortgage? A. I think I told him everything I knew. I don't remember all the details I told Mr. Boggio. 20

By the Court:

Q. Did Mr. Boggio ask you all these questions in Mr. Cahn's office? A. Whatever he asked me I answered.

By Mr. Cahn:

Q. And did you see me write on this piece of paper what you were telling Mr. Boggio, and what Mr. Boggio was telling me? A. Yes, I saw him writing, but I don't know what he wrote. 30

Q. Did you tell Mr. Boggio what the size of your house was? A. Yes.

By the Court:

Q. What is the size of your house? A. I think it is 38 x 25, but I don't know.

Q. Did you remember it any more distinctly when you were at Mr. Cahn's office than you do now? A. I may have remembered better than I do now. 40

Vincenzo Testa, direct.

By Mr. Cahn:

Q. Did you tell Mr. Boggio how many rooms you had on the first floor of your house? A. Yes.

10 Q. Did you tell Mr. Boggio that you got five rooms and bath on the first floor of your house? A. Yes.

Q. And did you tell Mr. Boggio that you got eight rooms and bath upstairs? A. No, no.

Q. Did you tell Mr. Boggio that you had eight rooms and bath in the upper two floors? A. No, no.

Q. Did you tell Mr. Boggio how many garages you had there? A. Yes, three.

20 Q. Did you tell Mr. Boggio how much rent you get every year? A. Yes.

Q. Did you tell Mr. Boggio that you get \$2,000 rent every year? A. I don't remember how much.

Q. Did you tell Mr. Boggio that you get \$60.00 a month for one floor? A. At that time I think, yes.

Q. Did you tell Mr. Boggio you were getting \$70.00 a month rent from another tenant? A. No.

30 Q. Did you tell Mr. Boggio that your apartment was worth \$70.00 a month in rent? A. I don't remember that.

Q. Did you tell Mr. Boggio that you get thirty-seven and a half a month rent from the other rooms? A. No. That's what I got for garages, I think.

Q. But you are sure that you got sixty and thirty-seven and a half a month rent from different people? A. At that time, yes, I think.

Q. And you were living in the house yourself, weren't you? A. Yes.

40 Q. And how many rooms did you and your family occupy in the house? A. Five and bath.

Vincenzo Testa, direct.

Q. Now, then, I ask you again, do you remember how much money this mortgage from the building and loan association was for at the time you signed it? A. Ten thousand. That's what they told me.

Q. And how much was the second mortgage you signed at that time? A. I made an application for a four, but they didn't give it to me. 10

Q. How much did you get? A. Three, I think.

Q. And were you to get an additional five hundred when you got a permit from Jersey City to build more garages? A. Yes.

Q. And isn't it the fact that even today you haven't got a permit from Jersey City for the building of more garages? 20

The Court: How is that material?

Mr. Cahn: To prove that this man had complete knowledge of all the details of this transaction.

The Court: I am not concerned with the extra five hundred, because Exhibit C-9 indicates the total amount of mortgages, \$13,000—ten and three, the second mortgage going to a man named Joseph Brauer. Why am I concerned with the other five hundred? 30

Mr. Cahn: I want to show he was to get thirty-five hundred.

The Court: Where is the mortgage?

Mr. Cahn: I don't know.

The Court: Then I will overrule the question.

Mr. Cahn: I want to show that he knew everything that was going on and also told Boggio those things and whether I got it down correctly. 40

The Court: I will overrule questions as to the other mortgage.

Vincenzo Testa, direct.

By the Court:

10 Q. Exhibit C-9, Mr. Witness, shows you were paying legal fees and commissions amounting to \$1,600.00 to somebody? A. I only know when they gave me the bill.

Q. Did you agree with Mr. Cahn to pay \$1,600.00? A. No. No such contract.

By Mr. Cahn:

Q. Didn't Mr. Boggio tell you how much it is going to cost to get these mortgages? A. Never told me that.

Q. Then why did you sign the mortgages when you didn't know how much you were paying?

20 The Court: I am not concerned about that. I am only concerned how much he was to get on the mortgages.

Mr. Cahn: I am satisfied he is not telling the truth and I am trying to show that he is not.

The Court: All right, I will let you show it, but he can't understand English.

30 (Witness.) A. Because I signed the mortgages before they talked about how much I was to pay.

By Mr. Cahn:

Q. How much do you figure you needed to pay off all your mortgages? A. I figured at that time that to pay off all my mortgages I needed between thirteen thousand and thirteen thousand five hundred.

Q. And how much mortgages did you actually get? A. From whom? Mr. Cahn?

40 Q. From anybody? A. Three thousand Mr. Mar-

Vincenzo Testa, direct.

rano gave me first, and they gave me thirteen thousand.

By the Court:

Q. Three thousand from Marrano was when you bought the property? A. Yes. 10

By Mr. Cahn:

Q. Was Mr. Marrano's mortgage to remain on the property?

The Court: How can he say that? Marrano is the one to say that.

Mr. Cahn: According to his understanding. I want to see what his idea was of financing the mortgages. 20

The Court: I will overrule the question in the way it is formed.

By Mr. Cahn:

Q. Were all the mortgages to be paid off from the moneys of the new mortgages? A. When I made that new deed I signed to pay off all the mortgages.

By the Court:

Q. Does that include the Marrano mortgage? A. Certainly. 30

By Mr. Cahn:

Q. Before you testified that you needed about fourteen thousand dollars to pay off your mortgages and you only got thirteen thousand. How were you to pay off the balance? A. I signed I would have to get the money somewhere else if I needed more. 40

Q. So you knew at the time you got the new

Vincenzo Testa, direct.

mortgages you would not have enough to pay off all the mortgages? A. I don't know anything about the financial part because I left it all to Mr. Cahn.

10 Q. But you just said that you would need to get extra money to pay off the balance of the mortgages, did you not? A. I signed if there was any balance left it would be very small and I would have to pay myself.

Q. But you got from me \$115.00 and change. Did you ask at that time how it come that you were being paid money? A. I figures maybe that was what was left over after he paid everything. He did all the accounts.

20 Q. You didn't know after you got the check what the check was for, did you? A. Who was I to know? When they sent me a check I figures it was the balance on the mortgage moneys.

By the Court:

Q. You say sent it or gave it to you? A. Sent it.

By Mr. Cahn:

30 Q. When you got the check for \$115.00 didn't it occur to you that something was wrong that you should receive money after paying off the mortgages? A. I never thought of that.

Q. Did you receive copies of insurance policies on the building? A. I think so. You sent me some papers.

Mr. Cahn: That's all, except I would like to at this time put in evidence the certificate of tax and water search of the City of Jersey City.

40 The Court: You are offering that in evidence?

Mr. Cahn: Yes.

Vincenzo Testa, direct.

The Court: All right, have it marked.
(Marked Exhibit C-10 in evidence.)

By Mr. Cahn:

Q. At the time you made the application for the building and loan mortgage did you intend to give them a first mortgage? 10

The Court: I will strike that out. Just bring out what was said between the parties. I will overrule the form of question.

By Mr. Cahn:

Q. At the time you made the application for the building and loan mortgage was it your agreement to give them a first mortgage? 20

The Court: I will overrule the form of the question.

By Mr. Cahn:

Q. When you made the application for the building and loan mortgage was anything said about agreeing to give the building and loan association a first mortgage?

The Court: I will overrule that because the application speaks for itself. 30

Mr. Cahn: There are two applications.

The Court: There is only one for the building and loan mortgage, isn't there? In order to have the record show what it is, it is Exhibit C-3.

By Mr. Cahn:

Q. At the time you signed this application Exhibit C-3, did you know whether you were to give the building and loan association a first mortgage or a second mortgage, or a third mortgage? 40

Vincenzo Testa, direct.

The Court: I will overrule the question on the ground the application speaks for itself.

Mr. Cahn: I think the cases hold that the intention of the parties governs.

10 The Court: It will not override written instruments except in cases of fraud.

Mr. Cahn: When it is the intent of the parties?

The Court: In what manner?

Mr. Cahn: An agreement between a debtor and creditor.

20 The Court: I am willing to let you prove it but not by this witness whether he had an agreement. That is for me to determine. You can bring out what was said or done by which an agreement was effected, if there was.

By Mr. Cahn:

Q. What kind of a mortgage were you to give the building and loan association for this \$10,000?

A. I didn't know. I left that to Mr. Cahn.

30 The Court: Evidently Mr. Cahn was acting in a tri-party capacity. He represented a building and loan association as the first mortgagee, somebody by name of Brauer the second mortgagee—

Mr. Cahn: Just one moment, your Honor. I wasn't acting for him.

The Court: You represented him in obtaining a \$3,000 mortgage.

Mr. Cahn: Yes, through Mr. Boggio.

40 The Court: I don't know about Boggio. He said you arranged the loan.

*Vincenzo Testa, direct.**By Mr. Cahn:*

Q. Did Mr. Boggio tell you the first mortgage of \$10,000 would not be enough to pay your mortgages? A. (Interpreter.) He says they discussed, but he don't remember all the details.

10

Q. And this discussion took place between whom and where? A. On several occasions at different places.

Q. Name the occasions and name the places and the people who were present at that time? A. Only Joe. I discussed it with him, on the job.

Q. With whom? A. With Boggio.

Q. And what were you discussing with Mr. Boggio?

The Court: What is the purpose of the question?

20

Mr. Cahn: To show Mr. Boggio was his friend and acting in his behalf. The court has inferred we can't prove that Mr. Boggio was telling the truth. Now he discussed with Boggio—

The Court: All right.

By Mr. Cahn:

Q. What did you discuss with Mr. Boggio on the job? A. We talked about so many things I can't remember.

30

By the Court:

Q. Did you talk with him about arranging to get a mortgage loan for you? A. Yes.

Q. What did you say to him about that? A. I told Mr. Boggio that I needed money to pay off my mortgages and then he brought me to Mr. Cahn.

Q. Had you known Mr. Boggio for some time? A. I knew him about five or six years.

40

Vincenzo Testa, direct.

By Mr. Cahn:

Q. Did Mr. Boggio ever come to your house and talk to you about these mortgages? A. No, never at the home.

10 *By the Court:*

Q. What mortgage did you speak about obtaining? One or two mortgages? A. As many as I needed to pay off my mortgages. One or two.

Q. When you went to Mr. Cahn's office with Mr. Boggio did he tell you how many mortgages you would have? A. He didn't tell me how many. He told me he would get the money.

By Mr. Cahn:

20 Q. Did you ever go with Mr. Boggio to social affairs?

The Court: How will that prove agency?

Mr. Cahn: I am trying to show the intimate relationship between him and Mr. Boggio.

The Court: He said he knew him about five years.

30 *By Mr. Cahn:*

Q. Did Mr. Boggio tell you how much you would have to pay the building and loan association as premium? A. No, he never said anything about premium.

Q. You are sure about that? A. How can I remember all these things three or four years ago?

Q. Then it is possible he did tell you how much it would cost you?

40 The Court: If you can't prove he did tell him what has the possibility to do with it?

Vincenzo Testa, direct.

Mr. Cahn: He can't remember it.

The Court: It is possible. Will that help?

Mr. Cahn: Then I will bring out the amount which will—

The Court: All right.

10

By Mr. Cahn:

Q. It is possible Mr. Boggio told you how much you would have to pay the building and loan association for the mortgage? A. No, sir. I didn't find out until after.

By the Court:

Q. Did Mr. Boggio tell you before you signed the mortgage papers you were to pay \$500.00 to the building and loan association as a premium? A. No, I didn't know what the expenses were until I got my bill.

20

Q. And by bill you mean the paper Exhibit C-9? A. It was a white one, like that (indicating).

By Mr. Cahn:

Q. How many children have you got, Mr. Testa?

The Court: How am I concerned about that? What is the purpose of it?

30

Mr. Cahn: I am under the impression when he got the statement he took it up with his son.

The Court: I am not concerned about your impressions. I will overrule the question.

By Mr. Cahn:

Q. Did you ever talk to your son about this statement when you received it? A. No, I never told any fellow how much it cost me.

40

Vincenzo Testa, direct.

Mr. Cahn: That's all.

The Court: Any questions, Mr. Modarelli?

Mr. Modarelli: No, sir.

Mr. Cahn: The complainant rests.

10

The Court: Aren't you going to prove how much the shares are worth?

Mr. Cahn: It is in the stipulation. Mr. Modarelli signed a stipulation.

Mr. Modarelli: I signed a stipulation. I don't know whether I had the right.

The Court: What is the amount? How much is due on the shares of the association? You are obliged to apply that to the debt before you look to him for anything?

20

Mr. Cahn: I think I read it into the record, if the court please.

The Court: I don't know whether Mr. Modarelli appreciates what he is doing. There is no withdrawal check stated on the statement. The statement indicates the party assigned to the association the fifty shares of stock to hold as collateral security for the mortgage loan which authorizes the association to make sale of those shares at auction or any general meeting thereafter. And then appears the names of the Testas, the mortgagors, and the date and execution being blank, and to apply the proceeds to the loan. Has that been done?

30

Mr. Cahn: If the Court please counsel signed the stipulation otherwise I would have had the secretary of the building and loan present.

40

The Court: Your own instrument requires them to sell the shares and apply it towards the liquidation of the debt. Some-

Vincenzo Testa, direct.

body is trying to make money by withholding them.

Mr. Cahn: If the Court please no one is withholding it, and I can have the—

The Court: Are the shares being held by the association or are they transferred? 10

Mr. Cahn: They still hold them.

The Court: I will continue this case until tomorrow morning to find out what became of the shares. Have you any other proof to offer? I think Mr. Modarelli I will grant you an opportunity of withdrawing that stipulation and allowing them to prove what was due on the mortgage. The whole case looks so fishy I would like to have proof of what is due on the mortgage. 20

Mr. Cahn: I went over that book with Mr. Modarelli. I think Mr. Modarelli knows Mr. Cahn well enough to rely on his statements. The Court said it looked fishy.

The Court: I am not alluding to that.

Mr. Cahn: I think I have been honest in the transaction.

The Court: I am not questioning your honesty but I am questioning the propriety of your actions in dealing with this matter. 30

Mr. Cahn: Any man would do that when I told Mr. Boggio the details.

The Court: You have not shown any proof that you tried to get him here.

Mr. Cahn: Then I will produce my clerk who made the investigation.

The Court: Boggio, you said, was a licensed real estate agent, and if he was you can get the information from the Real Estate Board. Those licenses are valuable. If 40

Bertha Horn, direct.

he is not here any more the Real Estate Board ought to put an end to that license.

Mr. Cahn: That is true.

The Court: You ought to be diligent in bringing in witnesses.

10 Mr. Cahn: I will produce whatever proof I can.

The Court: I will continue this case until Thursday.

(Continuation of hearing June 12, 1930.)

BERTHA HORN, being sworn.

Direct examination by Mr. Cahn:

20 Q. Where do you live, Mrs. Horn? A. 20 Fourth Street, Weehawken.

Q. Are you the superintendent of that house, Mrs. Horn? A. Yes.

Q. Did you know a man by the name of David Boggio? A. Yes, I did.

Q. Did he ever live in your house? A. Yes.

Q. When did you last see Mr. Boggio? A. Between the 10th and 17th of March.

Q. Of what year? A. 1929—this year, 1930.

30 Q. And is Mr. Boggio living in your house now? A. No more.

Q. Will you tell us under what circumstances Mr. Boggio is away from your house? A. He went away and left the furniture up there and just took the small pieces.

By the Court:

Q. Where did he go? A. Nobody knows.

40 Q. Who moved the pieces? You saw the moving van, didn't you? A. Nobody moved the pieces.

Otto A. Thie, direct.

He owed three months rent and the landlord went to the court and had the furniture held for the rent.

Q. Where did the man work? A. I don't know. I guess he didn't have any work at that time.

10

By Mr. Cahn:

Q. At that time was he living there with his family? A. Yes.

Q. Do you know who was in the family? A. The wife and a small child, three or four years old.

Q. And you don't know where Mr. Boggio moved to? A. No.

By the Court:

20

Q. You didn't try to find out, did you? A. Oh, yes, the landlord—

Q. Did you personally? A. No, it is not my business.

By Mr. Cahn:

Q. Did you have any conversation with the neighbors as to where Mr. Boggio might be? A. No. Nobody knows where he is.

30

The Court: I will strike that out.

Mr. Cahn: That's all.

OTTO A. THIE, being sworn.

Direct examination by Mr. Cahn:

Q. Where do you live, Mr. Thie? A. 105 West-over Place, West New York.

Q. Are you an officer of the New City Building & Loan Association? A. I am.

40

Otto A. Thie, direct.

Q. What position do you hold? A. Secretary.

Q. And are you in charge of the books of the building and loan association? A. I am.

Q. Have you the records here regarding the loan made to Vincenzo and Marie Testa? A. I have.

10 Q. Will you refer to the records and tell us how much the loan is for? A. \$10,000.

Q. And when was the loan made? A. In April, 1927.

Q. And what series? A. The eighth.

Q. How many shares? A. Fifty shares.

Q. And what is the stockholders number? A. 430.

20 Q. From your records can you tell us how much of a premium Mr. Testa paid for the loan? A. Yes, he paid five hundred dollars.

Q. And how much has been paid on account of that loan? I will withdraw that question. How many shares were issued to Mr. Testa at the time the loan was made? A. Fifty shares.

Q. And how much has been paid in on account of those shares? A. \$1,150.00.

Q. And that is shown by the books? A. Yes, sir.

By the Court:

30 Q. Where? A. Following all the way through from the start he paid in \$1,150.00. That's the auditor's check there, the last examination in September, 1929. We start right from the first payment fifty dues in April, 1927, fifty in May, 1927, and so on until September, 1929, and find he has paid in \$1,150.00.

40 Q. And that same book shows he owed for dues three-fifty and interest? A. As of September, 1929, yes, sir.

Otto A. Thie, direct.

By Mr. Cahn:

Q. When did Mr. Testa make his last payment according to the records? A. His last payment was made and credited in the month of June, 1929.

By the Court:

10

Q. What do you mean by credited? A. Why, we have meetings only twice a month, on the first and fourth Monday, and if a man makes a payment after that fourth Monday it would not be credited in the month he made the payment. It would be credited on the following month.

Q. I show you the book and ask you to tell me where it is credited in the book? A. That payment was made on June 3rd. The payment prior to that was made on April 6th.

20

Q. Why not May 3rd? It looks to me like May 3rd. It does not say June 3rd? A. No, but it is credited in the month of June.

Q. It isn't opposite the month of June? It is opposite the month of May. It is right on the line. A. That's all I can say.

Q. Is that your handwriting in that book? A. No, sir.

By Mr. Cahn:

30

Q. From what month does Mr. Testa owe interest on this loan? A. Interest from March, 1929.

Q. To date? A. To date, yes, sir.

By the Court:

Q. How much would that be from March to September? A. September, 1929?

Q. Yes. How much would that make from March to September? A. \$350.00.

40

Q. Seven months? A. Yes, sir.

Otto A. Thie, direct.

By Mr. Cahn:

Q. And how much interest does Mr. Testa owe on this loan?

10 The Court: From that date, presumably.
 The Witness: Yes, sir.

By Mr. Cahn:

Q. Have you computed the amount of interest up to June, 1930? A. Yes.

Q. And what figure do you arrive at? A. \$800.00.

20 Q. Are there any additional moneys due the New City Building & Loan Association from Mr. Testa? A. Yes. We have fines what we call a fine for arrearage, and figuring six months fines against his dues and six months against his interest amounts to \$15.00. We are only allowed by law to charge fines for six months. No longer than six months.

By the Court:

Q. Five cents a share? A. No, it is graduated.

Q. You charge the fines against the shares. You don't charge it against interest, do you? A. Yes.

30 Q. Then you are beating the law. A. I guess the law allows us to do it.

 The Court: I am familiar with the law of payment of fines on dues and shares, but it is the first time I heard about fines for non-payment of interest.

By Mr. Cahn:

40 Q. From the records can you tell us what profits were earned on the shares issued to Mr. Testa on account of this loan?

Otto A. Thie, direct.

The Court: How is that material? I called your attention to the fact that the bond and the mortgage likewise provides in the event of default by this man on his mortgage you are obliged to sell those shares which you have taken by assignment as collateral security and apply the proceeds to the debt. Isn't that so? 10

Mr. Cahn: I don't think so. If the court will read the last paragraph which is an election on the part of the mortgagee to have all of the payments together with the profits applied towards the indebtedness.

The Court: What about the other part? It says—"In case of default in the payment of dues, interest, cost of insurance or taxes upon the premises mortgaged to the association, or fines for non-payment of same, we hereby authorize New City Building & Loan Association to make sale of said fifty shares of stock at auction at any general meeting thereafter, and in our names to make and execute a transfer of said stock to the purchaser of same applying the proceeds of said sale to the payment of said loan." And then it says—"And further, we do hereby elect to treat all past and future payments of dues on said stock as credits on said bond and mortgage accompanying the same, and authorize and direct the officers of said association to so appropriate and credit the same." What do those two conflicting clauses mean? 20 30

Mr. Cahn: The interpretation I make is that whatever method brings the highest price. 40

Otto A. Thie, direct.

The Court: Who is to determine that? Is it left to the building and loan association to say what it shall do?

10 Mr. Cahn: Apparently it does because it says "We hereby authorize the New City Building and Loan Association to make sale of said fifty shares of stock at any meeting thereafter." And then the second paragraph covers the election.

The Court: You know that shares are worth more in book value than the amount paid in on the shares?

Mr. Cahn: Yes, sir.

20 The Court: So if the building and loan association were to be permitted to exercise whatever rights it sought to exercise under the latter part of that clause it could favor some members of the association by allowing them to take over the shares, pay that amount to the association and reap the difference. That is a common thing done among scheming members of building and loan associations and I am not going to tolerate it if I can stop it. I am not charging it to this association. I am speaking about them as a class.

30

Mr. Cahn: I think I can convince the court what the value of those shares are.

By Mr. Cahn:

Q. Mr. Thie, have you a copy of the last financial statement issued by the New City Building & Loan Association? A. I have.

Q. Have you it in front of you? A. Yes.

40 Mr. Cahn: I ask it be marked as an exhibit.

Otto A. Thie, direct.

By the Court:

Q. You don't know anything about it? It was made by the accountant? A. I helped to get up the figures.

Q. Tell me what the value of those shares are at this time? Tell me what the withdrawal value is without looking at that statement? A. I can't tell you that as of this date. 10

Q. Why not? You helped to make up that statement of that date? A. I need all the figures for the entire year up to date. That is, all my assets and liabilities, and everything else.

Q. Your assets and liabilities are stated here on the first page. Now, taking those assets and liabilities tell me what the value of those fifty shares are today? That is a statement of your assets and liabilities? A. Yes, of September 30, 1929. 20

Q. Well, tell me the value of those shares as of September 30, 1929? A. I can't do that.

Q. I didn't think you could. You had nothing to do with making that statement. There is a committee appointed by the building and loan association to do that? A. I would say I made up all the figures so far as that is concerned, and they really check it. I have as much to do with the making up of that financial statement as the examining committee has. 30

Q. Well, do it here. Demonstrate to me here you are capable of doing it. I have a suspicion you are not capable. Here are the assets and liabilities. The receipts appear to be as of September 30, 1929, \$63,008.21. The disbursements according to this statement of that same time made up of various items including cash in bank as of September 30, 1929, are \$4,809.15. Now, make up the statement and verify that printed statement. 40

Otto A. Thie, direct.

If you cannot I will not allow it in evidence. A. I would like to read this.

Q. I am only asking you to make a mathematical deduction. A. It is an impossibility.

10 Q. You did it before? A. I need all my figures.

Q. What other figures do you need than what is here? A. In order to get the withdrawal value, or the book value, I have to have this information. Multiply the number of shares in each—

Q. You are going to tell me what is written in the book as to how you arrive at the value of the shares. I am asking you without looking at the book. A. I couldn't do that.

20 Q. Without relying on that book you know there is a method of determining the withdrawal shares? A. No, I have to refer to that. I can't do that off-hand.

The Court: Go ahead, Mr. Cahn.

By Mr. Cahn:

Q. Mr. Thie, in computing the withdrawal value of those shares did you follow the formula prescribed in the by-laws of the association? A. I did.

30 Q. And is that withdrawal value to your knowledge printed in the financial statement issued by the complainant as of September 30, 1929? A. It is.

Q. Can you, by referring to the financial statement, tell us what the withdrawal value of those shares were as of September 30, 1929? A. I can.

The Court: I will not let him tell it. It is clearly parrot like. If he can figure it himself I would be glad to have him do it.

40 Mr. Cahn: I am trying to establish a foundation—

The Court: Anyway we are losing time

Otto A. Thie, direct.

on that. The only thing I have in mind is which of those clauses are to govern in this particular instance. Whether you are obliged to sell the shares and apply the proceeds to this loan or whether you are permitted to appropriate the shares for the price you think should be allowed to them and apply that towards the loan. 10

Mr. Cahn: If I show the court through this witness they were allowed a certain withdrawal value?

The Court: You might do that arbitrarily. I want a mathematical manifestation.

Mr. Cahn: If it is done according to the published statement? 20

The Court: Every organization has its own scheme.

By Mr. Cahn:

Q. Do you recall from your memory the value of the Eighth Series shares, as of September 30, 1929?

The Court: How is that material? On what is that predicated? There is nothing in the bond and mortgage that warrants a question of that kind. Is there anything in the bond and mortgage about withdrawal value? It says sell it and apply the proceeds. 30

Mr. Cahn: It says, "And further we hereby elect to treat all past and future payments of dues on said stock as credits on the bond and mortgage accompanying the same."

The Court: Nothing said about withdrawal value, is there? 40

Otto A. Thie, direct.

Mr. Cahn: No, sir. I withdraw that question.

10 Q. From your memory can you tell us the value of the shares issued to Vincenzo Testa and Marie Testa, as of September 30, 1929? A. I have got to refer to that statement. I can't tell from memory.

Q. You have to refer to the printed statement?

A. Yes, sir.

Q. What is the practice of the complainant in selling out shares to be withdrawn—

The Court: I will overrule the question as being immaterial. I don't think you need anything more from this witness. He told you what the books show.

20 *By Mr. Cahn:*

Q. Have you the certificate issued to Vincenzo Testa here? A. I have.

By the Court:

Q. Is it still retained by the association, as assignee? A. Yes, sir.

Q. It has not been disposed of? A. No, sir.

30 *By Mr. Cahn:*

Q. And is that the original certificate that was issued to him? A. It is.

By the Court:

Q. Why has it not been disposed of in order to realize the sum it might bring and apply that sum to the mortgage indebtedness? A. That is up to our counsel. I don't know.

40 Q. I note the assignment is in blank. It is not made to any particular person, is it? A. No, sir.

Antonio Marrano, direct.

Q. The certificate reads to Maria or Vincenzo Testa. It is not made to both, is it? A. No, sir.

The Court: The certificate is No. 430, fifty shares bearing date April 29, 1927, of the New City Building & Loan Association of West New York, New Jersey, to Maria or Vincenzo Testa. The certificate says: "This is to certify that Maria or Vincenzo Testa is the owner of fifty shares in the Eighth Series of stock in the New City Building & Loan Association transferable only on the books of the association in person or by attorney on surrender of this certificate. Each share entitles the holder thereof to participate in the funds and property of the association subject to the provisions of the constitution and by-laws." On top of the certificate it says, "Maturity value 200 per share." On the back is an affidavit form in blank, but below appears the name Vincenzo Testa, and below that is a mark and some one has written the words "Maria Testa." On the left-hand margin it says, "Witnessed by C. C. Hayes."

Mr. Cahn: That's all from this witness. The complainant rests.

DEFENDANT—ANTONIO MARRANO'S CASE.

ANTONIO MARRANO, being sworn.

Direct examination by Mr. Modarelli:

Q. Where do you reside, Mr. Marrano? A. Now?

Q. Yes. A. 308—26th Street, Union City.

Q. I show you a bond and mortgage, Mr. Marrano, dated February 2, 1926, signed by Vincenzo

Antonio Marrano, direct.

Testa, and ask you whether this is the one you received from Mr. Testa? A. Yes, sir.

Mr. Modarelli: I offer it in evidence.

(Bond marked Exhibit D-1 in evidence—
Mortgage marked Exhibit D-2 in evidence.)

10

Mr. Modarelli: This is a mortgage of Vincenzo Testa to Antonio Marrano for the sum of \$3,000 to be paid on February 2, 1931, with interest from February 2, 1926, payable annually, covering the property in question, and recites it is a purchase money mortgage dated February 2, 1926, acknowledged on February 2, 1926, before Alfred E. Modarelli, Attorney at Law, recorded on

20 February 6, 1926, in Book 1353 of Mortgages for Hudson County on page 265, and the bond from Vincenzo Testa to Antonio Marrano, dated February 2, 1926, in the penal sum of \$6,000 securing the payment of \$3,000 on February 2, 1931, with interest from February 2, 1926, payable annually. The bond is signed by Vincenzo Testa and sealed in the presence of Alfred E. Modarelli.

30

Q. Mr. Marrano, have you received any interest on account of your mortgage? A. Yes, sir.

Q. How much? A. One year.

Q. The first year? A. Yes.

Q. Do you know when you received it? A. A few days after the year expired. Around the middle part of February.

Q. February, 1927? A. Yes.

Q. Have you received any other interest payments from Mr. Testa? A. No, sir.

40

The Court: How much do you claim is due on the mortgage with interest to date?

Antonio Marrano, cross.

Mr. Modarelli: Interest from February 2, 1927, to date.

The Court: And the principal?

Mr. Modarelli: \$3,000.

Q. Did you at any time subordinate your loan to the New City Building & Loan Association? 10

The Court: That word *subordinate* may call for a conclusion.

By Mr. Modarelli:

Q. Did you at any time sign any papers for the New City Building & Loan Association?

The Court: That is affirmative proof they will have to show.

Mr. Modarelli: That's all. 20

Cross examination by Mr. Cahn:

Q. Mr. Marrano, how much did you give Mr. Testa for this mortgage? A. \$3,000.

Q. In cash or check? A. In cash.

Q. You gave it in cash? A. Yes.

Q. Where did you get the cash from?

The Court: I am wondering how that concerns you. Oh, yes, he is a prior mortgagee. That's right. 30

By Mr. Cahn:

Q. How much bonus did Mr. Testa pay you?

The Court: I will overrule that on the ground there is nothing to indicate there was a bonus. The question is based upon an unwarranted assumption of fact.

Mr. Cahn: That may be true, but this is cross examination to see what consideration was given. 40

Antonio Marrano, cross.

The Court: I will overrule the question as it is framed. He told you he gave \$3,000.

By Mr. Cahn:

10 Q. How much of that \$3,000 did Mr. Testa give you back? A. Nothing. Only the interest at six per cent. for one year.

Q. How long have you known Mr. Testa? A. Since we can remember living on the other side. We was born and raised up together.

Q. And you know Mr. Testa how long? A. Since we can remember.

By the Court:

20 Q. You mean in Italy, don't you? A. Yes, sir. We went to the same school.

By Mr. Cahn:

Q. Where did you get this \$3,000 from?

The Court: I will overrule it as being immaterial to you.

By Mr. Cahn:

Q. Did you draw the money of the bank? A. No, sir.

30 Q. Where did you get the money from? A. From a salesman of mine.

Q. Then why was the mortgage made out to you and not to the salesman?

Mr. Modarelli: I object. It is absolutely immaterial.

The Court: I will sustain the objection.

By Mr. Cahn:

40 Q. Didn't Mr. Testa talk to you at some time or other that he was going to get some mortgages and pay you off? A. No, sir.

Antonio Marrano, cross.

Q. Did Mr. Testa at any time talk to you about this mortgage and the other mortgages on the property? A. Yes, sir.

Q. What did he say to you? A. When I saw the interest not coming to me I went to Mr. Testa and asked him about it and he said he was surprised. He said "I thought you was paid long ago." 10

Q. When did he say that? A. Let me see—1927—1928.

Q. What else did he say to you? A. That's all.

Q. Do you recall whether he told you what mortgages he had on the property when you demanded the interest from him? A. He says he thought I was paid.

Q. Did you ask him how or what you were to be paid, or by whom? A. By some loan company. 20

Q. Did he mention the name of the company to you? A. No, sir.

Q. And did he mention to you how much this loan company was to give him? A. No, sir.

Q. Did he tell you how many mortgages he had on the property? A. I was the last.

By the Court:

Q. Did he tell you how many mortgages he had on the property? A. I don't remember that. 30

By Mr. Cahn:

Q. How long did this conversation take between you and Mr. Testa? A. About sixteen months ago.

Q. I mean how long were you with Mr. Testa when you demanded your interest? A. Oh, about ten or fifteen minutes, stopping on the road.

Q. And in that ten or fifteen minutes the only conversation was with reference to interest and his information to you that he thought you had been 40

Antonio Marrano, cross.

paid, is that right? A. No, there was some other note I endorsed for him. He came to me to renew that.

10 Q. Recall to your memory what other conversation you had with Mr. Testa concerning the mortgages on his property on Palisade Avenue? A. That's all. He asked me how the kids were, that's all.

Q. Did he tell you he had a first mortgage on the property? A. He only told me he thought I was paid by some company that he borrowed the money and made a one mortgage out of three or four that he had. He says "I am surprised. I thought you was paid."

20 Q. He said he made one mortgage out of three or four, is that correct? A. Yes.

Q. Did he say anything about getting a second mortgage also? A. I don't know anything about it. I never heard of it.

Q. After he expressed surprise you were not paid off what was the conversation? A. I went to Mr. Modarelli.

The Court: What is the purpose of it?

30 Mr. Cahn: To see what additional conversation went on.

The Court: To bolster up your own case. You can if you will tell me what you are doing.

Mr. Cahn: As to admissions on the part of the defendant Testa.

The Court: As to what?

Mr. Cahn: As to his intention.

The Court: As to whose intention?

Mr. Cahn: By Testa.

40 The Court: How can you prove that by

Antonio Marrano, cross.

any conversation between this witness and Mr. Testa?

Mr. Cahn: As to what he told him about the mortgages.

The Court: It will not influence me, but I will let you go ahead.

10

By Mr. Cahn:

Q. Was there anything further said by Mr. Testa with respect to the mortgages after he said he was surprised? A. I told you once.

By the Court:

Q. Nothing else said? A. No.

By Mr. Cahn:

20

Q. When you originally gave Mr. Testa the \$3,000 you knew you were getting back a fourth mortgage, didn't you? A. Sir?

Q. When you gave Mr. Testa the \$3,000 for the mortgage you knew it was a fourth mortgage? A. I asked him for some security.

Q. And he gave you this bond and mortgage, is that right? A. Yes.

Q. And you knew there were three other mortgages ahead of you, didn't you? A. Not when I gave him the money.

30

Q. When did you first find out it was any kind of a mortgage? A. The following day.

Q. And the following day you found out it was what kind of a mortgage? A. A fourth mortgage, and I was satisfied to have it.

Q. You were satisfied. And you knew there were three other mortgages ahead of it? A. I didn't know how much, but I knew there was other mortgages before me.

40

AMENDMENT OF MEMORANDUM.

Filed July 19, 1930.

NEW JERSEY SUPREME COURT.

HUNTERDON COUNTY.

10

 GEORGE GORDON, *et als.*,
*Plaintiffs,**vs.*
 LUMBERVILLE DELAWARE BRIDGE
 COMPANY, a corporation of
 New Jersey,
*Defendant.**Action
at Law.**Amendment
of Memo-
randum.*

20

JESS, J.

The first paragraph of the memorandum and findings in the above-entitled cause, heretofore filed, hereby is amended to read as follows:

30

This case came on for trial at the December (1929) term. After the jury had been sworn it was agreed by counsel that there were no disputed questions of material fact and that the action should be tried by the Court without a jury on a stipulation of facts entered into in open court, and on briefs to be submitted. The findings which follow were reached by the Court during the current April (1930) term.

FRANK B. JESS,
Judge.

40

POSTEA.

Filed July 24, 1930.

NEW JERSEY SUPREME COURT.

HUNTERDON COUNTY.

10

GEORGE GORDON, EMMA GORDON,
 ELSIE DIEL, HARRY GORDON,
 CARRIE BEATTY, FRED DILTS,
 HERBERT S. DILTS, LESTER R.
 DILTS, JOHN W. DILTS, HIRAM
 ERRICKSON, HERBERT HORN,
 FLORA HERSEY, CHRISTINE
 GORDON, JENNIE GORDON, MIN-
 NIE GORDON, WILLIE GORDON,
 RACHEL S. POMBEAR, MARY
 ERRICKSON, OLIVE DILTS
 OGDEN, ADA M. D. DOOL,
 ANNIE HUNT, SARAH E. ARN-
 WEIN, EVA LENA PARENT, S.
 GARFIELD ERRICKSON, PHEBE
 ANNA ERRICKSON, LULU E.
 SINE and HERVEY ERRICKSON,
 Jr., heirs at law of John W.
 Connor, deceased,

*Plaintiffs,**vs.*

LUMBERVILLE DELAWARE BRIDGE
 COMPANY, a corporation of
 New Jersey,

Defendant.

20

*Action
at Law.**In Eject-
ment.**Postea.*

30

This case came on for trial at the December
 (1929) term. After the jury had been sworn, it

40

Court's Conclusions.

10 plainant, related to what might be called a closing
statement. Testa says he received that after the
transaction had been concluded some time later.
He could not read English and consequently he
could not be chargeable with the contents of that
paper writing. It is clear to me from the proofs
that counsel for the building and loan association
all the way through acted very slovenly in this
matter. Not only did he not have a formal ap-
plication blank of the building and loan associa-
tion for Testa, the proposed mortgagor, to sign,
but he used a blank of some other company and
struck out the name of that company which was
using such application blank and wrote in the
20 name of this New City Building & Loan Associa-
tion. In that application for loan there is nothing
whatever said about what encumbrances were
against the property. Any one having to do with
real estate transactions, and particularly with ap-
plications made to building and loan associations
or similar institutions, are well aware that blanks
customarily used contain queries which are
intended to elicit information as to what en-
cumbrances are against the property. It is
30 shown by the proofs in the case there were four
mortgages upon the property at the time Testa
applied to the New City Building & Loan Associa-
tion for a mortgage loan. Those mortgage loans
aggregated approximately \$14,000, as I remember
the testimony. It was one time mentioned as
\$16,000 by Testa, but my recollection is that he
corrected that to \$14,000, and the latter figure
seems to be the correct one. Counsel for the
building and loan association apprehended,
40 through some means or other which is not fully
disclosed, that additional moneys were required

Court's Conclusions.

to enable Testa, the one who executed the mortgage to the New City Building & Loan Association, to clean up the encumbrances, in addition to the loan of the building and loan association, and he, the lawyer representing the building and loan association, undertook to procure for Mr. Testa the additional moneys and he did procure the sum of \$3,000. Testa, however, testified he was to have procured \$4,000, but by some means or other the amount actually given by the mortgage loan was \$3,000. There is some testimony in the case, or intimation anyhow, whether it be testimony or not, that on Testa doing something an additional \$500.00 was to be advanced. There is nothing however in any of the papers submitted to the court to verify that statement. But I am impressed with the fact, as I regard it to be, that by some means the attorney for the building and loan association was aware that it required \$14,000 to pay off those encumbrances upon the property—I am referring to mortgage encumbrances. Testa has testified he appreciated it might have taken a little more moneys than the mortgage moneys he contemplated, and he said he would have to pay the difference. The moneys required to pay off all the charges against the property was a very small sum owing for taxes standing somewhat above \$100.00 and the sum of \$500.00 to be deducted by the building and loan association from its mortgage loan for premium charged by it for the loan plus such charges as the lawyer for the building and loan association might make for his services. But that there was some circumlocution exercised by the lawyer for the building and loan association in this matter with respect to the transaction in question is mani-

10

20

30

40

Court's Conclusions.

10 fested to me by this Exhibit C-9 which was offered
in evidence in behalf of the complainant. That
exhibit indicates that some eleven or twelve hun-
dred dollars was taken out of Testa's mortgage
moneys for commissions, or the like. The items
20 have not been particularly testified to or disclosed.
Counsel should have known that commissions and
the like were not deductible from those mortgage
moneys by the building and loan association. My
recollection is there is a case of *Fischgrund v.*
Erickson Real Estate Co., which is contained in
147 Atl. Rep. on the page following after the case
of *Thirteenth Ward Building & Loan Association*
v. Kanter, which manifests this court's decision,
upon the advice of Vice-Chancellor Backes, if I
20 remember it, that such deductions may not be
made and charged to a mortgagor when it comes
to the foreclosure of the mortgage executed. If
that twelve hundred dollars had been used in
connection with other moneys it would have went
far towards paying off all of the mortgage encum-
brances on this property. What was done with it
has not been disclosed. It certainly never went to
Testa. The proofs show that Testa received one
30 hundred and some odd dollars out of the \$13,000
mortgage moneys. Counsel for the building and
loan association, as I intimated throughout the
hearing of this case when I observed that which
was clearly observable that Mr. Testa could not
write English and could not understand the Eng-
lish language, should have been extremely cautious
in his dealings with him. Counsel has said that a
man by name of Boggio, whom he described as a
real estate broker, accompanied Mr. Testa to his
40 office and that Boggio acted as interpreter between
himself and Testa. This Exhibit C-4, which coun-

Court's Conclusions.

sel in his argument has referred to, is a paper which is said to have been the result of some talk between Boggio and Testa, and signed by Testa. The fact that Testa could not write the English language and could not read the English language, and the fact that the instrument Exhibit C-4 is written in the English language, clearly demonstrates to me that that paper cannot be chargeable as evidence against him. Boggio has not been produced as a witness. When this case was first before the court I questioned counsel as to why Boggio was not in court to testify in complainant's behalf, and particularly to verify some of the statements being made by counsel to the court. Counsel stated that his process server had not been able to serve Mr. Boggio. A witness was produced in court in this hearing today to which the matter was continued to facilitate the opportunity afforded counsel for the complainant to present his case properly. That witness was a superintendent or a janitress of a building in which this Boggio is said to have lived. She said he moved from the premises in March, 1930. She does not know where he went to. She made no inquiry to ascertain where he went to. So far as the proofs disclose no inquiry was made by any one as to the whereabouts of Boggio. It is manifest to us all, in dealing with legal matters, that the best evidence should be offered to the court. I have no reason to presume that if a diligent effort would have been made to locate the whereabouts of Boggio he might not have been produced in court here in behalf of the complainant. The fact there is no proof produced thus far that effort has been made diligently or otherwise to produce him in court, other than the attempt to serve a

10

20

30

40

Court's Conclusions.

subpoena upon him as indicated at the previous day, and that attempt was made just a day or two before the case came up in court for hearing, and the fact that Boggio is not presented to the court as a witness, warrants the court in assuming that Boggio, if produced, may not have sustained or verified the contentions or claims of the complainant in this suit. Boggio is said by counsel to have been a real estate broker. It seems to me it would have been very easy to ascertain his whereabouts, if such was the fact, because the Real Estate Board from which he received his license would very likely be aware of his whereabouts and could inform counsel thereof. No effort apparently has been made to make such inquiry of the Real Estate Board, and we know that under statutory authority a real estate board does issue licenses to real estate brokers authorizing and permitting them to carry on business in connection with real estate. There has been no proof indicated to the court that Boggio was sought at his place of business, wherever it might have been. No proof offered to the court that Boggio's friends or acquaintances were sought out to ascertain where he might be located. The testimony of the witness who was a janitress of the house in today's session of the hearing indicated that Boggio was a married man living with his wife and children. Now I appreciate that in matters which may be regarded as somewhat in the nature of the case now before the court, the court upon the prayer and complaint of a mortgagee who finds himself inequitably deprived of the lawful rights that he considered he was entitled to, and should have been entitled to, may grant relief. The case of Jackson Trust Company *v.* Gilkinson, to which counsel for the com-

Court's Conclusions.

plainant has referred, and which I think is reported in 147 Atl. Rep., and which is an opinion that I myself rendered, quite clearly indicates circumstances under which relief may be afforded a complainant. But, as I stated before in that case there was an express agreement between the parties when the mortgage loan was arranged for that the complainant was to have a first mortgage lien on the premises, and there is no such proof in this case, because this man Testa has clearly demonstrated to me by his testimony that he knew nothing whatever about the details but entrusted the entire matter to counsel for the building and loan association, and there is no proof in the case that counsel for the building and loan association used any sort of diligence—much less reasonable diligence, to ascertain what encumbrances were against the property upon which the mortgage of the building and loan association was to be based. If the slightest examination of the records of the Register's Office of Hudson County had been made by counsel for the building and loan association he would have ascertained that there was a mortgage lien held on the property by this man Marrano, one of the defendants in this case who holds a mortgage for \$3,000. Where counsel for the complainant obtained his information from—there were three mortgages against the property, has not been disclosed by adequate proof. The only mortgage offered in evidence by counsel for the complainant was, as I recall it, the mortgage of the building and loan association. My impression is no other mortgages were offered in evidence notwithstanding I called counsel's attention before the case was closed no mortgages were offered in evidence other than the building and loan mortgage, and the Mar-

10

20

30

40

Court's Conclusions.

10 rano mortgage, which has subsequently been offered in evidence. The court is not informed of the terms of these various mortgages other than the complainant's mortgage, that is, the mortgage of the building and loan association, and that mortgage is undoubtedly a different mortgage than the first mortgage lien which was previously upon the property. The first mortgage was paid off by the moneys handled by counsel for the building and loan association and the second mortgagee through whom \$3,000 came. The first mortgage which was paid off has not been offered in evidence. Any one having to do with real estate matters well knows that the terms of a building and loan association mortgage are much more strict and contain many more clauses and provisions than the ordinary or statutory mortgage form. The second mortgage which was upon the property prior to the cancellation of it through the means of these moneys which were paid out by the lawyer to whom I have adverted has not been offered in evidence, and consequently I am not informed of the terms of that mortgage. The third mortgage which was on the property has not been offered in evidence, and consequently I am not informed of the terms of that mortgage. The fourth mortgage, the Marrano mortgage, was offered in evidence in behalf of the defendant Marrano, and I am informed of the particulars thereof. While a court of equity will afford relief in appropriate cases to persons who may have been misled by parties, or who by fraud, accident or mistake have been placed in an unequitable position with respect to mortgage loans, and the priority of such liens as appearing of record, nevertheless, this court will not in *all* cases, and I am emphasizing the word *all*, grant re-

20

30

40

Court's Conclusions.

lief to parties who seek relief in this court. I have indicated such to be the fact by the remarks that I have made in this case by referring to the equitable maxim to which I referred. How counsel for the complainant can expect this court, in view of the manifest indifference exhibited by him in his conduct of the affairs relating to the transaction, and in view of his lack of any diligence whatever, and in view of his non-inquiry of Testa as to what mortgage liens were against the property, and in view of his absolute neglect to make any inquiry whatever as to what liens were upon this property, expect this court to allow the mortgage of the building and loan association to have priority over the Marrano mortgage which is now, as has been stated, a first lien on this property, is a matter that I might only conjecture with. The complainant has itself, through its agents, and by that I refer to the attorney representing it, placed itself in the predicament or position in which it now finds itself, and in that position this court ought to leave it. It appears to me quite significant too in this case that counsel for the building and loan association is only attempting to establish the priority of the building and loan mortgage of \$10,000 against the Marrano mortgage of \$3,000, notwithstanding that he represented at the time of the closing of this mortgage transaction another mortgagee named Brauer in the sum of \$3,000. He seems to be sacrificing Brauer's \$3,000 mortgage entirely. No application was made to the court to place the Brauer mortgage in priority to the Marrano mortgage. It appears to me to be unconscionable. It manifests to me that counsel for the complainant cannot be sincere in his attempt to now have the court place the building and loan

10

20

30

40

Court's Conclusions.

association mortgage in priority as a mortgage lien on this property over the Marrano mortgage. Why he persists in his attempt to establish the priority of the building and loan mortgage over another \$3,000 mortgage of another client of his named Brauer is beyond me to conjecture at this time. I appreciate that sometimes negligence attributable to an agent of a mortgagee or counsel to a mortgagee may be excused. It was excused by me in the case of Jackson Trust Company *v.* Gilkinson for reasons that I therein stated. But in that case the court could do complete equity between the parties and no one was injured. In this case the court cannot comply with the requirement or request of the complainant without injuring Marrano. Marrano should not be obliged to subordinate his mortgage as a lien to the \$10,000 mortgage of the building and loan association which is now in process of foreclosure, or may be at any day, which mortgage is entirely dissimilar in terms to the mortgage which was of record preceding it and subordinate to which Marrano took his mortgage. I recall too that Marrano has testified that Mr. Testa manifested surprise to him when he, Mr. Marrano, sought from Mr. Testa the payment of the second years interest on his mortgage, and that Testa said to him he was of the opinion that he, Marrano, had been paid off out of the mortgage moneys which he, Testa, had arranged for through what was described by Mr. Marrano as a loan society. I take it to mean he was referring to the building and loan association. Furthermore, the bond which has been offered in evidence here in behalf of the complainant as evidencing the mortgage loan transaction between Testa and the building and loan

Court's Conclusions.

association, has expressly written and printed upon it, part writing and part print, that in the event of default in the payment of interest, premium, dues, fines, and so forth, secured by the mortgage accompanying the bond, the building and loan association is authorized to make sale of fifty shares issued by the building and loan association to Testa as was said, although it appears it was not issued to Vincenzo Testa. It was issued to Maria Testa or Vincenzo Testa. The proofs herein show that the 50 shares so issued were assigned *by Testa* to the building and loan association. There appears to be a variance in the language contained in the instruments and the shares as to who owns those 50 shares. The certificate itself says Maria Testa or Vincenzo Testa. The aforesaid mortgage instrument refers to Vincenzo Testa and Maria Testa. This matter contained in the bond to which I referred reads in part as follows—

“For value received we Vincenzo Testa and Maria Testa, his wife, the within named obligors, do hereby assign, transfer and set over unto the New City Building & Loan Association of West New York, New Jersey, the fifty shares of stock held by them in said association as collateral security for the payment of the debts mentioned in the within bond. In case of default in payment of dues, interest, cost of insurance or taxes upon the premises mortgaged to the association, or fines for non-payment of same, we hereby authorize New City Building & Loan Association to make sale of said fifty shares of stock at auction at any general meeting thereafter, and in our names to execute a transfer in our names of said fifty shares of stock to the purchaser of same applying the proceeds of said sale to the payment of said loan, and further

10

20

30

40

Court's Conclusions.

we do hereby elect to treat all past and future payments of dues on said shares as credits on said bond and mortgage accompanying the same, and authorize and direct the officers of said association to so appropriate and credit the same.”

10 That is dated April 28, 1927, the same date of the bond and mortgage, and apparently was a simultaneous transaction. There is no proof in this case that the building and loan association made sale of the fifty shares of stock issued to the Testas, at auction, at any general meeting of the association. It is well known in law that where one holds collateral security for a loan or obligation, they must first resort to the collateral and obtain such satisfaction therefrom as possible before they resort otherwise. Counsel for the building and loan association alluded to the latter part of the clause I just read wherein it is said that the Testas elect to treat all past and future payments of dues on shares as credits on the bond and mortgage, and so forth. I do not accord with counsel in that respect, and if the clause was to have the meaning he undertakes to have applied to it it would manifestly be an attempt to impose a penalty on these parties, and a court of equity does not favor penalties.

20 Proof has been established here in this case as to how much money was paid by the Testas on the fifty shares. It is said to be \$1,150.00, or thereabout—I do not recall the exact figures. There has been no adequate proof established here to the satisfaction of this court as to either the withdrawal value of the shares or as to the loan value upon those shares, nor is there any proof before the court that the shares have been in anywise assigned to any person. It is said they are still retained by the association. Without knowing

30 how much money would be realized from the sale

40

Court's Conclusions.

of these shares there is no means of definitely determining how much money would be due to the complainant on its mortgage. The court cannot speculate as to how much a decree should be for if a decree should be ordered. I have in mind at this time a recent decision, with respect to the rule of law applicable to building and loan association shares, such as in the case now before me, wherein the court held there must be applied towards the satisfaction of the mortgage the value of the shares ascertained on a sale of the shares in the manner indicated by the contract between the shareholder and the building and loan association. Counsel may consider there are conflicting decisions as to how a complainant may obtain the remedy sought by complainant with respect to rights of subrogation in instances such as now before the court. It is true that in the case of Jackson Trust Company *v.* Gilkinson, I determined that the trust company mortgage should be favored as a prior lien to the liens it had displaced, but if my recollection serves me right Vice-Chancellor Backes in the case of Thirteenth Ward Building & Loan Association *v.* Kanter determined, and in passing I might say the facts in the two cases were different, that the complainant's source of relief should be by resuscitation of the mortgages which had been cancelled of record mistakenly or otherwise. The prayer for relief in this case however, as indicated by prayer two, is "that the said defendant, Antonio Marrano, may be ordered and decreed to surrender the said bond and mortgage properly endorsed for cancellation to the complainant, or in the alternative that the said defendant Antonio Marrano, may be ordered and decreed to subordinate the lien and effect of

10

20

30

40

Court's Conclusions.

his said mortgage to the lien and effect of complainant's mortgage," and by prayer three, "that the said mortgage may be decreed to be cancelled of record and shall be no longer a lien upon the premises therein described against the said complainant, or in the alternative that the said mortgage may be decreed to be subordinated in lien and effect to the lien and effect of complainant's mortgage." I find nothing in this case to warrant the court in granting to the complainant the relief thus prayed. I will advise a decree dismissing the bill. While I have not the file of pleadings in this case before me, counsel has furnished me with what was said to be a copy of the bill of complaint filed in behalf of the New City Building & Loan Association, and a copy of the answer and counterclaim filed in behalf of Antonio Marrano. In the counterclaim I find that Marrano seeks a decree for the payment of the moneys due to him on his mortgage, which from what has been indicated to me now appears to be a first mortgage lien of record, and for a decree of sale of the premises covered by the mortgage in the event of the non-payment of the decree in order that there may be raised from such sale the amount required to be paid Marrano. I will advise a decree in behalf of Marrano, as prayed. The amount of the decree will be for \$3,000 with interest from February 2, 1927, at six per cent. The particular amount can be readily calculated by counsel.

Stipulation.

(Filed June 10, 1930.)

IN CHANCERY OF NEW JERSEY.

Between NEW CITY BUILDING AND LOAN ASSOCIATION, a New Jersey Cor- poration, <div style="text-align: center;"><i>Complainant,</i></div> and VINCENZO TESTA, <i>et ux., et al.,</i> <div style="text-align: center;"><i>Defendants.</i></div>	}	On Bill, etc. 	10
---	---	-------------------------------	----

It is stipulated and agreed by and between Mitchell Cahn, solicitor of complainant, and Alfred E. Modarelli, solicitor of defendant, Antonio Mar-
 rano, that the following facts and figures are ad-
 mitted: 20

1. That the amount due complainant on its bond and mortgage is Nine thousand five hundred and ninety dollars and fifty cents (\$9,590.50), computed as follows:

Original amount of loan	\$10,000.00	30
Interest from March, 1929, to June, 1930, inclusive	800.00	
Fines	15.00	
	\$10,815.00	
Paid in on 50 shares from April, 1927, to March, 1929, inclusive	\$1,150.00	
Profit earned	74.50 1,224.50	
	\$9,590.50	40
Balance	\$9,590.50	

Exhibits.

2. That defendants, Vincenzo Testa and Maria Testa, have defaulted in the performance of the conditions of the mortgage given to complainant and that the complainant has a right to demand the full amount of its mortgage, interest, fines to date, minus whatever profits have been earned, all in accordance with paragraph One of this stipulation.

10

3. That it shall not be necessary to introduce evidence at the final Hearing of the above matters in support of any of the facts herein stipulated.

MITCHELL CAHN,
Solicitor of Complainant.

20

ALFRED E. MODARELLI,
Solicitor of Defendant,
Antonio Marrano.

Exhibit C-1.

KNOW ALL MEN BY THESE PRESENTS: That We, Vincenzo Testa and Maria Testa, his wife, of the City of Jersey City, in the County of Hudson and State of New Jersey, are held and firmly bound unto New City Building and Loan Association, a body corporate of the State of New Jersey, in the penal sum of Twenty-thousand dollars (20000) Dollars, lawful money of the United States of America, to be paid to the said Association, its successors or assigns, FOR WHICH PAYMENT well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents. Sealed with our seal, Dated the Twenty-eighth day of April One Thousand Nine Hundred and twenty-seven.

30

40

THE CONDITION of the above obligation is such

Exhibits.

that if the above bounden Vincenzo Testa and Maria Testa, his wife, or their heirs, executors or administrators, shall well and truly pay or cause to be paid, unto the above named Association, its successors or assigns, the just and full sum of Ten thousand dollars (10000)Dollars 10
in the manner following, viz.: By the payment of One Dollar Dues on each of fifty (50) shares of the capital stock of said Association, owned by the said Vincenzo Testa and standing in their names on the books of said Association, and assigned to it as collateral security for the payment hereof, and on which this loan is based, on the Fourth Thursday of each and every month hereafter, or such other time as may hereafter be appointed for that purpose, until the said shares shall attain 20
the par value of Two Hundred Dollars each, together with interest on said sum of Ten thousand dollars (10000)Dollars,
to be computed monthly from April 28, 1927, at the rate of six (6) per cent. per annum, and payable monthly at the same time and in the same manner as the stock-payments aforesaid, and also all fines that may become due, as provided for by the Constitution and By-Laws of said Association, which 30
have been duly assented to by said obligors, and made a part hereof, 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 installment or premium on said shares, or interest, or of any part thereof on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent or other 40
municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the

Exhibits.

10 premises described in the mortgage accompanying
 this bond, and become due and payable; and
 should the said installment or premium on said
 shares, or interest or of any part thereof remain
 unpaid and in arrears for the space of thirty days
 or said tax assessment, water rent, or other muni-
 cipal or governmental rate, charge, imposition or
 lien, or any or either of them, remain unpaid and
 in arrear for the space of sixty days or should
 the said obligors refuse or neglect for thirty days
 after demand to produce and exhibit to the obligee
 the vouchers showing the payments of such tax,
 assessment, water rent or other lien due and pay-
 able, then and from thenceforth, that is to say,
 20 after the lapse or expiration of either of the said
 periods, as the case may be, the aforesaid prin-
 cipal sum of Ten thousand dollars (\$10000) or the
 balance thereof remaining unpaid with all arrear-
 age of interest, premiums and fines thereon, shall
 at the option of the said Association, or its 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 con-
 30 tained to the contrary thereof in anywise notwith-
 standing, and the said Mortgagee may, at its op-
 tion, pay such tax, assessment, or water rent in
 arrear, and the amount so paid shall be added to
 and become part of the principal sum above men-
 tioned, and shall be payable on demand with in-
 terest at six per centum per annum.

VINCENZO TESTA (L. S.)

her

MARIA X TESTA (L. S.)

mark

40

Sealed and Delivered
 in the presence of
 MITCHELL CAHN

Exhibits.

FOR VALUE RECEIVED, We, Vincenzo Testa and Maria Testa, his wife, the within named obligors do hereby assign, transfer and set over unto the New City Building and Loan Association of West New York, N. J. the fifty (50) shares of stock, held by us in said Association, as collateral security for the payment of the debt mentioned in the within bond. And in case of default in payment of the dues, interest, cost of insurance or taxes upon premises mortgaged to the Association, or fines for non-payment of same, we hereby authorize New City Building and Loan Association, to make sale of said fifty (50) shares of stock, at auction at any general meeting thereafter, and in our names to make and execute a transfer of said fifty (50) shares of stock to the purchaser of same, applying the proceeds of said sale to payment of said loan.

10

20

And further we do hereby elect to treat all past and future payments of dues on said stock as credits on the within bond and mortgage accompanying the same, and authorize and direct the officers of said Association to so appropriate and credit the same.

WITNESS our hands and seals this 28th day of April, A. D. 1927.

30

VINCENZO TESTA (L. S.)

her

MARIA X TESTA (L. S.)

mark

Sealed and Delivered
in the presence of
MITCHELL CAHN

40

*Exhibits.***Exhibit C-2.**

THIS INDENTURE, made the Twenty-eighth day of April, in the year One Thousand Nine Hundred and Twenty-seven.

10 BETWEEN Vincenzo Testa and Maria Testa, his wife, of the City of Jersey City in the County of Hudson and State of New Jersey, parties of the first part and New City Building and Loan Association, a body corporate of the State of New Jersey, party of the second part:

20 WHEREAS, the said parties of the first part are justly indebted to the said party of the second part, in the sum of Ten thousand dollars (10000) Dollars, lawful money of the United States of America, secured to be paid by their certain bond or obligation, bearing even date with these presents, in the penal sum of Twenty thousand dollars (20000) Dollars, lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of Ten thousand dollars (10000) Dollars, lawful money as aforesaid, to the said party of the second part, its successors or assigns, in the manner following, viz.: By the payment of One Dollar

30 Dues per month on each of fifty (50) shares of the capital stock of said Association, owned by said Vincenzo Testa and Maria Testa, his wife, of the first part, and standing in their names on the books of said Association, and assigned to said party of the second part as collateral security for the payment hereof, and on which this loan is based, on the Fourth Thursday of each and every month hereafter, or such other time as may hereafter be appointed for that purpose, until the said

40 shares shall attain the par value of Two Hundred Dollars each, together with interest on said sum

Exhibits.

of Ten thousand dollars (10000) Dollars, to be computed monthly from April 1st, 1927, at the rate of six (6) per cent. per annum, and payable monthly at the same time and in the same manner as the stock-payments aforesaid, and also all fines that may become due, as provided for by the Constitution and By-Laws of said Association, which have been duly assented to by said party of the first part and are made a part hereof.

10

AND IT IS THEREBY EXPRESSLY AGREED, that should any default be made in the payment of the said installment or premium on said shares, or interest, or of any part, thereof, on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage, and become due and payable, and should the said installment or premium on said shares, or interest or any part of them, or either of them, remain unpaid and in arrear for the space of thirty days or said tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien, or any or either of them, remain unpaid and in arrear for the space of sixty days or should the said party of the first part refuse or neglect for thirty days after demand to produce and exhibit to the party of the second part the vouchers showing the payments of such tax, assessment, water rent or other lien due and payable, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of Ten thousand dollars (10000) Dollars, or the residue thereof, with all arrearage of inter-

20

30

40

Exhibits.

est, premiums and fines, thereon, shall at the option of the said party of the second part, or its legal representatives, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have
10 expired, anything therein before contained to the contrary thereof in anywise notwithstanding: and the said Mortgagee may, at its option, pay such tax, assessment, or water rent in arrear, and the amount so paid shall be added to and become part of the principal sum secured by the said bond and by this mortgage, and shall be payable on demand with interest at six per centum per annum, as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more
20 fully appear.

NOW THIS INDENTURE WITNESSETH, That the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to them in hand paid by the said party of the second part, at or before
30 the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, release, convey and confirm, unto the said party of the second part, and to its successors and assigns, forever, ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Jersey City in the County of Hudson and State of New Jersey, and which are known
40 on a certain map of property belonging to Corne-

Exhibits.

lius Van Vorst, deceased, made for him by Joseph F. Budes, Surveyor, bearing date October 24, 1850, and filed in the office of the Clerk (now Register) of the County of Hudson on October 29, 1850, as lots #77 and 78 and which are also known on a certain other map made by order of the Mayor and Common Council of Hudson City, 1859 as lots #12 and 13 in block 30, which are also known on a certain other map of 9-10-11-12th Wards of Jersey City, made for the Mayor and Alderman of Jersey City 1871 as lot #77 and 78 in block 786, said lots being bounded and described as follows: viz:

Beginning at a point on the westerly side of Palisade Avenue, distant Two hundred and seventy-five feet southerly from the southwesterly corner of Palisade Avenue and Congress (late Warren Street) and running (1) southerly along the said Palisade Avenue Fifty (50) feet, thence (2) westerly at right angles to Palisade Avenue One hundred feet (100') to the center line of the block thence (3) Northerly along said center line and parallel with Palisade Avenue, Fifty (50) feet, thence (4) Easterly and again at right angles to Palisade Avenue One hundred (100) feet to the point or place of beginning. Be the said several distances and dimensions more or less.

Being known as and by street #575-577 Palisade Avenue.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, AND ALSO, all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as

Exhibits.

in equity, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances:

10 To HAVE AND HOLD the above granted and described premises, with the appurtenances, unto the said party of the second part, its successors and assigns, to its and their own proper use, benefit and behoof forever. AND the said party of the first part, and their heirs the above described and granted premises, and every part thereof, with the appurtenances, in the quiet and peaceable possession of the said party of the second part, its successors, legal representatives and assigns against every person whomsoever will WARRANT and for-
20 EVER DEFEND.

PROVIDED ALWAYS, and these presents are upon this express condition, that if the said party of the first part, their heirs, executors or administrators, shall well and truly pay unto the said party of the second part, its successors or assigns, the said sum of money mentioned in the condition of said bond or obligation, and the interest thereon, at the time and times, and in the manner mentioned in the said condition, according to the true intent and
30 meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine and be void.

AND IT IS ALSO AGREED, by and between the parties to these presents, that the said party of the first part, their heirs, executors, administrators and assigns, shall and will keep the buildings erected, and to be erected, upon the lands above conveyed, insured against loss or damage by fire,
40 by insurers, and in a Company and an amount approved by the said party of the second part, its

Exhibits.

successors or assigns, and assign the policy, and certificates thereof, to the said party of the second part; and in default thereof, it shall be lawful for the said party of the second part to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, payable on demand with interest at the rate of six per cent. per annum, from the time of payment of such premium or premiums. 10

AND THE SAID parties of the first part, the owners of the lands above described for themselves, their heirs and assigns, do further covenant and agree to and with the said party of the second part, its successors and assigns, that they will pay in full, all taxes, levied or to be levied, upon the lands embraced in this mortgage, and will not claim any credit on, or make any deduction from the interest or principal hereby secured by reason of the payment of any taxes so levied, or to be levied, during the continuance of the lien of this mortgage, and upon the breach of this covenant or any part thereof, this mortgage may become and be due and payable immediately, at the option of the said party of the second part hereto 20 30

All of the covenants and conditions hereinabove contained shall be for the benefit of and shall apply to and bind the said parties hereto and their respective heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF, the said party of the first

Exhibits.

MORTGAGE

Compared

Register's Office
 Apr 30 9 51 AM 1927 10
 Hudson County, N. J.
 Vincenzo Testa.
 to
 New City Building and Loan
 Association.

Indexed under County Block No. 1293

Dated, April 28th—1927.

Amount, \$10,000.00.
 principal due,
 Interest payable.

20

RECEIVED in the Register's Office of
 the County of Hudson, N. J. on the
 30th day of April A. D., 1927, at 9:51
 o'clock, in the forenoon and recorded
 in Book 1434 of Mortgages for said
 County, on page 452.

30

CHARLES F. X. O'BRIEN
 Register

40

*Exhibits.***Exhibit C-3.**

NEW CITY BUILDING AND LOAN ASSOCIATION.
West New York, N. J.

10 The Undersigned desires to procure a loan of \$10,000 00/100 at six per cent. Interest per annum, on Mortgage secured by the Bond of Vincenzo and Maria Testa on the property described as follows:

LOCATION No. 575-577 Palisade Ave. CITY Jersey City, N. J.

DIMENSIONS OF GROUND 50 x 100 DIMENSIONS OF BUILDING 30 x 40

BUILDING MATERIAL Frame. WHAT IMPROVEMENTS? All Steam, Elec., etc.

20 PURPOSES OF USE. Dwelling—two families—5R &B. and 8R &B.—3 Garages.

VALUE OF GROUND \$10,000. ANNUAL RENT \$2010.00

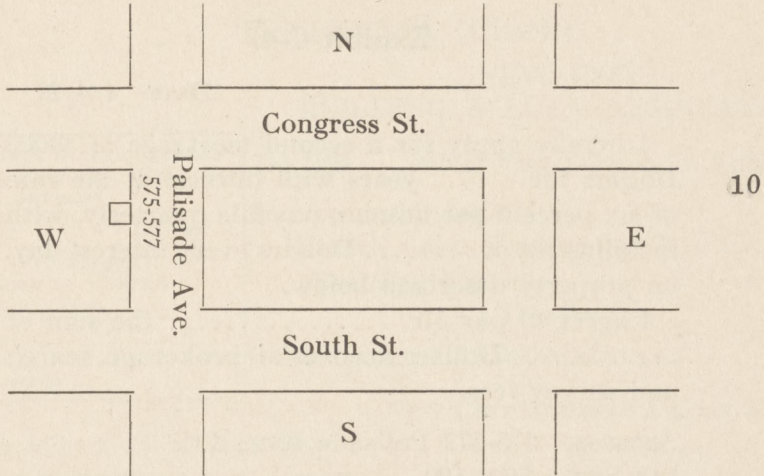
VALUE OF BUILDING \$10,000. TOTAL VALUE \$20,000.

I hereby agree to accept the above loan and to pay all expenses necessary for drawing papers and examining title to said premises.

30 In consideration of the granting of the above loan, I further agree that all fire insurance necessary to cover the above loan shall be placed by the officers of said Association and paid for by me, and to keep the property in good repair.

Signed Vincenzo Testa
Address 575 Palisade Ave., J.C.

Exhibits.



The undersigned, committee, has investigated the above described property and recommend a loan of \$10,000 00/100 based on valuation of Land \$8000. Property \$8000. 20

Total value \$16,000. 00/100

Report approved19...

Georg Zahnleiter } Appraising
 P. Gottlieb } Committee

30

40

Exhibits.

Exhibit C-4.

DATE 4/4/27

10 I hereby apply for a second mortgage of \$4000 Dollars for years with interest at the rate of six percent per annum, payable quarterly, with installments of Dollars every interest day, on property described below.

I agree to pay Mr. the sum of Dollars to cover all brokerage, search and survey fees.

ADDRESS. 575-577 Palisade Ave., J.C.

LOT SIZE. 50 x 100.

20 APARTMENTS. Two. GARAGES. Three.

STORES. None BRICK OR FRAME. Frame.

IMPROVEMENTS. Steam, hot water, electric.

Amount of 1st Mortgage \$9000. Due 11/1/28

Held by. Dr. Reitman.

Amount of 2nd Mortgage \$500. Due 11/27/27

Held by Dr. Reitman.

Installments of \$125 payable quarterly.

Third Mtge. \$825 due now.

30 REMARKS: The 2nd mtge was originally ?

Annual rent \$2010 — 60, 70, 37/50

WITNESSED BY

Vincenzo Testa.

.....

Accepted for \$3500.

Exhibits.

Exhibit C-4A (Check).

NEW CITY
BUILDING & LOAN ASSOCIATION.

This check is in full payment
of the following bills. No
receipt necessary.

Date	Amount
	Full payment
	Loan to Vincenzo
	Testa.
Total	
Discount	
Net Amount	

No. 260. West New York, N. J. April 29, 1927.

10

PAY TO THE ORDER OF

Mitchell Cahn, Trustee for New City

Building & Loan - - - - - \$10,000 00

Trustee a/c

The sum of \$10000xxx00xxx - - - - - Dollars

NEW CITY BUILDING & LOAN ASSOCIATION

Payable in New York City
through Northern New Jersey
Clearing House.

O. A. THIE,
Treas.

WEST NEW YORK TRUST COMPANY
West New York, N. J.

JOSEPH LEER
Pres.

ROWLAND DWYER
Secy.

20

MITCHELL CAHN, Trustee for New City B/L Assn.

(Perforated): Paid 5-6-27.

30

40

*Exhibits.***Exhibit C-5 (Check).**

No. 22.

WEST NEW YORK TRUST COMPANY 55-552

10

West New York, N. J. April 29, 1927.

Pay to the order of J. J. Reitman. \$6000.00.
 Six thousand dollars. Dollars.
 Par in New York City
 Through Northern New Jersey
 Clearing House.

NEW CITY BUILDING AND LOAN
ASSOCIATION.

Trust Account

20

Mitchell Cahn,
Trustee.

Certified for holder

Apr 29, 1927.

Payable through Northern
 New Jersey Clearing House.
 New York City.

WEST NEW YORK TRUST COMPANY,

West New York, N. J.

Rowland Dwyer, Teller.

30

Endorsed:

J. J. Reitman
 Jacob Reitman.

Received payment

Through Northern New Jersey
 Clearing House

Prior Endorsements Guaranteed

Apr 29 1927

40

9 The N. J. Title Guarantee & Trust Co. 9
 Andrew C. Greene
 Treasurer.

(Perforated) Paid 5 9 27.

*Exhibits.***Exhibit C-6 (Check).**

No. 21.

WEST NEW YORK TRUST COMPANY. 55-552.

West New York, N. J. April 29, 1927.

10

Pay to the order of J. J. Reitman. \$3785.00
 Three thousand seven hundred eighty five dol-
 lars. Dollars.

Par in New York City
 Through Northern New Jersey
 Clearing House.

NEW CITY BUILDING AND LOAN
 ASSOCIATION.

Trust Account 20
 Mitchell Cahn
 Trustee.

Certified for Holder
 Apr 29 1927.

Payable through
 Northern New Jersey
 Clearing House
 New York City

West New York Trust Company.

West New York, N. J.

30

Rowland Dwyer, Teller.

 Endorsed:

Pay to S. L. Epstein or order

J. J. Reitman

S. L. Epstein

Samuel L. Epstein.

(Perforated) Paid 5 9 27

40

*Exhibits.***Exhibit C-7 (Check).**

No. 23.

West New York, N. J. April 29, 1927.

10 Pay to the order of Maurice R. Seiden, Attorney.
 \$1014.24.
 One thousand fourteen dollars twenty four cents.
 Dollars.

To
 West New York Trust Company
 West New York, N. J.
 55-552.

20 NEW CITY BUILDING & LOAN
 ASSOCIATION.
 Trust Account
 Mitchell Cahn,
 Trustee.

Certified for holder
 Apr 28 1927
 Payable Through
 Northern New Jersey
 Clearing House
 New York City.
 West New York Trust Company.
 West New York, N. J.
 30 Rowland Dwyer, Teller.

Endorsed:
 For Deposit
 Maurice R. Seiden,
 Attorney.
 Maurice R. Seiden.

40 Received Payment
 Through Northern New Jersey
 Clearing House.
 Prior Endorsement Guaranteed.
 Apr 30 1927.
 Commercial Trust Co. of New Jersey.
 Five Corners Branch
 Frank Pratt, Asst. Treasurer.
 (Perforated) Paid 5 9 27

*Exhibits.***Exhibit C-8.**

ABSTRACT OF BUILDING AND LOAN PASS BOOK OF DEFENDANTS
 VINCENZO AND MARIA TESTA

Series 8.

Shares 50.

No. 430.

10

Testa, Vincenzo and Maria.

Name.

577 Palisade Ave. Jersey City.

Book No. 430.

Record of payments.

19...	Monthly Dues	Interest	Adm. Fee, Premium, Etc.	Fines	Received Payment		
1927							
Apr.	50	50	AF50	500	Dwyer.	20	
May	50	50			Dwyer.		
June	50	50			Dwyer.		
July	50	50			Dwyer.		
Aug.	50	50					
	Audited and found correct.						
Sept.	50	50			Dwyer.		
Oct.	50	50	By receipt.		C. C. H.		
Nov.							
Dec.							
1928.							
Jan.	100	100			O. A. Thie.	30	
Feb.	50	50	Jan		C. C. H.		
17							
29	Mar.	50	50	Feb.	C. C. H.		
	Apr.						
28	May	100	100	Mar. & Apl.	Diekhaus		
7/2	June	100	100	May & June	Diekhaus		
27	July	50	50		C. C. H.		
	Aug.						
	9/25	100	100		C. C. H. D9/28		
	Sept.	Total dues received to date \$900—Audited R.					
	Oct.	50	50		C. C. H.	40	
3	Nov.						
	Dec.						

Exhibits.

	12	1929.	100	100	Nov. Dec.	C. C. H.
		Jan.				
		Feb.				
		Mar.				
10	6	Apr.	50	50		C. C. H.
		May				
	3	June	50	50		C. C. H.

Exhibit C-9.STATEMENT OF PAYMENTS SENT TO DEFENDANT
VINCENZO TESTA.

May 3, 1927.

20 Mr. Vincenzo Testa, 577 Palisade Ave.,
Jersey City, N. J.

	Received from New City Building and Loan Association	\$10,000.00	
	Received from Joseph Brauer	3,000.00	
			<hr/>
			\$13,000.00
	Paid to J. J. Reitman	\$9,785.00	
	Paid to Unity Realty Company	1,014.24	
	Paid taxes	163.19	
30	Paid Building and Loan dues and admission fee for April 1927	100.50	
	Paid water bill	10.66	
	Paid insurance premiums....	210.94	
	Legal fees, commissions and premiums	1,600.00	12,884.53
			<hr/>
			\$ 115.47
40	Encl. MC.ES		

*Exhibits.***Exhibit D-1.**

10 KNOW ALL MEN BY THESE PRESENTS: That
I, VINCENZO TESTA, of the City of Union City in the
County of Hudson and State of New Jersey, held
and firmly bound unto ANTONIO MARRANO of the
Town of West New York in the County of Hudson
and State of New Jersey, in the penal sum of Six
Thousand (\$6000.00) Dollars, lawful money of the
United States of America, to be paid to the said
ANTONIO MARRANO, his heirs, executors, administra-
tors or assigns: FOR WHICH PAYMENT well and truly
to be made, I bind myself, my heirs, executors and
administrators, jointly and severally, firmly by
20 these presents. Sealed with my seal. Dated the
second day of February, One Thousand Nine Hun-
dred and twenty-six,

THE CONDITION of the above obligation is such
that if the above bounden obligor, his heirs, execu-
tors or administrators, shall well and truly pay, or
cause to be paid, unto the above named obligee,
his executors, administrators or assigns, the just
and full sum of Three Thousand (\$3,000) Dollars,
30 on the second day of February which will be in
the year One Thousand Nine Hundred and thirty-
one, and the interest thereon, to be computed from
February 2, 1926 at and after the rate of six per
cent. per annum, and to be paid annually, without
any fraud or other delay, then the above Obliga-
tion to be Void, otherwise to remain in full force
and virtue.

40 AND IT IS HEREBY EXPRESSLY AGREED, that should
any default be made in the payment of the said
interest, or of any part thereof, on any day where-
on the same is made payable as above expressed,
or should any tax, assessment, water rent or other

Exhibits.

municipal or governmental rate, charge, imposition or 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 sixty days then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of Three Thousand (\$3,000) Dollars, with all arrearage of interest thereon, shall, at the option of the said ANTONIO MARRANO, 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.

VINCENZO TESTA L. S.

Signed, Sealed and Delivered }
in the Presence of }

ALFRED E. MODARELLI

Exhibit D-2.

THIS MORTGAGE, made the second day of February nineteen hundred and twenty-six BETWEEN VINCENZO TESTA of the City of Union City in the County of Hudson and State of New Jersey, the Mortgagor, AND ANTONIO MARRANO of the Town of West New York in the County of Hudson and State of New Jersey, the Mortgagee

Exhibits.

WITNESSETH, that to secure the payment of an indebtedness in the sum of Three Thousand (\$3000.00) Dollars lawful money of the United States, to be paid on the second day of February, nineteen hundred and thirty-one, with interest thereon to be computed from February 2nd, 1926 at the rate of six per centum per annum, and to be paid annually, according to a certain bond or obligation bearing even date herewith, and in consideration of one dollar the Mortgagor hereby mortgages to the Mortgagee ALL the two tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of Jersey City in the County of Hudson and State of New Jersey, and which are known on a certain map of property belonging to Cornelius Van Vorst, deceased, made for him by Joseph F. Bridges, Surveyor, bears date October 24th, 1850, and filed in the office of the Clerk (now Register) of the County of Hudson on the 29th day of October, 1850, as lots numbered seventy-seven (77) and seventy-eight (78) and which are also known on a certain other map made by order of the Mayor and Common Council of Hudson City, 1859, as lots numbered twelve (12) and thirteen (13) in Block thirty (30) and which are also known on a certain other map made by order of the Mayor and Common Council of Hudson City, 1859, as lots numbered twelve (12) and thirteen (13) in block thirty (30) and which are also known on a certain other map of the Ninth, Tenth, Eleventh and Twelfth Wards of Jersey City made for the Mayor and Alderman of Jersey City, 1871, as lots numbered seventy-seven (77) and seventy-eight (78) in block seven hundred eighty-six (786) said lots being bounded and described as follows, viz:

Exhibits.

BEGINNING at a point on the westerly side of Palisade Avenue distant two hundred seventy-five (275) feet southerly from the southwesterly corner of Palisade Avenue and Congress Street (late Warren Street); and running (1) southerly along said Palisade Avenue fifty (50) feet, thence (2) westerly at right angles to Palisade Avenue one hundred (100) feet to the centre line of the block; thence (3) northerly along said centre line and parallel with Palisade Avenue fifty (50) feet; thence (4) easterly and again at right angles to Palisade Avenue one hundred (100) feet to the point or place of beginning. 10

BE the said several distances and dimensions more or less. 20

BEING the same premises conveyed to the mortgagor hereto by the Unity Realty Corporation, Inc., by deed of even date. This mortgage is a purchase money mortgage and is given to secure the payment of moneys advanced by the mortgagee hereof to the mortgagor, in payment of part of the consideration for the above described premises.

AND VINCENZO TESTA, the Mortgagor covenants with the Mortgagee as follows: 30

1. That the Mortgagor warrant the title to the premises.

2. That no owner of the mortgaged property shall be entitled to any credit by reason of the payment of any tax thereon.

3. That VINCENZO TESTA will pay the indebtedness as hereinbefore provided.

4. That the buildings on the premises shall be 40

Exhibits.

kept insured against loss by fire for the benefit of the holder hereof.

10 5. That the whole of the principal sum shall at the option of the holder of the mortgage become due after default in the payment of any installment of principal or interest for thirty days or after default in the payment of any tax, water rate or assessment for sixty days or in default in keeping the buildings insured against loss by fire for the benefit of and to the satisfaction of the Mortgagee.

20 6. That the Mortgagor within ten days, upon written request of the holder hereof will furnish at the expense of said holder a statement of the amount due on this mortgage.

7. That no building on the premises shall be removed or demolished without the consent of the Mortgagee.

IN WITNESS WHEREOF, the said Mortgagor has hereunto set his hand and seal the day and year first above written.

VINCENZO TESTA L. S.

30 Signed, Sealed and Delivered
in the presence of
ALFRED E. MODARELLI

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

40 BE IT REMEMBERED, That on this second day of February, in the year of our Lord One Thousand Nine Hundred and twenty-six, before me, the subscriber, an Attorney at Law of New Jersey, personally appeared VINCENZO TESTA, who, I am satisfied, is the mortgagor mentioned in the within Instru-

Exhibits.

ment, to whom I first made known the contents thereof, and thereupon he acknowledged that, he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

ALFRED E. MODARELLI 10
Attorney at Law of New Jersey.

(Copy)

MORTGAGE.

VINCENZO TESTA
TO
ANTONIO MARRANO. 20
Indexed under County Block No. 1293

Dated February 2nd, 1926
\$3000.00

RECEIVED in the Register's Office of
the County of Hudson, N. J. on the 6th
day of Feb. A. D., 1926, at 9.22 o'clock,
in the forenoon and recorded in Book 30
1353 of Mortgages for said County, on
page 265

CHARLES F. X. O'BRIEN
Register.

New Jersey Court of Errors and Appeals

Between

NEW CITY BUILDING AND LOAN
ASSOCIATION, a corporation of
the State of New Jersey,

Complainant-Appellant,

and

VINCENZO TESTA, *et al.*,

Defendants-Respondents.

On Appeal from
the Court of
Chancery.

BRIEF OF COMPLAINANT-APPELLANT.

Preliminary Statement.

The single question presented by this appeal is whether a certain mortgage held by the complainant-appellant, covering lands located in Jersey City, N. J., is entitled to priority of lien over a certain mortgage held by the only answering defendant, Antonio Marrano. Complainant-appellant contends that it is entitled to such priority by reason of the fact that it paid off three certain mortgages which were liens upon the said lands superior to the lien of the defendant Marrano, and that thereby the complainant became subrogated to the rights of the three mortgagees whose mortgages it had paid off. The Court below held that the mortgage of the respondent Marrano was prior in lien to that of the complainant.

A great deal of irrelevant and immaterial matter was interjected upon the hearing of this cause, which tended to becloud the real issue. Nevertheless, the sole question involved is as set forth above.

The Facts.

The pertinent facts herein involved may be set forth briefly as follows:

Vincenzo Testa was the owner of premises set forth in the bill of complaint, located in Jersey City, N. J. Prior to the placing of the appellant's mortgage, the premises were subject to a first mortgage of \$9,000, a second mortgage of \$2,000 (which was subsequently reduced to \$1,000), both held by one Reitman, a third mortgage in the sum of \$1,000 held by the Unity Realty Corporation, Inc., and a fourth mortgage in the sum of \$3,000 held by the defendant Antonio Marrano. This, in fact, was the condition under which the said Testa acquired title to the premises.

Thereafter, on April 28, 1927, the said Vincenzo Testa made application to the complainant herein for a mortgage loan of \$10,000. The purpose of this mortgage loan was to pay off all existing liens on the premises. This was to be accomplished by the additional advancement of \$3,000 which the said Testa was to borrow by way of second mortgage on the said premises from one Brauer. The complainant and Brauer actually advanced these moneys, although the rights of Brauer in this matter are inconsequential because he has not answered the bill of complaint and a decree *pro confesso* has gone against him.

That the agreement was that these moneys so advanced on these new mortgages, particularly on the mortgage of the complainant, were to be used

to pay off the then existing liens is amply supported by the testimony (Case p. 33, fol. 40) (Case p. 34, fols. 1-30). This is also corroborated by the testimony of the defendant Marrano (Case p. 85, fols. 10-30) (Case p. 86, fols. 10-20).

Thereafter and on April 28, 1927, Testa and his wife executed the mortgage to the complainant-appellant and the mortgage to Brauer. The proceeds were used to pay off the first, second and third mortgages on the said premises, but, through oversight, the attorney of the complainant failed to pay off the fourth mortgage, held by the defendant Antonio Marrano.

Thereafter the defendant Testa, the owner of the premises, defaulted upon the complainant's mortgage, and on October 1, 1929, complainant commenced foreclosure proceedings. When the complainant made a search for the purpose of its foreclosure it was discovered that the defendant Marrano held a mortgage covering these same premises, which of record was earlier than the mortgage of the complainant. The defendant Antonio Marrano thereupon answered and counter-claimed in the foreclosure suit, setting up that his mortgage was prior to that of the complainant. Complainant in its bill prayed to be subrogated to the rights of the three mortgagees whose mortgages admittedly were prior in lien to that of the defendant Marrano's mortgage, and which mortgages complainant had paid off. None of the other defendants answered the bill of complaint.

The testimony leaves no room for doubt that the complainant-appellant in fact paid off these three mortgages which were prior to that of the defendant Marrano. Exhibits C-5, C-6 and C-7 (Case pp. 120, 121 and 122) are the checks which were paid to these three mortgagees. One Dr. Reitman held the first two mortgages and one Mr.

Seiden was the attorney for the third mortgagee (Case p. 42, fols. 20, &c.) (Case p. 35, fols. 10-30). The complainant-appellant did not produce the cancelled mortgages because they had been sent to the owner of the property, Testa, to satisfy him that his money had been used to pay off these encumbrances (Case p. 35, fols. 10-30). In fact, the defendant Marrano himself admits that he knew there were three mortgage liens on the said lands prior to his mortgage (Case p. 87, fol. 35):

“Q. And the following day you found out it was what kind of a mortgage? A. A fourth mortgage, and I was satisfied to have it.”

It appears from an examination of the testimony that the defendants Testa and Marrano were friends, and it is a fair assumption from the reading of the testimony that the defendant Testa, who was called as a witness for the complainant, was not a very willing witness. Clearly he had nothing to gain if the complainant succeeded since he had already defaulted on the complainant's mortgage. It would probably be more advantageous to him if his friend Marrano would succeed in the litigation.

Upon these facts the Vice-Chancellor concluded that the lien of Marrano was prior to that of the complainant and advised a decree in accordance with such conclusions. We respectfully submit that the Vice-Chancellor erred in so holding.

THE LAW.

POINT ONE.

Complainant-appellant is entitled to be subrogated to the rights of the mortgagees whose mortgages it paid off and which mortgages were admittedly prior in lien to the mortgage of the defendant Marrano.

It is clear from the evidence that the complainant in advancing the moneys to the defendant Testa by way of mortgage on Testa's lands did not intend to make a voluntary or gratuitous payment of such moneys. The complainant was to obtain a first mortgage lien upon such lands and this was the agreement of the parties. Not having in fact obtained a first mortgage lien as it intended, it is elementary that to the extent to which the said moneys were used to pay off encumbrances admittedly prior to that of Marrano's mortgage it would be subrogated to the rights of such prior mortgages.

Gaskill v. Wales, 36 N. J. Equity 527
(Errors & Appeals).

In that case this Court defined the doctrine of subrogation as follows (p. 531):

“Subrogation is the substitution of a new for an old creditor in succession to his rights. When a man pays a debt which could not properly be called his own, but which it was to his interest to pay, the law subrogates him to all the rights of the creditor.”

In that case the right of subrogation was denied because of the intervention of *bona fide* purchasers who relied on the record which showed can-

cellation of the prior mortgages. The Court said, on page 533:

“The principle of subrogation is one of equity merely, and it will accordingly be applied only in the exercise of an equitable discretion, and always with due regard to the legal and equitable rights of others.”

The rights of *bona fide* purchasers who may have intervened is not present in our case as it was in the case cited. It is submitted that the defendant Marrano is in no worse position if the complainant-appellant stands in the shoes of the mortgagees whose mortgages have been paid off, than he would have been in otherwise. Marrano knew he was a fourth mortgagee when he obtained his mortgage and has admitted his contentment therewith. If the decree appealed from is allowed to stand it is perfectly obvious that the defendant Marrano is getting a windfall at the expense of the complainant-appellant. This, we submit, is inequitable.

We respectfully submit that the learned Vice-Chancellor's distinction that Marrano is injured because of the added terms in the building and loan mortgage, is tenuous and beside the point. Marrano himself admits that he knew there were prior mortgages but had no idea as to their amounts nor who held them. Manifestly, he did not rely upon the fact that the prior mortgagees were individuals and not building and loan associations. Hence no equity could arise in his favor in this respect. Besides, this distinction ignores the basic principle underlying subrogation, *id est*, that the one who pays the old creditor stands in the shoes of that creditor; he obtains all of the rights of the old creditor. That is all the complainant-appellant is asking for. It wishes to stand prior to Marrano's mortgage just as the prior

three mortgages which have been paid off stood prior to Marrano's mortgage. In view of the generally recognized principle of subrogation, it is respectfully submitted that the complainant-appellant only asks for what it is clearly entitled to have.

The learned Vice-Chancellor attempted to draw a distinction between the case at bar and the one which he decided in

Jackson Trust Co. v. Gilkinson, 105 N. J. Equity 116; 147 Atl. 113.

We respectfully submit that the distinction so attempted to be drawn is without substance. The distinction is drawn on page 89 of the Court's conclusions. The Court said that in the case *sub judice* there was no express agreement that the mortgage to the complainant-appellant was for the purpose of paying off the prior mortgages. How this can be said in the face of the clear, uncontradicted testimony is difficult to comprehend. The further distinction is drawn by the Vice-Chancellor that it was not expressly agreed that the complainant-appellant's mortgage was to be a prior lien. This, we contend, is likewise without basis in fact. If the old mortgages were to be paid off then the new mortgage would necessarily be a first lien. Besides, it is common knowledge, of which this Court may take judicial notice, that building and loan associations are allowed by law to make *only* first mortgage loans. It is far fetched to say that the intention of the parties was that the complainant's mortgage was to be a lien on the said premises second to a then existing fourth mortgage after the complainant had paid off the prior three mortgages.

The learned Vice-Chancellor further finds fault with the prayers as set forth in the bill of complaint (Case pp. 101-102). Yet in the *Gilkinson* case, *supra*, he said:

"If complainant's bill and prayer for relief therein is not so framed as to effectuate the relief sought by the complainant, * * * it may be amended to conform with the proofs herein so as to effectuate the purpose intended."

It is our contention that the prayers of the bill of complaint herein sufficiently entitle the complainant to the relief sought, although perhaps these prayers are not drawn with exactness and precision. In any event, the substantial merits of this case should not be lost sight of because of the inartificial method of drawing the bill. Certainly the amendment should be permitted when the substantial equities are with the appellant so that substantial justice might not be frustrated.

The learned Vice-Chancellor, all through the case, commented at length upon the negligence and "slipshod" conduct of the complainant-appellant's counsel. We respectfully submit that this is entirely immaterial in the disposition and determination of the main question involved herein, to wit, the right of subrogation.

Institute B. & L. Association v. Edwards,
81 N. J. Equity 359; 86 Atl. 962.

The factual situation in the case cited is not unlike that existing in the case involved. The Court said:

"Where, however, no one is injured by the mistake but the party himself, and no one has changed his position by reason of the act executed through the influence of the alleged mistake, I see no reason why the mistake should not be corrected although the highest degree of vigilance has not been exercised."

And again the Court said:

"The negligence of the complainant in failing to procure proper searches should, I think, be thus considered with reference to its effects

on the rights of others, and, so considered cannot be properly regarded as that type of culpable negligence which appropriately affords a bar to equitable relief."

These quotations are pertinent to the case *sub judice*. Certainly the complainant or its attorney has been negligent in not discovering the mortgage held by Marrano; but we may well say, "What of it?" Marrano has not changed his position in any respect due to the complainant's default. How can he be harmed if the complainant stands in the position of the mortgagees whose mortgages have been paid?

Homeopathic Mutual Life Ins. Co. v. Marshall, 32 N. J. Equity 103.

The facts in this last cited case strongly resemble those in the case involved. The Court said (p. 112):

"As before stated, the loan was bona fide made and almost all the money used in discharging encumbrances on two properties. The complainant cannot be regarded as a volunteer. Those encumbrances were on the property when it lent the money, and it lent it to enable the Marrenners to remove them. In appropriate proceedings subrogation might be obtained."

See also the case of

Barnett v. Griffith, 27 N. J. Equity 201,

wherein the Court said:

"The complainant advanced the money paid on account of these two mortgages, on the security of his mortgage, and to release the mortgaged premises from the encumbrance of those mortgages, which were prior liens to his mortgage and to the claims of the lien claimants. He is entitled to be subrogated to the rights of the mortgagee under those mort-

gages, to the extent of the money paid and interest thereon."

These cases all indicate in no uncertain terms that the complainant-appellant is entitled to relief by way of subrogation. The learned Vice-Chancellor intimates that resuscitation is the proper remedy (Case p. 101). In support thereof he cites the case of

Thirteenth Ward B. & L. Ass'n v. Kanter,
105 N. J. Equity 338; 147 Atl. 809.

It is respectfully urged that the last cited case deals with a question entirely foreign to that involved in the case at bar. There is no question of the rights of mechanic's lien claimants here involved and the intricacies of marshalling of assets which exist in lien cases is not here present. That is the question involved in the *Kanter* case.

For the same reason the case of

Fischgrund v. Erikson Real Estate Co., 105
N. J. Equity 345; 147 Atl. 811,

cited by the Court is not applicable.

POINT TWO.

By virtue of the decree *pro confesso* entered against all the defendants except Marrano, their possible rights can furnish no obstacle to complainant-appellant's right of subrogation.

The learned Vice-Chancellor placed great stress on the possible rights of Joseph Brauer and Vincenzo Testa whose interests were effectively cut off by their failure to answer. Thereby they had admitted the complainant's right to relief.

Martin v. Morales, 102 N. J. Equity 535;
142 Atl. 31 (Errors & Appeals).

These parties had their day in court and the mere fact that they have not seen fit to assert their possible rights is no reason for the Court to be oversolicitous of their unasserted rights to the extent of barring the complainant-appellant in asserting its right to priority over the defendant Marrano's mortgage. If the defendant Brauer was desirous of asserting his right to priority along with that of the complainant-appellant, he had his opportunity to do so. His failure cannot prejudice the complainant-appellant's right to its priority.

Testa likewise had his opportunity to take issue upon the claim of the complainant-appellant. He did not desire to do so. Certainly it was not for the Court below to have voluntarily taken upon itself the burden of Testa's rights, if any. The sole question involved was one of priority. If the learned Vice-Chancellor felt that the amount due upon the complainant's mortgage was less than that asserted by the complainant, such fact was readily ascertainable. What has this question to do with the right to priority claimed by the complainant-appellant by reason of its right to subrogation? We respectfully submit that it has none. Besides, even the answering defendant Marrano, by stipulation marked in evidence, admitted the amount due upon complainant's bond and mortgage (Case p. 103). Certainly the non-answering defendants could not complain, and for the learned Vice-Chancellor to have gone into this question in great detail, particularly in an extended colloquy with counsel of the complainant, we respectfully submit could serve no useful purpose in the decision of the single question involved herein.

POINT THREE.

It is respectfully submitted that the decree of the Court of Chancery should be reversed and that a decree be directed to be entered in said Court that the rights of the complainant-appellant to the extent of the moneys actually advanced in paying off mortgages prior to that of the defendant Marrano is superior in lien to the lien of the mortgage of the defendant Marrano.

Respectfully submitted,

MITCHELL CAHN,
Solicitor of Complainant-Appellant.

BENJAMIN GROSS,
Of Counsel.

New Jersey Court of Errors and Appeals

Between

NEW CITY BUILDING AND LOAN
ASSOCIATION, a Corporation
of the State of New Jersey,
Complainant-Appellant,

and

VINCENZO TESTA, et als,
Defendants-Respondents.

On Appeal
from the
Court of
Chancery.

BRIEF ON BEHALF OF DEFENDANT- RESPONDENT, ANTONIO MARRANO

Preliminary Statement

Complainant-Appellant appeals from a final decree. By said decree the bill of complaint filed in the above entitled cause was dismissed. The defendant, Antonio Marrano, was awarded a decree for the sum of \$3,000 with lawful interest from February 2, 1927, on a mortgage made by the defendant Testa, and the complainant-appellant was awarded a decree for the sum of \$9,590.50 with lawful interest from July 1, 1930, on a mortgage made by defendant Testa, said amounts to be made by a sale of the mortgaged premises. The decree provided that defendant Marrano was to be first paid out of the proceeds of said sale.

The Facts

Defendant Antonio Marrano was the owner of a bond and mortgage dated February 2, 1926, made by the defendant, Vincenzo Testa, given to secure payment of the sum of \$3,000 on February

2, 1931, with interest at 6%, payable annually (Exhibits D-1 and D-2, pages 126-130).

On or about April 4, 1927, the defendant Testa is alleged to have signed two applications for mortgage loans totaling \$14,000 (Exhibits C-3 and C-4, pages 116-118).

Exhibit C-3 does not set forth any encumbrances upon the property owned by defendant, Testa. Exhibit C-4 discloses that there was a first mortgage of \$9,000 due November 1, 1928, a second mortgage for \$500 held by the first mortgagee due November 27, 1927, and a third mortgage for \$825 then due. Exhibit C-4 was for a mortgage of \$4,000.

Defendant Testa testified that when he applied for the mortgages that there were on the premises a first mortgage of \$9,000, a second for \$1,000, a third for \$1,000 and a fourth for \$3,000 (page 32, fol. 30-36).

Testa did not understand English (page 31, fol. 14). When he signed the bond and mortgage of the complainant he requested an interpreter, but an interpreter was not furnished (page 38, fol. 10-28).

Complainant's bond and mortgage (Exhibits C-1 and C-2, pages 104-115) were executed on April 28, 1927.

Except for what appears on Exhibit C-4, there is no evidence in the case as to the terms and conditions of the first, second and third mortgages which complainant alleges to have paid. The mortgage of the defendant Antonio Marrano is not disclosed on either Exhibits C-3 or C-4.

If the data on Exhibit C-4 is correct, on April 28, 1927, the date on which complainant's mortgage was executed, the unexpired term of the first

mortgage was one year and six months, and the unexpired term of the second mortgage was seven months. It would appear that the only mortgage which was due was the third mortgage.

The closing statement (Exhibit C-9, page 124) indicates that \$9,785 was paid for a cancellation of the first and second mortgages. The evidence does not disclose the calculation of interest on said mortgages (page 44, fol. 20-29). From the evidence it is impossible to state whether the first and second mortgagees insisted upon the payment of interest on the mortgages to their due date. It is significant that the evidence does disclose the calculation on the third mortgage (page 44, fol. 34-40).

There is no evidence that the defendant Antonio Marrano either directly or indirectly agreed that the mortgage of the complainant was to be superior to his mortgage. No interest has been paid on Marrano's mortgage since February, 1927 (page 82, fol. 30-40).

Complainant-Appellant contends that its mortgage for \$10,000, dated April 28, 1927, is superior to the mortgage of the defendant Marrano, which was executed and recorded more than a year prior to the execution and recording of the complainant's mortgage.

Point I.

Defendant Marrano's mortgage is entitled to priority over complainant-appellant's mortgage.

In the case of *Gaskill vs. Wales*, 36 N. J. E. 527, cited in appellant's brief, the rule is stated to be that the right of subrogation will be denied

when the rights of innocent third parties would be affected adversely.

It is respectfully submitted that the learned Vice Chancellor applied this rule properly to the facts in the case at bar when he denied the complainant-appellant the right of subrogation.

If the mortgage of the complainant-appellant is subrogated to the rights of the mortgagees whose mortgages are alleged to have been paid off, the defendant Marrano is placed in a worse position than he was when he accepted his mortgage from the defendant Testa.

The evidence in the case at bar is that when the complainant-appellant advanced its funds that the first mortgage on the premises would not be due for one year and six months, and the second mortgage would not be due for seven months (Exhibit C-4).

The third mortgage was under foreclosure (page 44, fol. 30-40). The evidence does not disclose whether the defendant Marrano as a subsequent mortgagee was made a defendant in said foreclosure. Complainant-appellant maintains that it advanced \$1,014.24 (Exhibit C-9) to pay this mortgage. If defendant Marrano was made a party defendant in said foreclosure, he could at that time have protected his mortgage of \$3,000 by the payment of \$1,014.24.

Defendant Marrano is in an entirely different position today. Complainant-appellant's mortgage is in default. It has a decree for \$9,590.50 with lawful interest from July 1, 1930, and costs of suit. If its contention prevails, defendant Marrano will be required to advance a substantial sum to protect his \$3,000 mortgage. It must also be recognized that the market for the sale of real

estate has been adversely affected since April, 1927.

Defendant Marrano is not responsible for being in this position. For over two years after the complainant-appellant obtained its mortgage, defendant Marrano had no knowledge of its existence. He never either directly or indirectly induced the complainant-appellant to advance money on its mortgage to Testa. He never directly or indirectly agreed to subordinate his mortgage to its mortgage.

The present condition of the complainant-appellant is due entirely to its agent. Its agent knew that there were mortgages aggregating \$14,000 on said premises when he accepted the application for the \$10,000 mortgage. This agent also represented the person to whom application was made for a \$4,000 second mortgage (page 40, fol. 20-30).

The closing statement (Exhibit C-9) prepared by the complainant-appellant's agent shows that, while he knew that mortgages aggregating \$14,000 were liens on the premises that he had but \$13,000 to close the transaction. From the \$13,000 he deducted \$1,600 for legal fees, commissions and premiums, \$100.50 for building and loan dues and \$210.94 for insurance premiums. This loan of \$13,000 to Testa cost him \$1,911.44, leaving but \$11,088.56 to pay mortgages totaling \$14,000. The agent of the complainant-appellant entirely disregarded the mortgage of defendant Marrano. Testa, the owner of the property, was illiterate and relied solely on the agent of complainant-appellant (page 34).

It is respectfully submitted that by reason of these facts that the learned Vice Chancellor prop-

erly drew a distinction between the case at bar and the one in which he decided in

Jackson Trust Co. vs. Gilkinson, 105 N. J. E. 116.

In the cited case the mortgage was placed with the knowledge and consent of the subsequent mortgagee. The subsequent mortgagee agreed to subordinate his mortgage to the lien of the new mortgage to be procured to pay off an existing first mortgage which was in default. A mechanic's lien was subsequent to the existing first mortgage. A foreclosure of the existing first mortgage would have terminated its lien. It would also have been subsequent to the second mortgage. In that case the mechanic's lien claimant would have been unjustly enriched at the expense of the new mortgagee through an innocent error made by the agent of the new mortgagee.

In the case at bar there is no evidence that the lien of the defendant, Marrano, was in jeopardy when the complainant-appellant's mortgage was placed. He by contract had contracted for a definite lien. When his mortgage was placed, it was a fourth mortgage. He had a right to assume that Testa would pay his first, second and third mortgages when they came due. According to Exhibit C-4, they all came due before his mortgage. Upon the payment and discharge of each of these mortgages his mortgage would become more valuable.

In

Institute B. & L. Association vs. Edwards, 81 N. J. E., 359,

cited in complainant-appellant's brief, it is re-

spectfully submitted that the factual situation was entirely different than in the case at bar.

In the cited case the complainant held a first mortgage for \$2,500. The mortgagor was unable to pay. The complainant to assist the mortgagor gave credit for payments that had been made, cancelled the old mortgage and took a new mortgage for \$2,400. It neglected to discover two judgments that were acquired subsequent to the execution of the \$2,500 mortgage. The lien of the judgments were subsequent to the mortgage of \$2,500 and would have been terminated by a foreclosure of that mortgage. The judgment creditors would be placed in a more favorable position after the execution of the new mortgage of \$2,400 if the principle of subrogation was not applied.

In the case at bar the defendant, Marrano, acquired his lien by virtue of a contract. In April, 1927, the property would bring sufficient to protect his fourth mortgage in the event of the foreclosure of the third. He would at most have had to advance \$1,014.24 to protect his mortgage and today he would be required to advance \$9,590.50 to protect his mortgage.

It is respectfully submitted that the application of the rule in the cited case to the facts in the case at bar requires that the right of subrogation be denied as defendant Marrano's position has been changed through no act of his own.

It is respectfully submitted that the facts in

Homeopathic Mutual Life Insurance Co.
vs. *Marshall*, 32 N. J. E., 103.

do not strongly resemble those in the case at bar.

In the cited case there were two mortgages which it was necessary to pay in order to prevent

foreclosure and also unpaid municipal liens which threatened the title. A mortgage loan was obtained to satisfy these encumbrances. On the foreclosure of said mortgage it was contended that the mortgage was void owing to defective execution. It was held in that case that all parties had benefited by the cancelling of said liens and the principle of subrogation was applied.

In the case at bar there is no evidence that the defendant, Marrano, benefited by the three prior mortgages. To deny subrogation in that case sons hereinbefore set forth the defendant, Marrano, was injured by the discharge of said mortgages in the manner in which it was accomplished.

In

Barnet vs. Griffith, 27 N. J. E., 201,

cited in complainant-appellant's brief, the facts are not similar to the facts in the case at bar.

In the cited case the question was whether complainant's mortgage is entitled to priority over lien claims and the inchoate right of dower of the wife of the mortgagor, she being a minor at the time of the execution of the mortgage. The mortgage money was used to discharge two existing mortgages. To deny subrogation in that case would have unjustly enriched the holder of the lien at the expense of the mortgagee.

In all of the cases cited in complainant-appellant's brief the doctrine of subrogation has been applied in favor of the mortgagee as against liens which were created by operation of law. In none of the cases was there a dispute as to the priority of a lien which had been created by contract prior to the placing of the new mortgage.

It is respectfully submitted that there is a distinction between a lien created by operation of

law and a lien created by contract. A mortgage creates a lien by contract. The mortgagee contracts for a lien and in the case where he contracts for a lien subsequent to other contracted liens he has a right to assume that the prior liens will be cancelled in the manner prescribed by law.

The fact that a subsequent mortgagee may not be able to protect his mortgage on a foreclosure of the prior mortgages is one that cannot be assumed. The subsequent mortgagee should have the right to determine whether it is to his advantage to substitute a new mortgage or to permit a foreclosure of the prior mortgages.

In the case at bar the defendant, Marrano, was not given this opportunity. The mortgagor without consulting him procured a new mortgage to pay off prior mortgages and as a result the defendant, Marrano, now finds that his mortgage is in a much more precarious condition than when he advanced the money.

The only question in the case at bar is whether the complainant-appellant, who created the condition, or the defendant-respondent, who had no part in creating the condition, shall suffer the loss.

It is respectfully submitted that equity and justice requires that the loss should be borne by the person who brought about the condition.

Point II.

It is respectfully submitted that the decree of the Court of Chancery should be sustained and that the defendant Marrano is entitled to have his mortgage paid in full prior to the payment of the mortgage of the complainant-appellant.

Respectfully submitted,
ALFRED E. MODARELLI,
Solicitor for and of Counsel with
Defendant-Respondent, Antonio Marrano

