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Bill of Complaint and Amendment.

IN CHANCERY OF NEW JERSEY.

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

The complainant, Active Mortgage Company, a corporation of the State of New Jersey, having its principal office in the City of Newark, County of Essex in said State respectfully shows that: 10

1. On April 26, 1927, Apex Building Co., a corporation executed and delivered to Lenox Land Co., a corporation, its bond in the sum of eighty-five thousand dollars (\$85,000.00) dated on that date to secure that sum and payable on January 26, 1928, with interest at the rate of six per centum per annum payable at maturity.

2. To secure the payment of the bond, said Apex Building Co., a corporation, executed to said Lenox Land Co., a corporation, a mortgage of even date with the bond; and thereby conveyed to it 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 proved according to law was recorded in the Register's Office of Essex County in Book Q 60 of Mortgages, pages 599-602. 20 30

3. The mortgaged premises are described as follows:

All those two certain tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of Orange, in the County of Essex and State of New Jersey, 40

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FIRST TRACT.

10 BEGINNING at a point in the southerly side of Willow Street, at a point distant easterly three hundred and twenty-nine feet and fifteen hundredths of a foot from the south-easterly corner of Scotland and Willow Streets; thence along said Willow Street, south forty seven degrees, thirty minutes east fifty feet (50') to the proposed extension of Lincoln Avenue; thence along said proposed extension, south forty two degrees thirty minutes west one hundred and one feet to land of Joseph Wilde; thence along his line north forty seven degrees thirty minutes west fifty feet to the southeasterly corner of

20 lot #6 on a map of property of Abraham Baldwin; thence along said lot, north forty two degrees thirty minutes east one hundred and one feet to said Willow Street and place of Beginning. Excepting therefrom so much as was heretofore taken by the City of Orange for the widening of Lincoln Avenue.

SECOND TRACT.

30 BEGINNING on the southerly side of Willow Street at a point therein distant two hundred and seventy nine feet and fifteen hundredths of a foot southeasterly from the southeasterly corner of Willow Street and Scotland Road, formerly Scotland Street; thence (1) south forty two degrees thirty minutes west one hundred and one feet (101'); more or less to land now or formerly of Joseph Wilde, deceased; thence (2) along his line south forty seven degrees thirty minutes east fifty feet

40 to land now or formerly of William E. Bell;

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thence (3) along that line, north forty two degrees thirty minutes east one hundred and one feet to said Willow Street; thence (4) along said Willow Street north forty seven degrees thirty minutes west fifty feet to the beginning.

Said mortgage recites that it is an advance money mortgage drawn in pursuance of Section 14 of an Act entitled "An Act to secure to mechanics and others, payment for their labor and materials in erecting any building and in making certain improvements to land (revision of one thousand eight hundred and ninety-eight)" and the various amendments and supplements thereto, and that the principal sum thereof is to be advanced in connection with the erection and construction of a five story brick apartment building in accordance with plans and specifications prepared by Harold Foster Clark (Architect) and that said building was to contain 98 rooms.

Said mortgage also recited that the principal sum thereof to be advanced on the building to be erected on the premises therein described shall be advanced in the manner and in accordance with the schedule of payments forming part of said mortgage.

Said mortgage contains a provision that the lien thereof shall attach to all materials brought in and about the premises used or intended to be used in connection with the building to be erected thereon.

4. Both bond and mortgage contained an agreement that if any installment of interest should remain unpaid for 30 days after the same

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should fall due, then the whole principal sum, with all unpaid interest, should, at the option of the mortgagee, its representatives, or assigns, become immediately due.

10 5. The mortgage also contained an agree-
ment that the mortgagor, its successors and as-
signs, would keep the building erected or to be
erected on the mortgaged premises insured
against loss or damage by fire in a sum not less
than the principal of the mortgage debt, and
would assign the policy of insurance to the mort-
gagee, its representatives or assigns, and in de-
fault of so doing, that the mortgagee, its repre-
sentatives or assigns, should be entitled to effect
such insurance, and the premiums paid for the
20 same by the mortgagee, or its assigns, with in-
terest at six per centum per annum, should be a
lien on said land, added to the amount of the
mortgage debt and secured by the mortgage.

30 4-A. Said mortgage also contained an agree-
ment that the principal sum thereof or the amount
from time to time due thereunder for advance-
ments thereon, together with interest at the rates
stated shall become immediately due and pay-
able upon the filing of any mechanic's lien against
said premises and the failure of the owner there-
of to procure within thirty days after the same
is filed, a cancellation of the said lien or a dis-
charge thereof in the manner and form provided
by law.

40 5. On June 30, 1927, said Lenox Land Co., a
corporation, by an instrument in writing dated
on that date, assigned to the complainant the
aforementioned bond and mortgage, which assign-
ment after having been duly proved according
to law was recorded in the Essex County Regis-

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ter's Office in Book 191 of Assignments of Mortgages for Essex County on page 357.

6. On April 26, 1927, said Apex Building Co., a corporation, mortgaged the land and premises hereinabove described to Lenox Land Co., a corporation, to secure the principal sum of \$14,500 besides interest, which mortgage after having been duly proved according to law, was recorded in the Essex County Register's Office in Book Q 60 of Mortgages for said County, on pages 597, etc. 10

7. On July 1, 1927, said Lenox Land Co., a corporation, by an instrument in writing and for a valuable consideration sub-ordinated the lien of its said mortgage in favor of the aforementioned mortgage held by the complainant, which instrument in writing after having been duly proved according to law was recorded on September 2, 1927, in the Essex County Register's Office in Book 96 of Releases of Mortgages for said County on page 148. 20

Any interest which the said Lenox Land Co., a corporation, may have in said lands is subject to the lien of complainant's mortgage.

8. On June 21, 1927, Ransome Concrete Machinery Co., a corporation, caused to be filed in the Essex County Register's Office, an agreement purporting to be a conditional bill of sale under the terms of which said Ransome Concrete Machinery Co. agreed to ship to the premises described in the bill of complaint herein, one Ransome Building Mixer at the agreed price of \$735. Said agreement was recorded on June 25, 1927 as Instrument No. 28440. 30

Any interest which the said Ransome Concrete Machinery Co., a corporation, may have in said 40

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land by virtue of the making and recording of said agreement, is subject to the lien of complainant's said mortgage.

10 9. On June 9, 1927, Watson Elevator Co., a corporation, caused to be filed in the Essex County Register's Office an agreement, whereby the said Watson Elevator Co. agreed to install one electric passenger elevator in the building in the course of construction upon the land hereinabove described at the agreed price of \$4,545.00. Said agreement was recorded on September 13, 1927 as Instrument No. 34076.

20 Any interest which the said Watson Elevator Co., a corporation, may have in said land by virtue of the making and recording of said agreement, is subject to the lien of complainant's said mortgage.

30 10. On September 13, 1927, Industrial Sales Engineering Company, a corporation, caused to be filed in the Essex County Register's Office, an agreement whereby the said Industrial Sales Engineering Company, agreed to furnish the oil burner equipment in the building in the course of construction upon the land hereinabove described at the agreed price of \$980.00. Said agreement was recorded on September 16, 1927 as Instrument No. 34262.

Any interest which the said Industrial Sales Engineering Company, a corporation, may have in said land by virtue of the making and recording of said agreement, is subject to the lien of complainant's said mortgage.

40 11. On September 14, 1927, Peter Russo Co. caused to be filed in the Essex County Register's Office, an agreement whereby the said Peter Russo Co. agreed to install dumbwaiters in the

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building in the course of construction upon the land hereinabove described at the agreed price of \$60 each if one hand rope required and \$70 each if two hand ropes required. Said agreement was recorded on September 20, 1927 as Instrument No. 34561.

Any interest which the said Peter Russo Co. may have in said land by virtue of the making and recording of said agreement, is subject to the lien of complainant's said mortgage. 10

12. On June 8, 1928 said Apex Building Co., a corporation, executed to complainant, Active Mortgage Company, a corporation, a bond of that date to secure the principal sum of \$15,000 with interest at the rate of six per cent. per annum, payable at maturity of said bond. Said bond was so given by said Apex Building Co. to secure the additional sum of \$15,000 which complainant agreed to advance in connection with the construction and completion of the building in the course of construction upon said land and premises as hereinafter recited. 20

13. To secure payment of the bond, said Apex Building Co., a corporation, executed to said Active Mortgage Company, a corporation, the complainant herein, a mortgage of even date with the bond and thereby conveyed to it in fee the same lands and premises as hereinabove described and embraced by the mortgage held by complainant as aforesaid on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage after having been first duly proved according to law, was recorded on June 25, 1928 in Book O 64 of Mortgages, for Essex County, pages 416-418. 30

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Said mortgage contains a recital that the funds secured thereby are to be advanced in connection with the construction and completion of the five-story brick apartment building in the course of construction upon said land and premises in accordance with plans and specifications prepared
10 by Harold Foster Clark (Architect), and that said advancements were to be made in accordance with the terms of an agreement on that date entered into between the parties.

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

15. The mortgage also contained an agreement that the mortgagor, its successors and assigns, would keep the building erected or to be erected on the mortgaged premises insured against loss or damage by fire in a sum not less than the principal of the mortgage debt, and would assign the policy of insurance to the mortgagee, its representatives or assigns; and in default of so doing that the mortgagee, its representatives or assigns, should be entitled to effect
30 such insurance, and the premiums paid for the same by the mortgagee, or its assigns, with interest at six per centum per annum, should be a lien on said land, added to the amount of the mortgage debt and secured by the mortgage.

16. On June 8, 1928, said Lenox Land Co., a corporation by an instrument in writing subordinated the lien of the mortgage held by it as
40 hereinabove recited in favor of the mortgage

Bill of Complaint.

held by complainant dated June 8, 1928, given to secure the principal sum of \$15,000 which instrument in writing after having been duly proved according to law was recorded in the Essex County Register's Office on June 25, 1928 as Instrument No. 9 and re-recorded on July 25, 1928, in Book 102 of Releases of Mortgages for said County on page 433.

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Any interest which the said Lenox Land Co., may have in said land and premises is subject to the lien of complainant's said mortgage.

17. On August 17, 1927, said Apex Building Co., a corporation, mortgaged said land and premises to Warranty Building & Loan Association of the City of Newark, a corporation, to secure the principal sum of \$165,000. Said mortgage after having been duly proved according to law was recorded on September 8, 1927 in the Essex County Register's Office in Book K 62 of Mortgages on page 142, etc., and which mortgage was subsequently, to wit; on September 19, 1927 re-recorded in the Essex County Register's Office in Book C-62 of Mortgages for said County on pages 402, etc.

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Said Warranty Building & Loan Association of the City of Newark has not advanced any of the funds intended to be secured by its said mortgage and therefore has no interest in the land and premises hereinabove described, complainant says that if it has any interest in said lands such claim or interest is subject to the lien of complainant's said mortgages.

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18. On April 2, 1928, Lionel P. Kristeller, a Receiver appointed by the Chancellor of the State of New Jersey in a certain cause theretofore pending in the Court of Chancery of New Jer-

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Bill of Complaint.

sey in which the Belmont Lumber Co., a corporation, was complainant and said Apex Building Co., a corporation, was defendant, executed and delivered to said Apex Building Co. a deed of conveyance for the land and premises hereinabove described, pursuant to an order made in
10 said cause on March 2, 1928. Said deed after having been duly acknowledged according to law was recorded in the Essex County Register's Office in Book D 78 of Deeds for Essex County on pages 95, etc.

19. On June 9, 1928, Domestic Electric Co., Inc., a corporation, caused to be filed in the Essex County Register's Office a conditional bill of sale made by said Domestic Electric Co., Inc., with Apex Building Co., a corporation, wherein
20 and whereby said Domestic Electric Co., Inc., agreed to furnish and install the frigidaire equipment in the building in the course of construction upon the land hereinabove described at the agreed price of \$4,800. Said conditional sales agreement was recorded as Instrument No. 54159.

20. On or about the 18th day of November, 1927, the said Domestic Electric Co., Inc., caused to be recorded in the Essex County Register's
30 Office an instrument in writing purporting to be a conditional sales agreement wherein it is recited that said Domestic Electric Co., Inc., a corporation, agrees to furnish and install frigidaire equipment for the premises described in complainant's said mortgages for the sum of \$5,775 payable in manner therein recited. Said paper writing is recorded in the Essex County Register's Office in Book B 63 of Mortgages, page 97.

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Complainant says that the said Domestic Electric Co., Inc., has not installed the equipment referred to in the aforementioned conditional sales agreements and that it therefore has no lien against the land and premises described in complainant's mortgages and that any claim or interest which it may have by virtue of the making and recording of said agreements is subject to the lien of complainant's said mortgage. 10

21. On July 24, 1928 Maier-Rich & Co., a corporation, caused to be filed in the Essex County Register's Office, an agreement, whereby the said Maier-Rich & Co., agreed to furnish forty-two gas ranges to be installed in the building in the course of construction upon the land hereinabove described at the agreed price of \$1,318.00. Said agreement was recorded on July 27, 1928, in the Essex County Register's Office as Instrument No. 55293. 20

Any interest which the said Maier-Rice & Co., a corporation, may have in said land by virtue of the making and recording of said agreement, is subject to the lien of complainant's said mortgages.

22. On November 25, 1927, Victory Sash & Door Co., a corporation, by Frank D. Holloway, Louis F. Mesmer and John J. Whittier, as trustees, caused to be filed in the Essex County Clerk's Office a mechanic's lien against the land and premises hereinabove described in which said Apex Building Co. is named as Builder and Owner and Active Mortgage Company and Warranty Building & Loan Association, as mortgagees, whose liens may be affected by a sale in said proceedings. Said mechanic's lien was filed on November 25, 1927 in Book 21 of Mechanic's Liens for Essex County on page 316, etc. 30 40

Bill of Complaint.

A suit was subsequently instituted in the Essex County Circuit Court upon said mechanics' lien claim said Apex Building Co. as Builder and Owner and complainant and said Warranty Building & Loan Association as mortgagees. A rule for judgment was filed on August 13, 1928, against the said Apex Building Co. and Warranty Building & Loan Association and damages assessed against them and in favor of the plaintiff in said action for \$1,121.12 damages besides costs.

Complainant says that any interest which the said Frank D. Holloway, Louis F. Mesmer and John J. Whittier as trustees for said Victory Sash & Door Co., a corporation, may have in said land by virtue of said mechanic's lien and the recovery of said judgment is subject to the lien of complainant's said mortgage.

23. On June 28, 1928, Irvington Iron Works, a corporation, caused to be filed in the Essex County Clerk's Office a mechanics' lien against Apex Building Co., a corporation, as owner and complainant (*et als.*) as mortgagees. Which mechanics' lien was recorded in Book 23 of Mechanics' Liens for Essex County on page 408; and upon which mechanics' lien a suit was subsequently instituted in the Second District Court of the City of Newark which is still pending and undetermined as to complainant.

Any interest which the said Irvington Iron Works, a corporation, may have in said land by virtue of said mechanics' lien and the institution of said suit is subject to the lien of complainant's said mortgages.

24. On March 21, 1928, Hoffman Plumbing Co., a corporation, entered into a contract with said Apex Building Co., a corporation, under

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the terms whereof it agreed to complete the plumbing work on the building in the course of construction upon the land hereinabove described for the sum of \$13,800.00. Said contract was on April 1, 1928 filed in the Essex County Clerk's Office as Instrument No. 643.

25. Said Hoffman Plumbing Co., a corporation, did on or about the 8th day of June, 1928, execute and deliver to complainant, a stipulation in writing wherein and whereby in consideration of the complainant agreeing to advance the proceeds of the mortgage dated June 8, 1928, hereinabove referred to for the purpose of aiding the owner of said land to erect said building and for other considerations in said stipulation expressed, it postponed and subordinated any lien which said Hoffman Plumbing Co. may have, pursuant to the provisions of an Act entitled "An Act to secure to mechanics and others, payment for their labor and materials in erecting any building" and the supplements thereto and acts amendatory thereof, in favor of the aforementioned mortgage so held by complainant as aforesaid.

Any interest which the said Hoffman Plumbing Co. may have in said land by virtue of the filing of said contract as aforesaid, is subject to the lien of both of complainant's said mortgages.

26. The defendant, Apex Building Co. failed to procure within thirty days after the filing of the mechanics' liens hereinabove referred to, a cancellation or a discharge thereof in the manner and form provided by law, in violation of the agreement contained in complainant's said mortgage as hereinabove recited.

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Bill of Complaint.

Complainant has elected that the whole principal of the mortgage held by it with all unpaid interest, shall be now due.

10 27. The defendant, Apex Building Co., has failed and neglected to pay the taxes which were assessed against said land and premises for the first half of the year 1928 which became a lien on June 1, 1928, and that said taxes have remained unpaid and in arrears for the space of sixty days and upwards.

Complainant has elected that the whole principal of the mortgages held by it, with all unpaid interest, shall be now due.

20 28. Complainant has advanced all the funds secured by the mortgage dated April 26, 1927, in accordance with the terms of said bond and mortgage and there is due and owing thereon the entire principal sum thereof, to wit; eighty-five thousand dollars (\$85,000) with interest thereon from April 26, 1927.

30 29. Complainant has advanced all the funds secured by the mortgage dated June 8, 1928, in accordance with the terms of said bond and mortgage and there is due and owing thereon the entire principal sum thereof, to wit; fifteen thousand dollars (\$15,000) with interest thereon from June 8, 1928.

39. Said Apex Building Co., a corporation, has always been in possession of the mortgaged premises.

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

40 1. That Apex Building Co., a corporation, Lenox Land Co., a corporation, Warranty Building & Loan Association of the City of Newark, a

Bill of Complaint.

corporation, Irvington Iron Works, Inc., a corporation, Domestic Electric Co., Inc., a corporation, Ransome Concrete Machinery Co., a corporation, Watson Elevator Co., a corporation, Industrial Sales Engineering Company, a corporation, Peter Russo Co., a corporation, Maier-Rich & Co., a corporation, Victory Sash & Door Co., a corporation, Frank D. Holloway, Louis F. Mesmer and John J. Whittier, trustees, Hoffman Plumbing Co., a corporation, who are the defendants to this suit, may answer this bill of complaint, without oath, and each statement therein made. 10

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

3. That the defendants, or one of them, may be decreed to pay complainant the amount so found due, with interest and costs, by a short day, to be appointed by this Court; and that in default of such payment, they, and each of them, be debarred and foreclosed of all equity of redemption in said lands; or 20

4. That a decree may be made for the sale of the said mortgaged premises to raise and pay to the complainant the amount so found due on its mortgages, with interest and costs. 30

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.

SAMUEL ROESSLER,
Solicitor for and of Counsel with Complainant.

Amendment to Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

Between

10 ACTIVE MORTGAGE COMPANY,
a corporation,
Complainant,

and

APEX BUILDING Co., a corporation,
et als.,
Defendants.

On Bill, etc.
Amendment
to Bill of
Complaint
Before Issu-
ance of Sub-
poenas.

To the Honorable Edwin Robert Walker, Chan-
cellor of the State of New Jersey:

20 The complainant, Active Mortgage Company, a corporation of the State of New Jersey, having its principal office in the City of Newark, County of Essex in said State, respectfully shows that:

1. On August 30, 1928, the complainant's bill of complaint was filed in this cause.

2. Subpoenas to the several defendants have not yet been issued.

30 3. The complainant hereby amends its said bill of complaint in the following particulars, viz:

A. By adding to said bill of complaint immediately after paragraph 25, on page 11, the following paragraph:

40 "25a—On October 25, 1927, R. Young & Sons, a corporation, recovered a judgment in the Essex County Circuit Court on a mechanics' lien claim theretofore filed in the Essex County Clerk's Office against the land and premises hereinabove described, against

Amendment to Bill of Complaint.

Apex Building Co., a corporation, and Lenox Land Co. for \$4,151.25, damages, and \$69.13, costs, which judgment was recorded in Book 103 of Circuit Court Judgments for Essex County, on page 352.

Said R. Young & Sons, a corporation, by an instrument in writing and for the consideration therein expressed, did, on March 29, 1928, release and discharge the lands and premises hereinabove described from all claims, interest and lien which it may have by virtue of the above mentioned judgment and any proceedings thereupon, and did also in and by the said instrument, in writing release and discharge the said judgment of record against the said Apex Building Co. and Lenox Land Co. Said release and discharge was recorded in the Essex County Register's Office on August 30, 1928.

Complainant charges and insists that the above judgment, by reason of the execution and delivery of said release and discharge, is not now a lien upon the premises in question, but if a lien, is subsequent and subject to the lien of complainant's mortgages."

B. And by adding to the prayer for relief, being paragraph numbered 30 on page 12 of said bill of complaint, sub-division 1, after the words "Hoffman Plumbing Co., a corporation," the words "and R. Young & Sons, a corporation."

SAMUEL ROESSLER,
Solicitor for and of Counsel with Complainant.

**Answer and Counter-claim of Henry R. Isenberg,
Co., Inc.**

Sent to Trenton November 7.

IN CHANCERY OF NEW JERSEY.

10	<p style="margin: 0;">ACTIVE MORTGAGE COMPANY, a corporation, <i>Complainant,</i> <i>vs.</i> APEX BUILDING Co., <i>et als.</i>, <i>Defendants.</i></p>	<p style="margin: 0;"><i>On Bill &c.</i> <i>Answer and</i> <i>Counter-</i> <i>claim of</i> <i>Henry R.</i> <i>Isenberg Co.,</i> <i>Inc.</i></p>
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20 The answer and counter-claim of the defendant,
Henry R. Isenberg Co., Inc.

This defendant, Henry R. Isenberg Co., Inc., a corporation of the State of New Jersey, with its principal office in the City of Newark, Essex County, New Jersey, says that:

1. Paragraph 1 is admitted.
 2. Paragraph 2 is admitted, excepting the following allegation "which mortgage, having been first duly proved according to law," which said last mentioned allegation this defendant specifically denies.
 3. Paragraph 3 is admitted.
 4. Paragraph 4 is admitted.
 5. Paragraph 5 is admitted.
 6. Paragraph 4-A is admitted.
 7. Paragraph 5 is admitted, excepting that part of said paragraph which alleges as follows
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Answer and Counter-claim.

“which assignment having been duly proved according to law” which said last mentioned allegation this defendant denies.

8. Paragraph 6 is admitted, excepting that part of said paragraph which alleges viz: “which mortgage having been duly proved according to law” which said last mentioned allegation this defendant denies. 10

9. This defendant has no knowledge or information sufficient to form a belief as to allegations contained in paragraphs 7 to 11 inclusive.

10. Paragraph 12 is admitted.

11. Paragraph 13 is admitted excepting that part thereof which alleges “Which mortgage after having been first duly proved according to law” which said allegation this defendant denies, this defendant further alleging that the mechanics’ lien of this defendant against the premises described is prior and paramount to the lien of complainant’s said mortgage by virtue of the statute of New Jersey entitled “An act to secure to mechanics and others, payment for their labor and material in erecting any building and making certain improvements to land (Revision of 1898)” and the various amendments thereof and supplements thereto. 20 30

12. Paragraphs 14, 15, 16, 17 and 18 are admitted, this defendant alleging that its lien claim is prior and paramount to the lien of the mortgage held by the Lenox Land Co. and the Warranty Building and Loan Association, by virtue of the statute set forth in paragraph 11 above.

13. This defendant has no knowledge or information sufficient to form a belief as to allegations 40

Answer and Counter-claim.

contained in paragraphs 19 to 27 inclusive, of the original and amended bill of complaint.

14. Paragraph 28 is denied.

15. Paragraph 29 is denied.

10 By way of counter-claim against the complainant, this defendant says:

20 1. This defendant is a mechanics' lien claimant under and by virtue of the statute of New Jersey, entitled "An Act to secure to mechanics and others, payment for their labor and material in erecting any building and making certain improvements to land (Revision of 1898)" and the various amendments thereof and supplements thereto, for labor and material furnished in the construction of the building on said premises, having filed a lien claim therefor against the premises described in complainant's bill in the Essex County Clerk's Office and having instituted suit thereon in the Essex County Circuit Court, wherein said suit is now pending and undetermined.

30 2. That the Apex Building Co., a corporation of New Jersey, and one of the defendants herein named, was and is the owner and builder of the apartment house building being erected upon the premises described in the complainant's bill.

40 3. That on December 12, 1927, the said Apex Building Co. while engaged in the construction of said building, was by decree of this Honorable Court, declared insolvent in a proceeding instituted against it wherein Belmont Lumber Co. was complainant and the said Apex Building Co. was defendant and one Lionel P. Kristeller, Esq., was appointed by this Honorable Court, Receiver for said Apex Building Co. in pursuance to the

Answer and Counter-claim.

statute of New Jersey in such case made and provided.

4. That the facts and conditions which caused this Honorable Court to declare the said Apex Building Co. insolvent as set forth in paragraph 3 above, are matters of record of this Honorable Court in the aforesaid case of Belmont Lumber Co. v. Apex Building Co., reference to which is herein made as though such facts and conditions were herein fully recited. 10

5. That since the insolvency proceedings set forth in paragraph 3 above, the liabilities of the said Apex Building Co. have grossly increased by enlarging the number and amounts of its creditors without any additional investment of capital by the stockholders. The value of the assets of said Apex Building Co. consisting of the apartment house building and the premises described in complainant's bill has been substantially and steadily shrinking for the reason that the building is still unfinished, unoccupied and rapidly deteriorating. 20

6. That the insolvent condition of the said Apex Building Co. from the time of the adjudication as set forth in paragraph 3 to the time of the filing of the within counter-claim has been and is known to complainant and that the complainant had full and complete knowledge of such insolvency for the entire period of time from such proceedings to the date of the filing of the within counter-claim. 30

7. That on such date, to wit: December 12, 1927, the complainant had advanced under its mortgage set forth in paragraph 2 of the complaint, approximately the sum of sixty thousand 40

Answer and Counter-claim.

(\$60,000.00) dollars, leaving a balance of twenty-five thousand (\$25,000.00) dollars still to be advanced.

8. That on January 26, 1928, complainant's eighty-five thousand (\$85,000.00) dollar mortgage upon which there had been then advanced the approximate sum of sixty thousand (\$60,000.00) dollars, as set forth in paragraph 7 above became due and payable.

8. This defendant alleges and charges that any advances made by the complainant under its aforesaid eighty-five thousand (\$85,000.00) dollar mortgage on and after January 26, 1928, when said mortgage was fully due and payable, was made by the complainant with full knowledge of the insolvency of the defendant, the said Apex Building Co. and that such payments are utterly null and void as against this defendant and other creditors of the Apex Building Co. by virtue of the statute entitled "An act concerning corporations (Revision of 1896)" and the various amendments thereof and supplements thereto.

11. That by the terms of complainant's said eighty-five thousand (\$85,000.00) dollar mortgage, the principal was to be advanced in accordance with the schedule therein contained and forming part of said mortgage as set forth in paragraph 3 of complainant's bill which said schedule, among others provided the following payments:

	When plumbing fixtures are set....	\$4,000.00
	When first coat of paint is on	3,000.00
	When electric fixtures are hung ..	2,000.00
	When balance of painting work is on	2,000.00
	When gas ranges and ice-boxes are delivered	2,000.00
40	When building is completed.....	2,000.00

Answer and Counter-claim.

12. This defendant charges that the plumbing fixtures are not set, that the first coat of paint is not on, that there are no electric fixtures in said building, that the balance of painting work has not as yet been started, that the gas ranges and ice-boxes are not delivered and that the building is far from completed, yet the complainant alleges that the full principal secured by its mortgage has been fully advanced. This defendant charges that if such payments were made, they are in violation of the expressed covenant contained in the mortgage and made for the purpose of defeating the claims of this defendant and other creditors of said Apex Building Co. 10

12-A. As to the fifteen thousand (\$15,000.00) dollar mortgage held by complainant and set forth in paragraph 13 of the bill of complaint, this defendant repeats the allegations contained in paragraphs 3, 4, 5 and 6 of the within counter-claim. 20

13. That prior to June 8, 1928 and to the very date of the filing of the within counter-claim, said Apex Building Co., a corporation of New Jersey, which executed the said mortgage set forth in paragraph 13 of the bill of complaint, was insolvent and that the said complainant had full knowledge of such insolvency. 30

This defendant is without adequate remedy at law and therefore prays:

1. That the said complainant may answer this counter-claim without oath and each statement herein made.

2. That the mechanics' lien of this defendant be decreed prior and paramount to the lien of complainant's eighty-five thousand (\$85,000.00) 40

Answer and Counter-claim.

dollar mortgage to the extent of moneys advanced by said complainant after said mortgage by the terms thereof, became due and payable.

10 3. That said eighty-five thousand (\$85,000.00) dollar mortgage to the extent of moneys advanced by complainant after knowledge by it of the insolvency of the defendant, Apex Building Co. be declared utterly null and void as against this defendant and other creditors of said Apex Building Co.

4. That the fifteen thousand (\$15,000.00) dollar mortgage, held by complainant be declared utterly null and void as against this defendant and other creditors of said Apex Building Co.

20 MAX KRUEGER,
Solicitor of Defendant,
Henry R. Isenberg Co., Inc.

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Replication and Answer in Lieu of Plea to
Counter-claim of Defendant, Henry R.
Isenberg Co., Inc.

IN CHANCERY OF NEW JERSEY.

Between

ACTIVE MORTGAGE COMPANY,
a corporation,

Complainant,

and

APEX BUILDING Co., a corpora-
tion, et als.,

Defendants.

10

On Bill to
Foreclose.

20

Replication and Answer in Lieu of Plea to
Counter-claim of Defendant, Henry R. Isen-
berg Co., Inc.

The complainant joins issue on the answer of
the defendant, Henry R. Isenberg Co., Inc.

As to the counter-claim contained in said an-
swer, complainant in lieu of plea, answering said
counter-claim says:

1. On October 22, 1928, the counter-claimant,
Henry R. Isenberg Co., Inc., a corporation, filed
a mechanics' lien under and by virtue of the pro-
visions of the Statute of the State of New Jersey,
entitled, "An Act to secure to mechanics and
others, payment for their labor and materials in
erecting any building" (Revision of 1898) and
the several supplements thereto and acts amenda-
tory thereof, in which it claims a lien against the
land and premises described in the bill of com-
plaint in this cause in the sum of forty-eight hun-

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40

Replication and Answer to Counter-claim.

dred and thirty-four dollars (\$4,834.00), together with interest from June 23, 1928.

10 2. On or about the twenty-second day of October, 1928, said Henry R. Isenberg Co., Inc., instituted suit in the Essex County Circuit Court on said mechanics' lien claim, in which suit complainant, Active Mortgage Company, was made a party defendant because it holds two mortgages of record upon said land, one in the principal sum of eighty-five thousand dollars (\$85,000), dated April 26, 1927, and recorded in Book Q 60 of Mortgages for Essex County, on page 599, etc., and the other in the principal sum of fifteen thousand dollars (\$15,000), dated June 8, 1928, and recorded in Book O 64 of Mortgages for Essex County, on page 416, etc., and it is alleged in the
20 complaint that said mortgages will be cut off by a sale under the claim of said counter-claimant, Henry R. Isenberg Co., Inc.

30 3. On or about the nineteenth day of November, nineteen hundred and twenty-eight, complainant served notice upon the said counter-claimant, pursuant to the provisions of the statute in such case made and provided, that on Saturday, November 24, 1928, before the Essex County Circuit Court, it would move to strike out the complaint of said Henry R. Isenberg Co., Inc., in said action at law, insofar as it relates to the defendant therein, Active Mortgage Company, and for summary judgment on the following grounds, viz:

a. That said complaint does not set out a cause of action against the defendant, Active Mortgage Company, a corporation, and

40 b. Because said complaint, insofar as it relates to said defendant, Active Mortgage Company, is sham and frivolous.

Replication and Answer to Counter-claim.

4. Said motion was continued to December 1, 1928, at ten o'clock in the forenoon, at which time the said Essex County Circuit Court examined the proof offered by said Active Mortgage Company, a corporation, in support of said motion and also heard the arguments of respective counsel for the plaintiff and the said defendant.

10

5. An order was thereupon made by said Essex County Circuit Court, striking out said complaint, with prejudice to the institution of another proceeding at law based on the same cause of action as is set forth in said complaint and entering final judgment in favor of said Active Mortgage Company and against said Henry R. Isenberg Co., Inc., for the reasons, as stated in said order, that it satisfactorily appears from the affidavit of one Samuel Schechner, in support of said motion, that the said Active Mortgage Company is the holder of a certain mortgage dated April 26, 1927, in the principal sum of eighty-five thousand dollars (\$85,000) embracing the premises situate at the southwest corner of Lincoln avenue and Willow street in the City of Orange, Essex County, New Jersey, as described in said complaint and that said mortgage was given pursuant to the provisions of the Mechanics' Lien Act of this State and that the funds secured by said mortgage were advanced for the erection of the building upon said land and that all of the funds secured by said mortgage were advanced prior to the filing of the mechanics' lien by said Henry R. Isenberg Co., Inc., and further that it appears from said affidavit that said Active Mortgage Company is also the holder of another mortgage dated June 8, 1928 in the principal sum of fifteen thousand dollars (\$15,000) embracing the same lands and

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Replication and Answer to Counter-claim.

premises as are described in said complaint and that the said Henry R. Isenberg Co., Inc., executed and delivered to said Active Mortgage Company, an instrument in writing whereby it postponed and subordinated any lien which it may have under the provisions of said act on
 10 favor of said last mentioned mortgage, and because it also appears from said affidavit that the funds secured by said mortgage have been advanced by said Active Mortgage Company.

6. On December 4, 1928 the order made by said Essex County Circuit Court as aforesaid was filed with the Clerk of said Court as appears from the records thereof.

7. The order of said Essex County Circuit
 20 Court constitutes a final judgment in favor of this defendant and against said Henry R. Isenberg Co., Inc., and establishes the conclusive priority of complainant's mortgages over any lien which the said defendant Henry R. Isenberg Co., Inc., may have against the land and premises described in the bill of complaint in this cause, being the same lands and premises as are described in the complaint in said mechanics' lien
 30 suit and therefore the matter alleged by the counter-claimant in its counter-claim herein is *res adjudicata*.

SAMUEL ROESSLER,
 Solicitor for and of Counsel with Complainant.

Complainant's Answer to Counter-claim of Defendant, Henry R. Isenberg Co., Inc.

IN CHANCERY OF NEW JERSEY.

Between

ACTIVE MORTGAGE COMPANY,
a corporation,

Complainant,

and

APEX BUILDING Co., a corporation,
et als.,

Defendants.

10

On Bill, etc.

Complainant's Answer to Counter-claim of Defendant, Henry R. Isenberg Co., Inc., a corporation.

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The complainant having heretofore filed a plea to the counter-claim of the defendant, Henry R. Isenberg Co., Inc., setting up the judgment in favor of this complainant in a suit brought in the Essex County Circuit Court by the said counter-claimant, and the Court at the final hearing of this cause having granted leave to the complainant to answer said counter-claim generally, pursuant to Rule 68 of the Rules of this Court, answering said counter-claim, says:

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1. In answer to paragraph 1 of said counter-claim, complainant says that it is true that a suit was instituted in the Essex County Circuit Court by the said counter-claimant as recited in said paragraph, and further answering said paragraph this complainant says that a final judgment was entered in said suit on December 4,

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Complainant's Answer to Counter-claim.

1928, striking out the complaint filed by the said Henry R. Isenberg Co., Inc., as against complainant and entering final judgment in favor of complainant and against said Henry R. Isenberg Co., Inc.

10 2. In answer to paragraph 2, complainant says that said Apex Building Co., was formerly the owner of the apartment house building erected upon the premises described in complainant's bill of complaint and for further answer to said paragraph this complainant says that said land and premises were sold on the fifth day of November, nineteen hundred and twenty-eight, by Nicholas LaVecchia, Esq., one of the Special Masters of this Court, pursuant to an order for sale made in this cause on September 26, 1928.

20 3. Paragraph 3 is admitted.

4. Paragraph 4 is denied except that complainant admits that in the suit referred to in said paragraph, a decree was made adjudging said Apex Building Co., insolvent, and appointing Lionel P. Kristeller, Esq., Receiver.

30 5. Complainant denies the allegations contained in paragraph 5 of the counter-claim and for further answer thereto it says that on the second day of March, Nineteen Hundred and Twenty-eight, an Order was made discharging Lionel P. Kristeller as Receiver, and directing him to reconvey said land and premises to said Apex Building Co.; that said Order was made upon notice to all the creditors of said Apex Building Co., and with their consent, and that at the time of the entry of said Order discharging said Receiver, all the creditors of said Apex Building Co., discharged and released their claims against
40 said Apex Building Co., a corporation, all of

Complainant's Answer to Counter-claim.

which will appear from an examination of the proceedings in said suit.

6. Answering paragraph 6, complainant says that it had knowledge of the adjudication as set forth in paragraph 3 of the counter-claim, but it denies the other allegations contained in said paragraph. 10

7. Answering paragraph 7, complainant says that on the date mentioned in said paragraph, it had advanced under its mortgage, a sum in excess of Sixty thousand dollars, (\$60,000.00).

8. Paragraph 8 is denied.

9. Paragraph 9 is denied and for further answer thereto, complainant says that by the entry of the Order hereinabove referred to, dated March 2nd, 1928, this Court adjudicated that the said defendant company may resume control of and enjoy its property as fully as if the Receiver had never been appointed and that it was to the best interests of the creditors of said defendant company to discharge said Receiver. 20

10. Complainant admits that the mortgage of Eighty-five thousand dollars (\$85,000.00) held by it contained a schedule of payments and that among others, the payments recited in said paragraph were provided for, and for further answer to said paragraph complainant says that said mortgage expressly provided that parts or whole of any installment may be advanced before they became due if the mortgagor believes it advisable so to do and all such advances and payments shall be deemed to have been made in pursuance of said agreement and not to be in modification thereof. 30

11. Complainant denies paragraph 12 of the 40

Complainant's Answer to Counter-claim.

counter-claim and for further answer thereto it says that all payments made under the terms of complainant's mortgage or mortgages were made in good faith and in accordance with the provisions contained in said mortgage or mortgages relative to the advancement of any installment or installments as hereinabove recited. Further answering said paragraph, this complainant says that substantially all the funds secured by its mortgage of Eighty-five thousand dollars (\$85,000.00) had been advanced at the time the defendant, Henry R. Isenberg Co., Inc., entered into its alleged contract with the defendant, Apex Building Co., and with full knowledge on its part that substantially all of said funds had been advanced for the erection and construction of the building upon the mortgaged premises.

20

12. Answering paragraph 12-A of the counter-claim complainant repeats its answers to paragraphs 3, 4, 5 and 6 of said counter-claim.

13. This complainant denies paragraph 13 of the counter-claim and for further answer thereto it says that upon the discharge of the Receiver on or about the Second day of March, Nineteen Hundred and Twenty-eight, said defendant, Apex Building Co., had no creditors and was solvent and that such solvent condition so far as this complainant knows, continued.

30

Complainant further answering the counter-claim of said defendant, Henry R. Isenberg Co., Inc., says that the said defendant is estopped from disputing the validity or priority of complainant's mortgages because:

A. In the suit instituted by said Henry R. Isenberg Co. Inc., on its said lien claim in the Essex County Circuit Court, an Order was made on December 4th, 1928, striking out the com-

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Complainant's Answer to Counter-claim.

plaint of said Henry R. Isenberg Co., Inc., as against complainant and awarding final judgment in favor of complainant, which Order was based on proof submitted to said Court establishing the valadity, priority and amount due on complainant's said mortgages as against said defendant; and

10

B. Because said defendant executed and delivered to the complainant on or about the Eighth day of June, Nineteen Hundred and Twenty-eight, an instrument in writing wherein and whereby it, the said defendant, postponed any lien or right of lien which it might have in favor of complainant's mortgage of Fifteen thousand dollars (\$15,000.00), and at the time of the execution and delivery of said postponement, the said Henry R. Isenberg Co., Inc., knew that substantially all the funds secured by the other mortgage held by the complainant in the principal sum of Eighty-five thousand dollars (\$85,000.00) had been advanced for the erection and construction of the building standing upon the mortgaged premises.

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SAMUEL ROESSLER,
Solicitor for Complainant.

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Answer of Defendants, Victory Sash & Door Co.
IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i></p> <p style="text-align: center;">ACTIVE MORTGAGE COMPANY, a corporation, <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">APEX BUILDING Co., a corpora- tion, <i>et als.,</i> <i>Defendants.</i></p>	<p><i>On Bill to Foreclose.</i></p> <p><i>Answer of Defendants, Victory Sash & Door Co., and Frank D. Holloway, Louis F. Mesmer and John J. Whittier, trustees of Victory Sash & Door Co.</i></p>
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The defendants, Victory Sash & Door Co., and Frank D. Holloway, Louis F. Mesmer and John J. Whittier, trustees of Victory Sash & Door Co., answering the bill of complaint herein, say:

- 30 1. Paragraphs 1, 2, 3, 4, 5, 4-a and 5 are admitted, but for further answer thereto say, that the mortgage referred to in said paragraphs is not paramount to, but is subject to the mechanics' lien claim filed by these defendants against the premises described in the bill of complaint, and that these defendants have not signed a postponement of mechanics' lien in favor of said mortgage referred to in said paragraphs.
2. Paragraphs 6 and 7 are admitted.
- 40 3. As to paragraphs 8, 9, 10 and 11, these defendants have no knowledge or information

Answer of Victory Sash & Door Co.

thereof sufficient to form a belief, nor do they know whether or not the defendants mentioned in said paragraphs have performed their agreements as set forth in said paragraphs.

4. Paragraphs 12, 13, 14 and 15 are admitted, and for further answer thereto say that the said mortgage as set forth in said paragraphs, is not paramount to, but is subject to the mechanics' lien claim and the judgment recovered thereon by these defendants in the Essex County Circuit Court against the premises covered by the mortgages of the complainant, sought to be foreclosed. 10

5. Paragraph 16 is admitted.

6. These defendants admit paragraph 17, but say that the said defendant, the Warranty Building and Loan Association, did not disburse the funds intended to be secured by its mortgage and has no interest in the said land and premises. 20

7. Defendants admit paragraph 18.

8. As to paragraphs 19, 20 and 21, defendants have no knowledge or information thereof sufficient to form a belief, nor do they know if the defendants mentioned in said paragraphs have consummated their agreement with the Apex Building Co., one of the defendants. 30

9. Defendants admit paragraph 22, but for further answer say, that the said mechanic lien claim and the judgment recovered thereon, is not subsequent to, but is paramount to both of complainant's mortgages, first—because the complainant has not disbursed the funds intended to be secured by its mortgage as set forth in paragraphs 1, 2, 3, 4, 5 of complaint; second—because the complainant, before distributing any funds in 40

Answer of Victory Sash & Door Co.

relation to its mortgage, as set forth in paragraphs 1, 2, 3, 4, 5 had knowledge of these defendant's claim for material furnished in the erection of said building and did not secure from these answering defendants a postponement of lien in favor of the complainant's mortgage; that

10 the defendants' lien claim judgment is not subsequent to, but is paramount to the lien of complainant's mortgage as set forth in paragraphs 12, 13, 14 and 15, first—because it has not disbursed the funds intended to be secured by its mortgage into the actual construction and erection of said building located on the premises described in said mortgage, second—because, at the

20 time of the filing of the said mechanics' lien and the commencement of suit thereon, the mortgage as set forth in paragraphs 12, 13, 14 and 15 of the complaint, was not recorded, and by virtue of the judgment recovered on said lien claim by these answering defendants, these defendants mechanic lien and judgment thereon is paramount to the mortgage of \$15,000.00 set forth in paragraphs 12, 13, 14 and 15 of complaint.

10. As to paragraphs 23, 24, 25, 26 and 27, these answering defendants have no knowledge or information thereof sufficient to form a belief.

30 11. As to paragraphs 28 and 29, these answering defendants deny that the complainant has advanced all the funds secured by said mortgages.

Reply to Answer of Defendants, Victory Sash
& Door Co.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>ACTIVE MORTGAGE COMPANY, a corporation, <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>APEX BUILDING Co., a corpora- tion, <i>et als.,</i> <i>Defendants.</i></p>	<p><i>On Bill to Foreclose.</i> 10</p> <p><i>Reply to An- swer of De- fendants, Victory Sash & Door Co. and Frank D. Holloway, Louis F. Mes- mer and John J. Whittier,</i> 20</p> <p><i>trustees of Victory Sash & Door Co.</i></p>
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The complainant joins issue on the answer of
the defendants.

SAMUEL ROESSLER,
Solicitor for Complainant.

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Order Confirming Sale.

IN CHANCERY OF NEW JERSEY.

	<i>Between</i>	
10	ACTIVE MORTGAGE COMPANY, a corporation, <i>Complainant,</i>	}
	<i>and</i>	
	APEX BUILDING Co., a corpora- tion, <i>et als.,</i> <i>Defendants.</i>	} <i>On Bill to Foreclose. Order Con- firming Sale.</i>

20 Upon reading and filing a report made by Nicholas La Vecchia, Esq., one of the Special Masters of this Court, dated the Seventh day of November, Nineteen Hundred and Twenty-eight, and the affidavit to said report annexed, whereby it appears that on the Fifth day of November, Nineteen Hundred and Twenty-eight, the said Special Master sold at public vendue at the premises in the City of Orange, Essex County, New Jersey, after having first duly advertised the same, the lands and premises particularly described in the Order for Sale issued out of this

30 Court in the above entitled cause and dated the Second day of October, Nineteen Hundred and Twenty-eight, and directed to him, to the complainant herein, Active Mortgage Company, a corporation, for the sum of one hundred thousand dollars (\$100,000.00), subject to the liens and encumbrances set out in the report of sale, the said complainant being the highest bidder for said lands and premises, and that the said lands

40 and premises were sold at the best price that they

Order Confirming Sale.

would at the time of said sale bring in cash, and no cause appearing to the contrary:

It is, on this 16th day of November, Nineteen Hundred and Twenty-eight, ORDERED that the said sale be, and it is hereby ratified and confirmed, in all respects as valid and effectual in law.

It is further ORDERED that the said Special Master execute a good and sufficient conveyance to the said Active Mortgage Company or its assigns, for the said mortgaged lands and premises so sold to it. 10

(Signed) E. R. WALKER,
C.

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Henry F. Schmidt, direct.

Testimony.

IN CHANCERY OF NEW JERSEY.

February 7, 1929.

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Between

ACTIVE MORTGAGE COMPANY,
a corporation,

Complainant,

and

APEX BUILDING Co., a corpora-
tion, *et als.,*

Defendants.

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Transcript of shorthand notes of testimony taken in the above entitled matter before his Honor, John H. Backes, Vice-Chancellor, at the Chancery Chambers, in the City of Newark, New Jersey, in the presence of Mr. Samuel Roessler, for complainant; Paul G. Roder for defendant, Victory Sash & Door Company, *et als.*; Messrs. Cohen & Cohen for defendant Irvington Iron Works; Max Krueger for petitioners, and Frederick W. Schlosstein for defendant Lenox Land Company.

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HENRY F. SCHMIDT, sworn for complainant.

Direct examination by Mr. Roessler.

Q Mr. Schmidt, you are the secretary, I believe, of the Apex Building Company? A Yes, sir.

40

Henry F. Schmidt, direct.

Q And you have been subpoenaed here this morning, have you? A Yes, sir.

Q Are you in charge of the records of the Apex Building Company? A Yes, sir.

Q Are you familiar with payments made on the mortgages held by the Active Mortgage Company? A Yes, sir.

10

Q Have you your books of account here? A Yes, sir.

Q Have you a statement taken from your books of account showing how much has been advanced on these mortgages? A Yes, sir; I have the statement.

Q And this statement was prepared by you? A Yes, sir.

Q And it is taken from your books? A Yes, sir.

20

Q And what does it show as to the amount of money advanced on these two mortgages? A The total amount is \$99,782.91.

Q Now, as these payments were made to the Apex Building Company, what was done with the money? A They were used to pay contractors, labor and material on the job.

Q Was any part of this money used for any other purpose? A No, sir.

Q And are you familiar with the—(interrupted)

30

The Court: What job?

Witness: The building of the Apex Building Company.

Q Where is the property? A Up on Lincoln avenue and Willard street in Orange.

The Court: What do you mean?

Witness: Five-story apartment house they were putting up.

40

Henry F. Schmidt, direct.

Q On which the complainant had this mortgage? A Yes, sir.

Q Mr. Smith; you are familiar with the payments which were made on the \$15,000 mortgage?

A Yes, sir.

10 Q And does that statement show what became of that money? A Yes, sir.

Q Does that statement give the date? A Yes, sir; and who it was paid to.

Mr. Roessler: I offer the statement.
(Paper marked Exhibit C. 3.)

Q And from what date is interest to be calculated on the eighty-five thousand mortgage? A From April 9, to date.

20 Q April 9 what year? A 1928.

The Court: Is that the date of the mortgage?

Mr. Roessler: No, sir; it is not.

30 We have given credit for interest from the date of the mortgage. The date of the mortgage is April twenty-seven, and when this property was reconveyed we agreed to accept interest from a certain date, and the date fixed was April 9, 1928. The interest was adjusted up to that time. The mortgage was made April 26th, 1927. We want interest only from April 1928.

The Court: Why?

40 Mr. Roessler: Because there had been a suspension of operation and when the receiver was discharged we entered into an agreement whereby we gave them a credit by which the creditors saved about three or four thousand dollars.

Henry F. Schmidt, direct.

Q And has interest been paid on the fifteen thousand dollar mortgage? A Not to date.

Q Mr. Schmidt, did you attend to the signing of the postponement of the mechanics' lien of the Henry R. Isenberg Company? A Yes, sir.

Q And did Henry R. Isenberg sign that postponement in your presence? A Yes, sir. 10

Q Did you have any conversation with Mr. Eisenberg at the time of signing that postponement? A Yes, sir.

Q Will you just tell us briefly what was said with reference to the Active Mortgage Company?

Mr. Krueger: We admit the postponement, if your Honor please.

Q Who is Henry R. Isenberg? A He is president of the Henry R. Eisenberg Company. 20

Q He is the one that signed the postponement? A He signed the postponement.

Q What was said? A Why, he wanted to know why I asked him to sign it. I told him that we couldn't get that money to complete the building unless he and the rest of the creditors signed the postponement; so he asked if there was any more money coming from the old mortgage; I told him we had practically used all that up, and he finally—(interrupted) 30

Q What old mortgage? A The eighty-five thousand dollar mortgage.

Q Was the eighty-five thousand dollar mortgage spoken of? A Yes, sir.

Q As an eighty-five thousand dollar mortgage? A Yes, sir; he knew that was on record. We had been using some of that up until the time we gave him the contract for tile work.

Q What else was said? A That we had used practically all of the eighty-five and from 40

Henry F. Schmidt, cross.

the fifteen we had intended to pay the balance of the contractors on the job that we hired from the time we became trustee.

Q What do you mean "we became trustee"?

A I was one of the three appointed by the creditors to complete the building.

10 Q After—(interrupted) A After the receiver was dismissed.

Q Who were your associates? A I was in the plumbing supply—(interrupted)

Q Who were your associates? A Joseph H. was vice president and was acting president.

Q Of what? A Of the Apex Building.

Q I am talking about the trustees. A We were classed as trustees, but the property was kept in the name of the Apex Building Company.

20 Q You three were acting as officers? A The original officers resigned and we became the new officers.

Q Is this the postponement which was signed by Henry R. Eisenberg for the Henry R. Eisenberg Company? A Yes, sir.

30 Mr. Roessler: I offer it in evidence.
(Paper marked Exhibit C. 4.)

Cross examination by Mr. Krueger.

Q At the meeting of the creditors at which time you were appointed one of the trustees was there anybody representing the Victory Sash & Door present? A I do not remember.

40 Q Mr. Schmidt, you yourself are a creditor of this corporation, aren't you? A I was, but not any more.

Henry F. Schmidt, cross.

The Court: When the witness spoke of trustees he meant as substituted officers of the Apex Building Company?

Mr. Roessler: Yes, sir.

Q You yourself were a creditor of the Apex Building Company? A Not personally. 10

Q Your corporation? A Our corporation was a creditor.

Q Was or is? A Well, is yet a creditor.

Q What corporation? A The Irvington Plumbing Supply Corporation.

Q And what is your office in the Irvington?

A I was president.

Q You were president of that corporation at the time you became secretary of the Apex Building Company. How much did the Apex Building Corporation owe your corporation, the Irvington Plumbing & Supply Company? 20

The Court: Not cross examination.

Q You refer to a conversation with Mr. Henry R. Eisenberg in which you asked him to sign this postponement, is that correct? A Yes, sir.

Q Did you not say to him that out of the proceeds of this mortgage loan you will bring money to Mr. Eisenberg? A No, sir. 30

Q Sure about that? A I am positive about that.

Q Did you not say to Mr. Eisenberg that out of the proceeds of this loan there would be money available to him? A No, sir.

Q Sure of that? A Positive of that.

Q You did say to him, however, that out of the proceeds of both loans there will be money 40

Henry F. Schmidt, cross.

available to him if he signs this postponement.

A Which loan do you mean?

Q Both the eighty-five thousand loan and fifteen. A No, sir.

Q The eighty-five thousand dollar loan wasn't discussed at all? A No, sir—it was discussed, but there was no reference made to any payment to come to Mr. Eisenberg out of either one of those two loans.

Q Did he ask you whether he was going to get any money out of this when he signed it? A Yes, sir.

Q What did you answer? A I told him I couldn't tell him how far that fifteen thousand dollars would go and I couldn't make him any promises of payment until we had the permanent building and loan mortgage in our hands to make payments from.

Q But you did say to him that there was still money available from the eighty-five thousand dollar mortgage. A If there was it was very small.

Q You did say there was money available at that time? A I don't remember.

Q You said so in your direct testimony. A I don't remember how much there may have been but the date of his contract can tell me how much money was coming out of the eighty-five.

Q You answered Mr. Roessler's direct examination that you represented to Mr. Eisenberg there was some money still available on the eighty-five thousand dollar mortgage, is that so?

A I believe—(interrupted)

Q Is that so or isn't it? A I believe so.

Q Did you?

The Court: Pass it on.

Mr. Krueger: That is all, your Honor.

Offer of Documentary Evidence.

Mr. Roessler: I offer in evidence the eighty-five thousand dollar mortgage made by the Apex Building Company to the Lenox Land Company dated April 26, 1927.

(Paper marked Exhibit C. 5.)

Mr. Roessler: I also offer the bond bearing the same date. 10

(Paper marked Exhibit C. 6.)

Mr. Roessler: I offer the mortgage from the Apex Building Company to the Active Mortgage Company, June 8th, 1928, for fifteen thousand dollars.

(Paper marked Exhibit C. 7.)

Mr. Roessler: I also offer the bond bearing the same date.

(Paper marked Exhibit C. 8.)

Mr. Roessler: I offer the assignment of the mortgage from the Lenox Land Company to the Active Mortgage Company dated June 30, 1927, for \$25,000. 20

(Paper marked Exhibit C. 9.)

Mr. Roessler: I offer the postponement from the Lenox Land Company to the Active Mortgage Company of the mortgage of \$14,500 held by the Lenox Land Company in favor of the \$85,000 mortgage.

(Paper marked Exhibit C. 10.) 30

Mr. Roessler: I offer the postponement made by the Lenox Land Company to the Active Mortgage Company dated June 8, 1928, postponing the lien of the \$14,500 mortgage in favor of the Active Mortgage Company mortgage of \$15,000.

(Paper marked Exhibit C. 11.)

RECESS.

COMPLAINANT RESTS.

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Offer of Documentary Evidence.

Mr. Roder: I have a certified copy of the judgment of the Victory Sash & Door Company which I would like to offer.

The Court: You ought to have a copy of the judgment roll.

10 Mr. Roessler: I have no objection to the offer. I will waive the production of the original record.

The Court: Will you admit the filing of the lien and the pleadings in the matter?

Mr. Roessler: Yes, sir.

(Paper marked Exhibit D. 1.)

Mr. Cohen: I would like to prove our claim for the Irvington Iron Works.

20 The Court: Offer the mechanics' lien, the summons and the other papers and furnish me with copies.

Mr. Cohen: I want to prove the amount in my lien.

The Court: It is not disputed. It not being disputed it will be admitted. You better offer the files and then furnish me with the record.

30 Mr. Roder: I offer in evidence the files of the lien claim and proceedings taken under them in the Supreme Court for the Victory Sash & Door Company against the Apex Building Company.

The Court: Get the excerpts.

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

The Court: Bond and mortgage set out in the bill? Admitted without further proof.

40 Mr. Krueger: I want to offer in evidence certified copy of the judgment.

Discussion.

The Court: You have to have the judgment roll. You may furnish it later on.

Mr. Krueger: I offer copy of the mechanics' lien filed by Henry R. Eisenberg and the files of the suit to enforce the mechanics' lien.

(Paper marked Exhibit DH. 1.)

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Mr. Krueger: I also want to offer in evidence the petition of the receiver in the case of Belmont Lumber Company, a corporation, complainant against the Apex Building Company, defendant. The docket number is 66-397. I take it that the rest is admitted in the pleadings—insolvency and the purpose of offering this record is to substantiate further my allegation of the insolvency.

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The Court: That there was insolvency.

Mr. Krueger: And still is. My allegation in the counter-claim is that there is still insolvency.

Mr. Roessler: With the Court's permission I intend to file my answer.

The Court: Counsel are joining issue of everything you raise by your counter-claim. Have you any proof to offer if he joins issue with you in everything?

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Mr. Krueger: Not at this time. I want to produce testimony to show that no capital was contributed by the stockholders.

The Court: That is not denied.

Mr. Krueger: Of the insolvent condition of the corporation at the time of the appointment of the receiver.

The Court: That is declared by our decree.

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Discussion.

10 Mr. Krueger: That that same condition continued and became aggravated right up to the time of these proceedings pending before your Honor now, that the mortgagee complainant had knowledge of it and if the mortgagee purposes to contest on the theory that it is for the purpose of rehabilitating the corporation I want to be given an opportunity to meet that, that it was not.

20 Mr. Roessler: I am willing to admit, if it is going to help, that there was no such capital put into the corporation, that our money was used to complete the building and that the receiver was discharged on the strength of the representations made by the creditors that they had been promised a mortgage loan of a hundred and sixty-five thousand dollars by the Warranty Building & Loan Association which appears in the petition for the discharge of the receiver, and that we continued to pay our money out for the completion of this building.

The Court: I am wondering whether counsel could agree upon the state of facts as to what you expect to prove.

30 Mr. Krueger: If counsel for complainant does not attempt to prove anything else than he has already represented to the Court, there is nothing for me to meet.

40 The Court: I am afraid it is not on the record. What I am trying to do is to put on the record the facts as they exist so that if I err in my conclusions, counsel may appeal. In order that you may safeguard your position you ought to have either proof or a complete state of facts on the record. Start in with the story from the beginning of this

Discussion.

Apex Company, when it was formed, why it was formed and what was done. It can be done in a very few words.

Mr. Roessler: The Apex Building Company is a corporation organized under the laws of the State of New Jersey. It was incorporated some time prior to April, 1927, and under its charter it was authorized to engage in the real estate business, in the erection of houses, and so forth. In April, 1927, it executed—it purchased the property in question from the Lenox Land Company, executed to the Lenox Land Company a purchase money mortgage for \$14,500. 10

The Court: What was the property at the time, vacant lots?

Mr. Roessler: Vacant lots. To enable the Apex Building Company to erect a building upon this land, the Lenox Land Company agreed to advance eighty-five thousand dollars for the construction of an apartment house building upon this land. This mortgage was given pursuant to Section 14 of the Mechanics' Lien Act, which, in its preamble recites, "Whereas it is the custom of owners of land to sell to builders and take back a mortgage in excess of the purchase price", etc.—and this mortgage was given pursuant to that section of the Mechanics' Lien Act. After the execution and delivery of the two mortgages the Apex Building Company proceeded to erect an apartment house upon this land and in December of 1927 it met with reverses which resulted in the appointment of Lionel T. Kristeller as receiver pursuant to an order made by Vice-Chancellor Fielder in a cause pending in this court in which the 20 30 40

Discussion.

Belmont Electric Company was complainant and the Apex Building Company defendant.

The Court: The files of that have already been offered.

10 Mr. Roessler: Subsequent to the appointment of the receiver and after several examinations held by Lionel T. Kristeller as receiver, the creditors entered into an agreement which is on file to cancel their several claims against the Apex Building Company and requested this court to discharge the receiver appointed by it and to direct a reconveyance of the property to the Apex Building Company. Upon the return of an order to show cause and proof being made of service upon all parties in interest, an order was
20 made in the cause which bears date March 2nd, 1928, wherein it is directed that the receiver, Lionel T. Kristeller be and is hereby discharged as such receiver to take effect upon the carrying out of the following paragraph of this order, to wit: on the payment of costs of administration, all of which have been paid. Thereupon Lionel T. Kristeller as receiver executed to the Apex Building
30 Company his deed for the premises in question. His deed is dated April 2nd, 1928, and was duly recorded in the Essex County Register's office. In the petition for the discharge of the receiver it is recited in paragraph 11 thereof as follows: "Your petitioner further shows that it has been brought to his attention that by virtue of the failure to complete said building great losses have been sustained by the creditors in that they will not be able to rent said building in the seasonable period, to wit, in the
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Discussion.

spring, but if the creditors are permitted to take possession of the building and continue its completion, they will greatly gain thereby and will be able to obtain a loan, which said loan your petitioner has made arrangements for, to wit, \$165,000, and if the said loan is not accepted within the very immediate future, your petitioner has been informed that it will be cancelled, whereupon your petitioner and the creditors will find it exceedingly difficult to obtain another." There is appended to the petition for the discharge of the receiver a paper which purports to be a copy of an agreement entered into between the several creditors whereby they discharge their several liens made against the Apex Building Company. At this time I wish to offer in evidence the original of that agreement.

(Paper marked Exhibit C. 12.)

Mr. Roessler: This agreement does not contain the name of the Victory Sash, Henry R. Eisenberg or the Irvington Iron Works. Upon the reconveyance of the property to the Apex Building Company, the corporation proceeded or resumed its building operations and the mortgagee, the Active Mortgage Company proceeded to advance the balance of the funds which had not up to that time been advanced under its mortgage. On June 8, 1928, the Apex Building Company finding that the funds secured by the original mortgage had been exhausted, requested an additional loan of \$15,000 to enable it to complete the building. The Active Mortgage Company granted the additional loan and accepted the mortgage which has already

Discussion.

been offered in evidence and proceeded and did advance the money secured by that mortgage and the funds so secured were used in the erection and completion of the building in question.

10 The Court: Everybody subordinating their liens.

Mr. Roessler: Every creditor subordinated his and its lien to the additional mortgage of fifteen thousand dollars.

The Court: Except—

Mr. Roessler: Except the Victory Sash & Door Company and the Irvington Iron Works, but including the defendant, Henry R. Eisenberg.

20 The Court: What?

Mr. Roessler: I say, excepting the Irvington Iron Works and the Victory Sash. Henry R. Eisenberg did join in the postponement. The postponement signed by Eisenberg contained the names of the other creditors, and that has been offered in evidence already. I think I have covered the ground fairly well. The interest of Henry R. Eisenberg according to the mechanics' lien filed by it did not attach until some time in May of

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The Court: When was the debt contracted?

Mr. Roessler: The contract was signed May third, I believe, 1928, and the work was done during the months of May and June, 1928.

40 The Court: Was that before or after the discharge of the receiver?

Discussion.

Mr. Roessler: Long after the discharge of the receiver. The receiver was discharged in April.

The Court: But before your second mortgage?

Witness: Yes, sir.

That is why we took the subordination from the Eisenberg Company. I also wish to add that at the time Eisenberg appeared on the scene, practically all of the \$85,000 mortgage money had already been advanced—all but a few thousand dollars.

The Court: Now, is there any correction to be made in that statement? Is that state of facts agreed upon, subject to whatever modification can now be made?

Mr. Krueger: Yes, sir. In addition to those creditors mentioned by the complainant who did not sign the agreement referred to, there were the following: Johnson & Dielman, \$46.00; Watson Elevator Company, no amount stated; and Sam Parchuk, who claims \$1,000, but the receiver disputed that and tentatively admitted \$200 as due to him. There has been no contribution of capital either by the stockholders or from any other source after the property was restored to the company or prior thereto during the receivership proceedings.

Mr. Roessler: Except this, that creditors who were creditors before the receiver was appointed continued to furnish material and did furnish material for the erection of this building and several of these creditors have not been paid. That is to say, there was no additional capital in cash, but in lieu of cash several of the creditors offered and did fur-

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Discussion.

10 nish material for the completion of the building. And also, I wish to say, the Watson Elevator Company, whose name was just mentioned by Mr. Krueger, had a conditional sales agreement which was duly recorded in the register's office and when the property was sold it was sold expressly subject to any rights which the Watson Elevator Company may have.

Mr. Krueger: In addition thereto that there was no provision made for the resumption of business by the corporation upon the discharge of the receiver.

The Court: Meaning by that what?

20 Mr. Krueger: For the safeguarding of the public. There was no official action by either the directors of the corporation at the time the receiver was dismissed requesting the reconveyance of the property to the Apex Corporation, that at the time of the appointment of the receiver, to wit, December 12, 1927, the complainant had advanced on account of the principal sum of the \$85,000 mortgage, \$65,000, and that the number of creditors after the reconveyance of the property by the receiver has increased and the amount due the various creditors at the time
30 of the insolvency and the appointment of the receiver as well as after the dismissal of the proceedings of the receiver, grossly increased; liabilities increased.

40 Mr. Roessler: I wish to contradict one statement. Whereas there was owing to the creditors at the time of the discharge of the receiver \$51,000, as appears from the receiver's petition, there is due at the present time, according to the records of the Apex Building

Discussion.

Company, \$14,726.16. The debts which were owing to the creditors at the time of the discharge of the receiver were all extinguished by the agreement of the creditors, which was the basis of the order discharging the receiver.

The Court: I understand this to be the situation, that at the time of the appointment there were debts amounting to \$51,000; subsequent debts amounting to \$14,000 were incurred and which are not paid. Your claim is that the \$51,000 is not now a claim against the company because the creditors who were creditors prior to the appointment of the receiver discharged and cancelled their claims as per the agreement on file. 10

Mr. Roessler: Exactly. 20

Mr. Krueger: With this further addition, that the payment of the debts of the existing creditors at the time of the discharge of the receiver was not provided for in compliance with the statute.

TESTIMONY CLOSED.

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OPINION OF VICE-CHANCELLOR.
IN CHANCERY OF NEW JERSEY.

	<p style="text-align: center;"><i>Between</i></p> <p style="text-align: center;">10 ACTIVE MORTGAGE COMPANY, <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">APEX BUILDING COMPANY, <i>et als.,</i></p> <p style="text-align: center;"><i>Defendants.</i></p>	<p style="font-size: 4em; vertical-align: middle;">}</p> <p style="vertical-align: middle;"><i>Opinion.</i></p>
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1. The judgment of a law court dismissing a mortgagee as a party defendant in a suit to enforce a mechanic's lien, on the ground that the defendant's mortgages are superior liens, is *res adjudicata* in a suit to foreclose the mortgages.

2. A mortgage given by a building corporation when insolvent is not open to attack by a judgment creditor as void under Sec. 64 of the Corporation Act where the consideration was advanced after insolvency to enable the company to complete the building and the judgment creditor extended credit in the common effort to conserve the assets of the company and with notice of and assenting to the mortgage and the object for which it was given. The judgment creditor is estopped and takes nothing by the statute.

3. A holder of a mortgage on an uncompleted building who of necessity advances an additional sum on a second mortgage to an insolvent corporation to complete the building and thereby protect his security has a superior lien to the lien of a judgment creditor who seeks to annul

Opinion of Vice-Chancellor.

the mortgage under Sec. 64 of the Corporation Act.

For complainant, Mr. Samuel Roessler.

For defendant, Eisenberg Co., Mr. Max Krueger.

BACKES, Vice-Chancellor:

The bill is to foreclose two mortgages on an apartment house, one for \$85,000, the other for \$15,000, made by the Apex Building Company. The amounts are admitted to be due and that the proceeds were used in the erection of the building. H. R. Eisenberg Company, Inc., a mechanic's lien claimant, holding a general judgment against the owner Apex Building Company and to be specially made out of the mortgaged lands, asserts priority over complainant's mortgages. The complainant was a party defendant in the mechanic's lien suit in the Circuit Court and was dismissed upon a showing that its mortgages were prior liens. That settles the priority of the complainant's mortgage lien over the mechanic's lien.

The Eisenberg Company's general judgment in that suit is nevertheless a lien on the land subordinate of record to the complainant's mortgages. This lien is sought to be advanced but not to entire superiority. It is conceded that the larger mortgage has priority to the extent of \$65,000, but the remainder and the second mortgage are claimed to be inferior liens, and the reason for this is that the remaining moneys were advanced after the Apex Company became insolvent. A receiver in insolvency was appointed by this court December 12, 1927, and later discharged upon the petition of creditors. A committee of creditors took over the management of the company's affairs and finished the building. To that end the complainant paid what remained due on its first

Opinion of Vice-Chancellor.

mortgage and advanced an additional \$15,000 on a second mortgage, and the Eisenberg Company and others furnished material. It and other materialmen subordinated their mechanic's liens rights to the second mortgage. All the materialmen knew the arrangement, that the complainant was to advance the additional moneys upon the security of the mortgage. The argument is that the securities which the complainant took after the company became insolvent and which led to the receivership, although the receiver was discharged, are void under Sec. 64 of the Corporation Act (C. S. 1638) which declares void as against creditors all transfers of property by corporations when insolvent. The statute can have no application to the \$85,000 mortgage which was made eight months before insolvency.

The primary object of Sec. 64 is to condemn preferences, made in the face of insolvency, upon the assets of insolvent corporations so that they may be administered as a fund for the equal benefit of creditors and stockholders, as provided by ensuing sections, (*Wilkinson v. Bauerle*, 41 N. J. Eq. 635). But in *Cope v. Walton*, 77 N. J. Eq. 512, aff'd 79 *Id.* 165, an assignment of assets by an insolvent company was held void in favor of a creditor holding a municipal mechanic's lien upon the assets. The construction of the section in that case beyond the statutory scheme, however, is not authority for letting in a judgment creditor to contest the validity of a mortgage given after insolvency to sustain the mortgage security towards which the creditor itself extended credit, represented by the judgment, in the common effort to preserve the assets of the company, with knowledge of the insolvency and with notice of and assenting to the mortgage and the object for which it was given. The creditor is

Opinion of Vice-Chancellor.

estopped and he can take nothing by the statute.

Furthermore complainant has a superior equity under its second mortgage. It was compelled to lay out the money to complete the building to protect the security of its first mortgage and the law incorporates the outlay as a lien. *Vanderhaise v. Hughes*, 13 N. J. Eq. 410; *Sea Coast Real Estate Co. v. American Timber Co.*, 89 N. J. Eq. 293. In these cases the mortgagees were in possession but the principle applies. 10

The complainant is entitled to a decree for the amount due on both mortgages with interest.

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Final Decree.

IN CHANCERY OF NEW JERSEY.

69-471.

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*Between*ACTIVE MORTGAGE COMPANY,
a corporation,*Complainant,**On Bill, etc.**and**Final Decree.*APEX BUILDING Co., a corp.,
*et als.,**Defendants.*

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It appearing that a Decree Pro Confesso has been entered against the defendants Apex Building Co., a corporation, Warranty Building & Loan Association of the City of Newark and R. Young & Sons, a corporation, and this cause coming on to be heard pursuant to an Order of Reference made in this cause on the Twenty-first day of December, Nineteen Hundred and Twenty-eight, and in the presence of Samuel Roessler, solicitor for the complainant; Max Krueger, solicitor of the defendant Henry R. Isenberg Co., Inc., a corporation; Paul G. Roder, solicitor of the defendants Victory Sash & Door Co., a corporation, and Frank D. Holloway, Louis F. Mesmer and John J. Whittier, Trustees of said Victory Sash & Door Co., a corporation, and Messrs. Cohen & Cohen, solicitors of the defendant Irvington Iron Works, a corporation, and Frederick W. Schlosstein, solicitor of the defendant Lenox Land Company, a corporation, and the court having heard

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Final Decree.

the witnesses and considered their testimony and having heard and considered the arguments of the respective solicitors and being of the opinion that there should be a decree for the complainant for Ninety-nine thousand, seven hundred and eighty-two dollars and ninety-one cents (\$99,782.-91) being the amount due for principal on two mortgages held by the complainant as set out in the bill of complaint in this cause, together with interest on the first of said mortgages in the principal sum of eighty-five thousand dollars from April 9, 1928 to November 5, 1928 being the date of the sale of said land and premises pursuant to an Order of Sale Pendente Lite made in this cause on the Second day of October, Nineteen hundred and twenty-eight, and interest on the other of said mortgages in the principal sum of Fifteen thousand dollars from June 8, 1928 to said November 5, 1928, and that the mortgages of the complainant are duly recorded and executed; that there is due to the defendant Lenox Land Company, a corporation, the sum of Fourteen thousand, five hundred dollars for principal on the mortgage held by it together with interest thereon from April 26, 1927 to November 5, 1928, and that there is due to the defendant Henry R. Isenberg Co., Inc., a corporation, upon the mechanic's lien judgment recovered by it the sum of Five thousand and fifty dollars; and the court being advised that the defendants Victory Sash & Door Co., a corporation, and Frank D. Holloway, Louis F. Mesmer and John J. Whittier, Trustees for Victory Sash & Door Co., and the defendant Irvington Iron Works, a corporation, who attended the final hearing in this cause do not desire to have the amount due on their liens ascertained and adjudicated upon and consent being given by their respective solicitors to the en-

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Final Decree.

try of this decree and the court having determined that the mortgages held by the complainant are prior to the liens and encumbrances of the defendants and are entitled to priority of payment; that the mortgage held by the defendant Lenox Land Company, a corporation, is second in priority of payment and that the mechanic's lien judgment of the defendant Henry R. Isenberg Co., Inc., is third in priority of payment; it is on this Fourth day of June, Nineteen Hundred and Twenty-nine by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey,

10 ORDERED, ADJUDGED and DECREED and the Chancellor doth by virtue of the power and authority of this court hereby ORDER, ADJUDGE and DE-
 20 CREE that there is due to the complainant the sum of One hundred and two thousand, seven hundred and twenty-nine dollars and twenty-one cents (\$102,729.21) besides the complainant's costs to be taxed, including a counsel fee of \$1,500 which is hereby allowed to said complainant, which sums are entitled first to be paid out of the proceeds of the sale of the lands and premises heretofore had and described in the bill of complaint filed herein; and it is further

30 ORDERED, ADJUDGED and DECREED that there is due to the defendant Lenox Land Company, a corporation, the sum of Fifteen thousand, eight hundred and twenty-nine dollars and sixteen cents (\$15,829.16) with said defendant's costs to be taxed, which said sums are entitled to be paid second out of the proceeds of the sale of the lands and premises described in the bill of complaint filed herein; and it is further

40 ORDERED, ADJUDGED and DECREED that there is due to the defendant, Henry R. Isenberg Co., Inc.,

Final Decree.

a corporation, the sum of Five thousand and fifty dollars and said defendant's taxed costs, which sums are entitled to be paid third out of the proceeds of the sale of the lands and premises described in the bill of complaint filed herein.

And it is further ORDERED, ADJUDGED and DECREED that the Clerk of this Court be and he is hereby authorized and directed to pay to the complainant, Active Mortgage Company, the sum of seventy-five hundred dollars together with all accumulations of interest thereon, heretofore deposited with the Clerk of this Court, pursuant to an order made in this cause on November 14, 1928. 10

And it is further ORDERED, ADJUDGED and DECREED that the Clerk of this Court be and he is hereby authorized and directed to deliver up to the complainant Active Mortgage Company the bond in the principal sum of fifty thousand dollars entered into by the complainant to the Chancellor and heretofore filed with the Clerk of this Court, pursuant to the directions contained in the order heretofore referred to. 20

And it is further ORDERED, ADJUDGED and DECREED that the defendants Apex Building Co., a corporation, Lenox Land Co., a corporation, Warranty Building & Loan Association of the City of Newark, a corporation, Irvington Iron Works, Inc., a corporation, Maier-Rich & Co., a corporation, Victory Sash & Door Co., a corporation, and Frank D. Holloway, Louis F. Mesmer and John J. Whittier, Trustees, Hoffman Plumbing Co., a corporation, Henry R. Isenberg Co. Inc., a corporation, and R. Young & Sons, a corporation, and each of them stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises 30 40

Final Decree.

heretofore sold by virtue of an order of sale made
in this cause.

Respectfully advised,

JOHN H. BACKES,
V.-C.

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Consent is hereby given to the making of the
within decree.

PAUL G. RODER,
Solicitor for Defendants, Victory Sash &
Door Co.

Frank Holloway, Louis F. Mesmer and John
J. Whittier, Trustees.

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COHEN & COHEN,
Solicitors for defendant,
Irvington Iron Works.

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Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

Between

ACTIVE MORTGAGE COMPANY,
a corporation,
Complainant-Appellee,

and

HENRY R. ISENBERG CO., INC.,
Defendant-Appellant.

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On Bill, &c.
Notice
of Appeal.

The defendant, Henry R. Isenberg Co., Inc., hereby appeals from the final decree made in this court in the above stated cause, by the Chancellor, on the advice of Vice-Chancellor John H. Backes on the 13th day of June, 1929, and from the whole and every part thereof, to the Court of Errors and Appeals, the last resort in all causes.

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Dated June 21, 1929.

MAX KRUEGER,
Solicitor of Defendant-Appellant.

We conceive there is good cause for appeal in the above stated cause.

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MINTURN & WEINBERGER,
Of Counsel with Defendant-Appellant.

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Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

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Between

ACTIVE MORTGAGE COMPANY,
a corporation,
Complainant-Appellee,

and

HENRY R. ISENBERG Co., INC.,
Defendant-Appellant.

*On Appeal
from Court
of Chancery.*

*Petition
of Appeal.*

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*To the Honorable Court of Errors and Appeals,
the last resort in all causes:*

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The petition of Henry R. Isenberg Co., Inc., the appellant in the above stated cause, respectfully shows that your petitioner finds itself aggrieved by a decree made in the Court of Chancery of the State of New Jersey, advised by the Honorable John H. Backes, Vice-Chancellor of the State of New Jersey, on the 13th day of June, 1929, in which cause Active Mortgage Company, a corporation, was complainant, and Apex Building Co., a corporation, Lenox Land Co., a corporation, Warranty Building & Loan Association of the City of Newark, a corporation, Irvington Iron Works, Inc., a corporation, Domestic Electric Co., Inc., a corporation, Ransome Concrete Machinery Co., a corporation, Watson Elevator Co., a corporation, Industrial Sales Engineering Company, a corporation, Peter Rosso Co., a corporation, Maier-Rich & Co., a corporation, Victory Sash & Door Co., a cor-

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Petition of Appeal.

poration, Frank D. Holloway, Louis F. Mesmer and John J. Whittier, Trustees, Hoffman Plumbing Co., a corporation, were defendants, in these respects, to wit:

1. That the said decree erroneously ordered, adjudged and decreed that there is due to the Active Mortgage Company, a corporation, the sum of one hundred two thousand seven hundred twenty-nine dollars and twenty-one cents (\$102,729.21), together with costs to be taxed, said sum first to be paid out of the proceeds of the sale. 10

2. That the said decree erroneously ordered, adjudged and decreed that there is due to the defendant, Lenox Land Co., a corporation, the sum of fifteen thousand eight hundred twenty-nine dollars and sixteen cents (\$15,829.16), which should be paid to the Lenox Land Co., a corporation, prior to the judgment of Henry R. Isenberg Co., Inc., together with costs to be taxed. 20

3. That the said decree erroneously ordered, adjudged and decreed a priority to the extent of one hundred two thousand seven hundred twenty-nine dollars and twenty-one cents (\$102,729.21) to the complainant, as against the judgment of Henry R. Isenberg Co., Inc. 30

4. That the said decree erroneously ordered, adjudged and decreed a priority to the extent of fifteen thousand eight hundred twenty-nine dollars and sixteen cents (\$15,829.16) to the defendant, Lenox Land Co., a corporation, as against the judgment of Henry R. Isenberg Co., Inc. 30

And your petitioner humbly appeals from said portions of said decree, and from the whole of said decree, upon the ground that the same are 40

Petition of Appeal.

erroneous, in that the Chancellor should not have adjudged that the complainant and the defendant, Lenox Land Co., a corporation, were entitled to the relief and the decree awarded them, and to the priorities granted under the said decree, and in that the Chancellor should not have adjudged and decreed that the said Henry R. Isenberg Co., Inc., was to receive payment of the judgment only after the payment of the sum due to the complainant, on its mortgages, and the Lenox Land Co., a corporation.

Your petitioner, therefore, prays that the said decree of the Chancellor may, in the particulars aforesaid, be set aside and for nothing holden, and that your petitioner may have such other relief in the premises as in this Honorable Court may seem meet.

MAX KRUEGER,
Solicitor of Defendant-Appellant,
Henry R. Isenberg Co., Inc.

MINTURN & WEINBERGER,
Of Counsel.

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Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

*Between*ACTIVE MORTGAGE COMPANY,
a corporation,
*Complainant-Appellee,**and*HENRY R. ISENBERG CO., INC.,
a corporation,
Defendant-Appellant.

*On Appeal
from Court
of Chancery.*

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*Answer to
Petition of
Appeal.*

The answer of Active Mortgage Company, the
above named appellee, to the petition of appeal
of Henry R. Isenberg Co., Inc., the above named
appellant:

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This appellee not admitting the truth of all or
any of the matters in said petition of appeal con-
tained, for answer thereto, nevertheless admits
that a decree was on June 13, 1929 made and
entered in the Court of Chancery of New Jersey
in a certain cause in which said Active Mortgage
Company, a corporation, was complainant and
Apex Building Co., a corporation, Lenox Land
Co., a corporation, Warranty Building & Loan
Association of the City of Newark, a corporation,
Irvington Iron Works, Inc., a corporation, Do-
mestic Electric Co., Inc., a corporation, Ransome
Concrete Machinery Co., a corporation, Watson
Elevator Co., a corporation, Industrial Sales
Engineering Company, a corporation, Peter
Russo Co., a corporation, Maier-Rich & Co., a
corporation, Victory Sash & Door Co., a corpora-

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Answer to Petition of Appeal.

tion, Frank D. Holloway, Louis F. Mesmer and John J. Whittier, trustees, Hoffman Plumbing Co., a corporation, and R. Young & Sons, a corporation, were defendants, for the purposes in said petition mentioned and as therein set forth, but as to the substance and form of said decree this appellee begs leave to refer thereto when the same shall be produced.

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

SAMUEL ROESSLER,
Solicitor for and of Counsel
with Complainant-Appellee.

Service of within answer to petition of appeal is hereby acknowledged this 5th day of July, 1929.

MAX KRUEGER,
Solr. and

MINTURN & WEINBERGER,
Of Counsel with Defendant-Appellant.

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Exhibit C. 4.

Exhibit C. 4.

WHEREAS, we, the undersigned, have heretofore agreed to furnish materials and/or labor for the construction and erection of the five (5) story brick elevator apartment house, being erected by APEX BUILDING CO., a corporation, hereafter referred to as owner upon the lands described as follows: 10

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

FIRST TRACT: BEGINNING at a point on the southerly side of Willow street, at a point distant easterly three hundred and twenty-nine feet and fifteen hundredths of a foot from the southeasterly corner of Scotland and Willow streets; thence along said Willow street, south forty-seven degrees thirty minutes east fifty feet to the proposed extension of Lincoln avenue; thence along said proposed extension, south forty-two degrees thirty minutes west one hundred and one feet to land of Joseph Wilde; thence along his line, north forty-seven degrees thirty minutes west fifty feet, to the southeasterly corner of lot #6 on a map of property of Abraham Baldwin; thence along said lot, north forty-two degrees thirty minutes east one hundred and one feet to said Willow street and place of BEGINNING. Excepting therefrom so much as was heretofore taken by the City of Orange for the widening of Lincoln avenue; 20 30

SECOND TRACT: BEGINNING on the southerly side of Willow street at a point therein distant two hundred and seventy-nine feet and fifteen hundredths of a foot southeasterly from 40

Exhibit C. 4.

the southeasterly corner of Willow street and Scotland road, formerly Scotland street; thence (1) south forty-two degrees thirty minutes west one hundred and one feet more or less to land now or formerly of Joseph Wilde, deceased; thence (2) along his line south forty-seven degrees
 10 thirty minutes east fifty feet to land now or formerly of William E. Bell; thence (3) along that line, north forty-two degrees thirty minutes east one hundred and one feet to said Willow street; thence (4) along said Willow street, north forty-seven degrees thirty minutes west fifty feet to the BEGINNING.

WHEREAS, we have already furnished some materials and/or labor, and are about to furnish some materials and/or labor for the construction of the aforesaid building, and
 20

WHEREAS, ACTIVE MORTGAGE COMPANY, a corporation, for the purpose of aiding said owner to erect said building has agreed to loan to said owner, the sum of fifteen thousand (\$15,000) dollars to be secured by a mortgage upon said building and lands, and

WHEREAS, ACTIVE MORTGAGE COMPANY, a corporation, has refused to make the payment hereinafter mentioned on account of said mortgage, unless the undersigned execute this instrument.
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Now THEREFORE, the undersigned, in consideration of the said ACTIVE MORTGAGE COMPANY, a corporation, agreeing to advance the aforementioned sum for the purpose of aiding said owner to erect said building, and for and in further consideration of the said ACTIVE MORTGAGE COMPANY, a corporation, advancing to said owner, a payment or payments on account of said mortgage, and for and in further
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Exhibit C. 4.

consideration of the sum of One Dollar to each of the undersigned, in hand paid by the said ACTIVE MORTGAGE COMPANY, a corporation, the receipt whereof is hereby severally acknowledged, the undersigned do hereby severally stipulate and agree to and with the said ACTIVE MORTGAGE COMPANY, a corporation, that the mortgage of said ACTIVE MORTGAGE COMPANY, a corporation, given by the owner, and to secure the said loan aforesaid, shall be and remain a lien upon said building and lands whereon the same is located, and as more particularly described in said mortgage prior and paramount to any claim or lien that we, or any of us have at the present time, or that we or any of us may have in the future upon or against said building and lands, as aforesaid by virtue of the provisions of "An Act to secure to Mechanics and others, payment of their labor and materials in erecting any buildings, and in making certain improvements to land," and the several supplements and amendments thereto, or by virtue of any of the Mechanics' Lien Laws of the State of New Jersey, or otherwise, by reason of any materials furnished, sold and delivered, or that shall or may be hereafter furnished, sold and delivered by us, or any of us, or by reason of any labor furnished or performed by us, or any of us, or that may be hereafter furnished or performed by us, or any of us, for the erection and construction of said building.

IT IS HEREBY AGREED and understood that the subordination and postponement herein and hereby effectuated shall in no way be lessened or impaired by the fact that the said ACTIVE MORTGAGE COMPANY, a corporation, its successors or assigns, may pay or advance the principal of said mortgage, or any part thereof, to

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Exhibit C. 4.

any person or persons other than such as have or will have performed labor or as have or will have supplied materials in the erection and construction of said building, and we do jointly and severally hereby give our consent that said ACTIVE MORTGAGE COMPANY, a corporation, its successors or assigns by its or their officers, agents, attorneys and representatives may make payment of said principal sum in the manner mentioned in this paragraph, and we hereby agree with said ACTIVE MORTGAGE COMPANY, a corporation, its successors and assigns that any such payment made shall have the same force and effect as if the moneys so paid were actually used in the construction and erection of the building upon the above described premises.

20 And we further stipulate and agree and hereby authorize and empower the said ACTIVE MORTGAGE COMPANY, a corporation, and its attorney, and this shall be their warrant and authority for so doing, to deduct all premiums, back shares, interest and charges, and its counsel to deduct all fees, charges and expenses that shall or may become due during the construction and completion of the said building, until the total sum shall have been paid by the said ACTIVE MORTGAGE COMPANY, a corporation, to the said owners thereof upon completion; that is the sum agreed to be loaned and advanced by the said ACTIVE MORTGAGE COMPANY, a corporation.

30 It is distinctly understood and agreed that with respect to said ACTIVE MORTGAGE COMPANY, a corporation, its successors or assigns, this instrument shall at all times be deemed and construed as a release of all right of mechanic's lien, and that at no time and in no event shall
40 the right of mechanic's lien of the undersigned

Exhibit C. 4.

be asserted as against the said mortgage lien of said ACTIVE MORTGAGE COMPANY, a corporation.

We hereby jointly and severally for ourselves, our personal representatives, successors and assigns waive the provisions of the "An Act to secure to mechanics and others payment for their labor and materials in erecting any building and making certain improvements to land" (revision of 1898), and the several supplements and amendments thereto as to the mortgage of ACTIVE MORTGAGE COMPANY, a corporation, 10

It is hereby agreed and understood that this postponement of lien is delivered unconditionally and without any understanding or agreement had, excepting as is herein expressly provided for.

We further represent that in the event that we or any of us are signing this agreement on behalf of a corporation that we have been duly authorized by a proper resolution of said corporation to sign the foregoing agreement, and we further represent that in the event we, or any of us are signing this agreement on behalf of a partnership that we have been duly authorized to sign this agreement on behalf of said partnership; knowing that ACTIVE MORTGAGE COMPANY, a corporation, are advancing said mortgage moneys relying upon the truth of such representations. 20 30

IN WITNESS WHEREOF, the undersigned individuals have hereunto set their hands and seals, and the undersigned corporations have caused this stipulation to be signed by their respective

Exhibit C. 4.

duly authorized officers this Eighth day of June,
Nineteen Hundred and Twenty-eight.

Signed, Sealed and Delivered
in the Presence of

- 10 ROBERT A. EBERT INC.
 R. A. Ebert, Pres. (SEAL)
 Electrician,
- CIRO CANGIALOSS (SEAL)
 Mason,
- ALFRED ANDERSON (SEAL)
 Floor Layer,
- HOFFMAN PLUMBING CO. (SEAL)
 A. J. Hoffman, Pres.
- 20 IRVINGTON PLBG. SUPPLY CORP.,
 Henry F. Schmidt, Pres. (SEAL)
- ORANGE IRON WORKS,
 A. Yozzo, Prop. (SEAL)
- G. R. SUPPLY CO., INC.
 G. R. Leary, Pres. (SEAL)
- A. A. SHLER CO.,
 Alfred A. Shler, Sect. (SEAL)
- 30 Witness:
 SOPHIE PASTEELNICK.

Exhibit C. 4.

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

HENRY F. SCHMIDT of full age, being duly sworn deposes and says that he is secretary and treasurer of Apex Building Co, the owner of the premises described in the within Subordination and those who have executed the same, together with Louis Bohm and Belmont Lumber Co. and Watson Elevator Co., are all of the parties who have furnished or will furnish labor and/or materials in connection with the erection of the building herein described: That he saw the persons whose names are subscribed thereto, execute the within subordination. This affidavit is made for the purpose of inducing ACTIVE MORTGAGE COMPANY to pay over to the mortgagors the proceeds of the within stated mortgage. 10 20

HENRY F. SCHMIDT.

Sworn and Subscribed before me
 this 29th day of June, 1928.

SAMUEL ROESSLER,
 A Master in Chancery
 of New Jersey.

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*Exhibit C. 5.***Exhibit C. 5.**

THIS INDENTURE, Made the Twenty-sixth day of April in the year of our Lord One Thousand Nine Hundred and Twenty-seven

10 BETWEEN APEX BUILDING CO., a corporation of the State of New Jersey, party of the first part;

AND LENOX LAND CO., a corporation of the State of New Jersey, party of the second part;

WHEREAS, the said APEX BUILDING CO. is justly indebted to the said party of the second part, in the sum of EIGHTY FIVE THOUSAND (\$85,000) Dollars, lawful money of the United States of America, secured to be paid by its certain bond or obligation, bearing even date with
 20 these presents, in the penal sum of ONE HUNDRED SEVENTY THOUSAND (\$170,000) Dollars, lawful money as aforesaid conditioned for the payment of the said first mentioned sum of EIGHTY FIVE THOUSAND (\$85,000) Dollars, lawful money as aforesaid, to the said party of the second part, its successors or assigns on the Twenty-sixth day of January, which will be in the year One Thousand Nine Hundred and Twenty-eight and interest thereon, to be computed from the date hereof at and after the rate
 30 of six per cent. per annum and to be paid at maturity.

AND IT IS THEREBY EXPRESSLY AGREED that should any default be made in the payment of the said interest or of any part thereof, on any day 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
 40 or acquired upon the premises described in this

Exhibit C. 5.

mortgage, and become due and payable, and should the said interest or any part thereof remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrear for the space of sixty days, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum of EIGHTY FIVE THOUSAND (\$85,000) Dollars, with all arrearages of interest thereon, shall, at the option of the said party of the second part, its successors or assigns, become and be due and payable immediately thereafter although the period above limited for the payment thereof may not then have expired, anything therein before contained to the contrary thereof in anywise notwithstanding; and the said Mortgagee may at its option, pay such tax, assessment or water rent in arrear, and the amount so paid shall be added to and become part of the principal sum secured by the said bond and this mortgage, and shall be payable on demand with interest at six per centum per annum, as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear.

Now THIS INDENTURE WITNESSETH, that the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to it in hand paid by the said party of the second part at or before the ensealing and delivery of these

Exhibit C. 5.

presents, the receipt whereof is hereby acknowledged has granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part and to its successors or assigns forever,

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ALL those tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of Orange, in the County of Essex and State of New Jersey.

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FIRST TRACT: BEGINNING at a point on the southerly side of Willow street, at a point distant easterly there hundred and twenty-nine feet and fifteen hundredths of a foot from the southeasterly corner of Scotland and Willow streets; thence along said Willow street, south forty-seven degrees thirty minutes east fifty feet to the proposed extension of Lincoln avenue; thence along said proposed extension, south forty-two degrees thirty minutes west one hundred and one feet to land of Joseph Wilde; thence along his line, north forty-seven degrees thirty minutes west fifty feet to the southeasterly corner of lot #6 on a map of property of Abraham Baldwin; thence along said lot, north forty-two degrees thirty minutes east one hundred and one feet to said Willow street and place of BEGINNING. Excepting therefrom so much as was heretofore taken by the City of Orange for the widening of Lincoln avenue.

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SECOND TRACT: BEGINNING on the southerly side of Willow street at a point therein distant two hundred and seventy-nine feet and fifteen hundredths of a foot southeasterly from the southeasterly corner of Willow street and Scotland Road, formerly Scotland street; thence

Exhibit C. 5.

(1) south forty-two degrees thirty minutes west one hundred and one feet more or less to land now or formerly of Joseph Wilde, deceased; thence (2) along his line south forty-seven degrees thirty minutes east fifty feet to land now or formerly of William E. Bell; thence (3) along that line, north forty-two degrees thirty minutes east one hundred and one feet to said Willow street; thence (4) along said Willow street, north forty-seven degrees thirty minutes west fifty feet to the BEGINNING. 10

Being the same premises conveyed to the party of the first part by the Lenox Land Co. by deed of even date herewith.

This mortgage is subsequent to mortgages in the sum of \$6,000 now upon the premises and a mortgage in the sum of \$14,500 held by Lenox Land Co. 20

The within mortgage is an Advance Money Mortgage drawn in pursuance of Section 14 of an Act entitled "An Act to secure to mechanics and others, payment for their labor and materials in erecting any building and in making certain improvements to land (revision of one thousand eight hundred and ninety-eight)" and the various amendments and supplements thereto.

The aforesaid sum of EIGHTY FIVE THOUSAND DOLLARS, (\$85,000) is to be advanced in connection with the erection and construction of a five story brick apartment building in accordance with plans and specifications now being drawn by Harold Foster Clark, containing 98 rooms. 30

The said sum of EIGHTY FIVE THOUSAND DOLLARS, (\$85,000) to be advanced on the building to be erected on the premises herein-

Exhibit C. 5.

above described, shall be advanced in the following manner and in accordance with the following Schedule of Payments:

	When cellar is erected.....	\$10,000.
	When first floor is erected and second tier of beams is laid.....	4,000.
10	When second floor is erected and third tier of beams is laid.....	4,000.
	When third floor is erected and fourth tier of beams laid.....	4,000.
	When fourth floor is erected and fifth tier of beams is laid.....	4,000.
	When fifth floor is erected and ceiling beams laid.....	4,000.
	When roof is on.....	6,000.
	When rough plumbing and steam is in..	4,000.
20	When partitions are set, rough electric is in and building is ready for lath....	3,000.
	When first floor fireproof is laid.....	3,000.
	When building is brown coated.....	4,000.
	When building is white coated.....	3,000.
	When standing trim is erected.....	4,000.
	When plumbing fixtures are delivered, bath tubs set.....	4,000.
	When doors are hung.....	2,000.
	When tile and marble is in.....	4,000.
	When floors are laid.....	3,000.
30	When plumbing fixtures are set.....	4,000.
	When first coat of paint is on.....	3,000.
	When electric fixtures are hung.....	2,000.
	When balance of painting work is on...	2,000.
	When gas ranges and ice boxes are delivered	2,000.
	When building is completed.....	2,000.
		<hr/>
		\$85,000.

Exhibit C. 5.

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

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

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

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

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

Exhibit C. 5.

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

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

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

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

(a) To protect and preserve the mortgaged premises; (b) To complete the said building and to pay and satisfy all liabilities incurred for materials and labor employed in such construction;
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Exhibit C. 5.

(c) To pay for all work and materials already provided and furnished to owners, the mortgagee being authorized either to continue the construction under outstanding contracts of the owners or to create independent contracts for such completion.

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

To induce the mortgagee to advance the principal sum secured hereby or any part thereof, and as a prime and essential consideration to the mortgagee, the said owners do, for themselves, their heirs and executors, administrators, successors and assigns, hereby constitute and appoint the mortgagee, irrevocably, as their agent for the purpose of making the expenditures aforesaid and for the purpose of carrying out in every respect the authorities herein granted and, upon the completion of the said building, to enter into written or oral contracts, in the name of and on behalf of the said owners, for the renting or hiring of the said premises or any part thereof, under such terms and conditions as may seem advisable to the mortgagee and to use the rents, issues and profits for the upkeep and maintenance of the said premises and for the payment of prior liens and the liquidation of all interest due on mortgages as well to the mortgagee as to others, and for taxes, insurance, water charges,

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Exhibit C. 5.

etc., and to apply any surplus to the amount due for principal on the within mortgage.

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

- 10 TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, and remainder and remainders, rents, issues and profits thereof. AND ALSO, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances: To
- 20 HAVE AND TO HOLD the above granted and described premises, with the appurtenances, unto the said party of the second part, its successors or assigns, to it own proper use, benefit and behoof forever. PROVIDED ALWAYS, and these presents are upon this express condition, that if the said party of the first part, or its successors shall well and truly pay unto the said party of the second part, its successors or assigns, the said sum of money mentioned in the condition of said
- 30 bond or obligation, and the interest thereon, at the time and times, and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine and be void.

- AND the said party of the first part for itself and its successors does covenant and agree to pay unto the said party of the second part, its successors or assigns, the said sum of money and interest, as mentioned above and expressed in the
- 40 conditions of the said bond.

Exhibit C. 5.

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

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

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Exhibit C. 5.

fend the title thereof unto the mortgagee, its successors or assigns, against all lawful claims whatsoever.

10 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 part hath caused its corporate Seal to be hereto affixed and attested by its Secretary, and these presents to be signed by its President, the day and year first above written.

APEX BUILDING CO.

LOUIS WORTZEL,

Pres.

20 Signed, Sealed and Delivered
in the Presence of

Attest:

NATHAN WEINSTEIN,
(L. s.) Secy.

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

30 BE IT REMEMBERED, that on this 26th day of April in the year of our Lord One Thousand Nine Hundred and Twenty-seven, before me the subscriber, a Master in Chancery of N. J., personally appeared Nathan Weinstein who, being by me duly sworn on his oath, says that he is the Secretary of the Apex Building Co., the mortgagor named in the within instrument; that Louis Wortzel is the President of said corporation; that deponent well knows the corporate seal of said corporation; and the seal affixed to said Instrument is such corporate seal and was thereto af-

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Exhibit C. 5.

fixed, and said Instrument signed and delivered by said President, as and for his voluntary act and deed and as and for the voluntary act and deed of said corporation, in presence of deponent, who thereupon subscribed his name thereto as witness.

NATHAN WEINSTEIN.

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

JOSEPH H. STEINHARDT,
A Master in Chancery of N. J.

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MORTGAGE.

APEX BUILDING CO.

To

LENOX LAND CO.

Dated, April 26th, 1927.

Received in the Register's Office of the County of Essex, N. J. on the 28th day of April A. D. 1927, at 3:11 o'clock, in the afternoon and recorded in Book Q-60 of MORTGAGES for said County, on page 599-602.

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HOWARD S. DODD,
Register.

JOSEPH H. STEINHARDT,
Counsellor at Law
Firemen's Building,
Newark, New Jersey.

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*Exhibit C. 6.***Exhibit C. 6.**

KNOW ALL MEN BY THESE PRESENTS: That WE,
 LOUIS WORTZEL AND NATHAN WEIN-
 STEIN, individually, and APEX BUILDING
 10 CO. a corporation of the State of New Jersey is
 held and firmly bound unto LENOX LAND CO.
 in the penal sum of ONE HUNDRED
 SEVENTY THOUSAND DOLLARS, (\$170,000)
 lawful money of the United States of America,
 to be paid to the said LENOX LAND CO. its
 successors or assigns: FOR WHICH PAYMENT well
 and truly to be made, it binds itself and its suc-
 cessors firmly by these presents. Sealed with its
 corporate seal and signed by its President.
 20 Dated the 26th day of April One Thousand Nine
 Hundred and Twenty-seven

THE CONDITION of the above obligation is such
 that if the above bounden corporation or its suc-
 cessors, shall well and truly pay, or cause to be
 paid, unto the above named LENOX LAND CO.
 its successors or assigns, the just and full sum
 of EIGHTY FIVE THOUSAND DOLLARS,
 (\$85,000) on the 26th day of January which will
 be in the year One Thousand Nine Hundred and
 30 Twenty-eight, and the interest thereon, to be
 computed from the date hereof at and after the
 rate of six per cent. per annum, and to be paid at
 maturity without any fraud or other delay, then
 the above Obligation to be Void, otherwise to re-
 main in full force and virtue.

It is hereby expressly understood that all the
 terms, covenants and conditions of the mortgage
 this day given as collateral security for the pay-
 ment of this bond are hereby made a part of
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Exhibit C. 6.

this bond in the same manner and with like effect as if herein fully set forth.

AND IT IS HEREBY EXPRESSLY AGREED, that should any default be made in the payment of the said interest,

or of any part thereof, on any day whereon the same is made payable as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or 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 EIGHTY FIVE THOUSAND DOLLARS, (\$85,000) with all arrearage of interest thereon, shall, at the option of the said LENOX LAND CO. or its legal representatives or assigns, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding, and the said Obligee may at its option, pay such tax, assessment, or water rent in arrear, and the amount so paid shall be added to and become part of the principal sum secured by the said mortgage and

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Exhibit C. 6.

by this Bond, and shall be payable on demand with interest at six per centum per annum.

Louis Wortzel (L. s.)
Nathan Weinstein (L. s.)

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APEX BUILDING CO.

Louis Wortzel

Pres.
(L. s.)

Signed, Sealed and Delivered
in the Presence of

JOSEPH H. STEINHARDT,

Attest:

Nathan Weinstein
Secy.

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BOND.

Louis Wortzel and Nathan Weinstein,
individually, and Apex Building Co.

To

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Lenox Land Co.

Amount\$85,000

Date April 26, 1927.

Due January 26, 1928.

Interest payable 6%.

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Exhibit C. 7.

Exhibit C. 7.

THIS INDENTURE Made the Eighth day of June in the year of our Lord One Thousand Nine Hundred and Twenty-eight

BETWEEN APEX BUILDING CO. a corporation of the State of New Jersey, having its principal office in the City of Newark in the County of Essex and State of New Jersey party of the first part; 10

AND ACTIVE MORTGAGE COMPANY, a corporation of the State of New Jersey, having its principal office in the City of Newark in the County of Essex and State of New Jersey party of the second part;

WHEREAS, the said party of the first part, is justly indebted to the said party of the second part, in the sum of Fifteen thousand Dollars, lawful money of the United States of America, secured to be paid by its certain bond or obligation, bearing even date with these presents, in the penal sum of Thirty thousand Dollars, lawful money as aforesaid conditioned for the payment of the said first-mentioned sum of Fifteen thousand Dollars, lawful money as aforesaid, to the said party of the second part, its successors and assigns on the Eighth day of September which will be in the year One Thousand Nine Hundred and Twenty-eight and interest thereon, to be computed from June 8, 1928 at and after the rate of six per cent. per annum, and to be paid at maturity, 20 30

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

Exhibit C. 7.

rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage, and become due and payable, and should the said interest or any part thereof remain unpaid and in arrear for the space of

10 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 Fifteen thousand Dollars, with all arrearage of interest thereon, shall, at the option of the said party of the second part, or

20 its, legal representatives or assigns, become and be due and payable immediately thereafter although the period above limited for the payment thereof may not then have expired, anything therein before contained to the contrary thereof in anywise notwithstanding: and the holder of this mortgage 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

30 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 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

40 the true intent and meaning thereof, and also for

Exhibit C. 7.

and in consideration of the sum of one dollar, to it in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged has granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, release, convey and confirm, unto the said party of the second part, and to its successor and assigns forever. 10

ALL those two certain tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of Orange in the County of Essex and State of New Jersey.

FIRST TRACT: BEGINNING at a point on the southerly side of Willow Street, at a point distant easterly three hundred and twenty nine feet and fifteen hundredths of a foot (329.15') from the southeasterly corner of Scotland and Willow Streets; thence along said Willow Street, south forty seven degrees thirty minutes east fifty feet (50') to the proposed extension of Lincoln Avenue; thence along said proposed extension, south forty two degrees thirty minutes west one hundred and one feet (101') to land of Joseph Wilde; thence along his line, north forty seven degrees thirty minutes west fifty feet (50') to the southeasterly corner of lot #6 on a map of property of Abraham Baldwin; thence along said lot, north forty two degrees thirty minutes east one hundred and one feet (101') to said Willow Street and place of Beginning. Excepting therefrom so much as was heretofore taken by the City of Orange for the widening of Lincoln Avenue. 20 30

SECOND TRACT: BEGINNING on the southerly side of Willow Street at a point therein dis- 40

Exhibit C. 7.

tant two hundred and seventy nine feet and fifteen hundredths of a foot (279.15') southeasterly from the southeasterly corner of Willow Street and Scotland Road, formerly Scotland Street; thence (1) south forty two degrees thirty minutes west one hundred and one feet (101') more or
 10 less to land now or formerly of Joseph Wilde, deceased; thence (2) along his line south forty seven degrees thirty minutes east fifty feet (50') to land now or formerly of William E. Bell; thence (3) along that line, north forty two degrees thirty minutes east one hundred and one feet (101') to said Willow Street; thence (4) along said Willow Street, north forty seven degrees thirty minutes west fifty feet (50') to the Beginning.

20 Being the same premises conveyed to said Apex Building Co. by deed of Lenox Land Co., a corporation, dated April 26, 1927 and recorded in the Essex County Register's Office.

The funds intended to be secured hereby are to be advanced in connection with the construction and completion of a five story brick apartment building now in the course of construction upon the land and premises above described in accordance with plans and specifications prepared by Harold Foster Clark. Said advance-
 30 ments are to be made in accordance with the terms of an agreement this day entered into between the parties hereto.

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

Exhibit C. 7.

in law as in equity, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances: To HAVE AND TO HOLD the above granted and described premises, with the appurtenances, unto the said party of the second part, its successors and assigns, to its and their own proper use, benefit and behoof for ever. PROVIDED ALWAYS, and these presents are upon this express condition, that if the said party of the first part, its heirs, executors or administrators, shall well and truly pay unto the said party of the second part, successors, and assigns, the said sum of money mentioned in the condition of said bond or obligation, and the interest thereon, at the time and times, and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine and be void.

AND the said party of the first part for itself, its successors and assigns do covenant and agree to pay unto the said party of the second part, its successors and assigns, the said sum of money and interest, as mentioned above and expressed in the conditions of the said bond.

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

Exhibit C. 7.

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; and in default thereof for thirty days after demand, the principal sum hereof with all arrearage of interest thereon, shall, at the option of the party of the second part, its successors or assigns, become and be due and payable immediately thereafter.

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

AND the said mortgagor for itself, its successors and assigns do covenant with the mortgagee that it is seized of an indefeasible estate in fee simple in said premises, and will warrant and forever defend the title thereof unto the mortgagee, its successors and assigns, against all lawful claims whatsoever.

Exhibit C. 7.

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 part has hereunto set its corporate hand and seal the day and year first above written. 10

APEX BUILDING CO.

By Philip Wilensky
President.

Signed, Sealed and Delivered
in the presence of

Henry F. Schmidt,
Secretary. 20

Attest:
(SEAL)

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

BE IT REMEMBERED that on this eighth day of June in the year of our Lord One Thousand Nine Hundred and Twenty-eight before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Henry F. Schmidt who, being by me duly sworn on his oath, says that he is the Secretary of the Apex Building Co. the grantor named in the within instrument; that Philip Wilensky is the President of said corporation; that deponent well knows the corporate seal of said corporation; and the seal affixed to said Instrument is such corporate seal and was thereto affixed, and said Instrument signed and 40

Exhibit C. 7.

delivered by said President, as and for his voluntary act and deed and as and for the voluntary act and deed of said corporation, in presence of deponent, who thereupon subscribed his name thereto as witness.

10

Henry F. Schmidt.

Sworn and subscribed before me, at Newark, New Jersey the date aforesaid.

SAMUEL L. ROESSLER,
A Master in Chancery of New Jersey.

20

MORTGAGE.

Apex Building Co. a corporation,

To

Active Mortgage Company, a corporation,

Dated June 8, 1928.

30

Received in the Register's Office of the County of Essex, N. J., on the 25th day of June A. D., 1928, at 2:22 o'clock, in the afternoon and recorded in Book O-64 of Mortgages for said County, on pages 416-418.

Howard S. Dodd,
Register.

40

Exhibit C. 8.

Exhibit C. 8.

KNOW ALL MEN BY THESE PRESENTS: That APEX BUILDING CO. a corporation of the State of New Jersey, and are held and firmly bound unto ACTIVE MORTGAGE COMPANY, a corporation in the penal sum of Thirty thousand dollars (\$30,000.00) lawful money of the United States of America, to be paid to the said ACTIVE MORTGAGE COMPANY, a corporation, its successors, or assigns: FOR WHICH PAYMENT well and truly to be made, we bind ourselves, our successors and assigns, heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the Eighth day of June One Thousand Nine Hundred and Twenty-eight.

10

20

THE CONDITION of the above obligation is such that if the above bounden APEX BUILDING CO. its successors or assigns and their heirs, executors or administrators, shall well and truly pay, or cause to be paid, unto the above named ACTIVE MORTGAGE COMPANY, its successors or assigns, the just and full sum of Fifteen thousand dollars (\$15,000.00) on the Eighth day of September which will be in the year One Thousand Nine Hundred and Twenty-eight, and the interest thereon, to be computed from June 8, 1928 at and after the rate of six per cent. per annum, and to be paid at maturity without any fraud or other delay, then the above Obligation to be Void, otherwise to remain in full force and virtue.

30

It is hereby expressly understood and agreed that all the terms, covenants and conditions of the mortgage this day given as collateral security for the payment of this bond are hereby made

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Exhibit C. 8.

a part of this bond in the same manner and with like effect as if herein fully set forth.

AND IT IS HEREBY EXPRESSLY AGREED, that should any default be made in the payment of the said interest, or of any part thereof, on any day whereon the same is made payable as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or 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 Fifteen thousand dollars (\$15,000.00) with all arrearage of interest thereon, shall, at the option of the said ACTIVE MORTGAGE COMPANY, 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 contained to the contrary thereof in anywise notwithstanding, and the said Obligee may at its option, pay such tax, assessment, or water rent in arrear, and the amount so paid shall be added to and become part of the principal sum secured by the said mortgage and by this Bond, and shall be payable on demand with interest at six per centum per annum.

40

APEX BUILDING CO.
By Philip Wilensky,
President.

Exhibit C. 9.

Signed, Sealed and Delivered
in the Presence of

Henry F. Schmidt,
Secretary.

Attest:
(SEAL)

10

BOND.

Apex Building Co. a corporation and
To

Active Mortgage Company, a corpora-
tion,

Amount\$15,000

20

Date June 8, 1928

Due, Sept. 8, 1928

Interest payable at maturity 6%.

Exhibit C. 9.

KNOW ALL MEN BY THESE PRESENTS: That
LENOX LAND CO., a corporation of New Jer-
sey of the of

30

in the County of and State of
, party of the First Part,

in consideration of the sum of ONE DOLLAR
AND OTHER GOOD AND VALUABLE CON-
SIDERATION lawful money of the United
States of America, to it in hand paid by
ACTIVE MORTGAGE CO. party of the Second
Part, at or before the ensealing and delivery of
these presents, the receipt whereof is hereby ac-

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Exhibit C. 9.

10 knowledge, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant, bargain, sell, assign, transfer and set over unto the said party of the Second Part, its successors or Assigns, a certain Indenture of Mortgage bearing date the Twenty-sixth day of April One Thousand Nine Hundred and Twenty-seven made by Apex Building Co. on lands in the City of Orange in the County of Essex and State of New Jersey, to secure the payment of the sum of EIGHTY FIVE THOUSAND DOLLARS, (\$85,000) which mortgage is Recorded in the office of the Register of the County of Essex and State of New Jersey, in Book Q 60 of Mortgages, pages 599-602.

20 TOGETHER with the bond or obligation therein described, and the money due and to grow due thereon, with the interest. TO HAVE AND TO HOLD, the same unto the said party of the Second Part, its successors or Assigns forever subject only to the proviso in the said Indenture of Mortgage mentioned: AND it does hereby make, constitute, and appoint the said party of the Second Part its true and lawful attorney, irrevocable, in its name, or otherwise, but at its proper costs and charges, to have, use and take all lawful ways
30 and means for the recovery of all the said money and interest; and in case of payment, to discharge the same as fully as it might or could do if these presents were not made.

IN WITNESS WHEREOF, the Lenox Land Co. has caused these presents to be signed by its president and attested by its secretary and its common seal to be hereto affixed this 30th day of June, 1927.

40

LENOX LAND CO.,
Joseph Bomenblet, Pres.

Exhibit C. 9.

Signed, sealed and delivered in the presence of

Attest:

Joseph H. Steinhardt,
(SEAL) Secy.

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

10

BE IT REMEMBERED, That on this 30th day of June, Nineteen hundred and Twenty-seven before me the subscriber, a Master in Chancery of New Jersey personally appeared Joseph H. Steinhardt, who being by me duly sworn on his oath, says that he is the Secretary of Lenox Land Co. the assignor named in the foregoing Instrument; that he well knows the corporate seal of said corporation; that the seal affixed to said Instrument is the corporate seal of said corporation; that the said seal was so affixed and the said Instrument signed and delivered by Joseph Bomenblet who was at the date thereof the President of said corporation, in the presence of this deponent, and said President, at the same time acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, and as the voluntary act and deed of said corporation, and that deponent, at the same time, subscribed his name to said Instrument as an attesting witness to the execution thereof.

20

30

JOSEPH H. STEINHARDT.

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

FREDERICK SCHLOSSTEIN,
Master in Chancery of New Jersey.

40

Exhibit C. 10.

ASSIGNMENT OF MORTGAGE

Lenox Land Co.

To

Active Mortgage Co.

10

Dated, June 30th 1927.

Received in the Register's Office of the County of Essex, N. J., on the 2nd day of September, A. D., 1927, at 2:16 o'clock in the afternoon, and Recorded in Book 191 of Assignments of Mortgages for said County, on page 357.

Howard S. Dodd,
Register.

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Exhibit C. 10.

KNOW ALL MEN BY THESE PRESENTS: That WHEREAS APEX BUILDING CO. by its mortgage dated April 26, 1927 and recorded in Book Q-60 pages 497-498 of Mortgages for Essex County, New Jersey, mortgaged certain premises in the City of Orange, County of Essex and State of New Jersey, unto Lenox Land Co., to secure the payment of the sum of Fourteen Thousand Five Hundred Dollars, (\$14,500)

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AND WHEREAS the said Apex Building Co. is about to borrow from Active Mortgage Co. the sum of Eighty-five Thousand (\$85,000) Dollars, payment of which is to be secured by mortgage upon the same premises mortgaged as above stated;

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Exhibit C. 10.

Now THEREFORE in consideration of the premises and the sum of One Dollar and other good and valuable consideration to it in hand paid, the receipt whereof is hereby acknowledged, the said Lenox Land Co. does for its successors or assigns, hereby postpone the lien of the mortgage above mentioned, and now held by it, to the lien and effect of a mortgage to secure the payment of the sum of Eighty-five Thousand (\$85,000) Dollars, bearing date April 26, 1927, made and executed by Apex Building Co. to Lenox Land Co. and assigned to Active Mortgage Co., and recorded on April 28, 1927 in Book Q 60 of Mortgages for Essex County, at pages 599-602, so that such mortgage to Active Mortgage Co. aforesaid, shall be a lien on the said therein mortgaged premises prior to the lien of the mortgage held by the said Lenox Land Co. and recorded in Book Q 60 pages 597-598 of Essex County mortgages aforesaid.

IN WITNESS WHEREOF, the said Lenox Land Co. has caused these presents to be signed by its proper officers and its common seal to be hereto affixed this 1st day of July, 1927.

LENOX LAND CO.,
 Louis Koppelon,
 Vice-President (SEAL)

Signed, Sealed and Delivered
 in the presence of

Attest:

Joseph H. Steinhardt,
 Secy.

(SEAL)

Exhibit C. 10.

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

10 BE IT REMEMBERED, That on this First day of July, Nineteen hundred and Twenty-seven before me the subscriber, a Attorney at Law of New Jersey personally appeared Joseph H. Steinhardt who being by me duly sworn on his oath, says that he is the Secretary of Lenox Land Co. the grantor named in the foregoing Instrument; that he well knows the corporate seal of said corporation; that the seal affixed to said Instrument is the corporate seal of said corporation; that the said seal was so affixed and the said Instrument signed and delivered by Louis Koppelon who was at the date thereof the Vice President of said corporation, in the presence of this deponent, and said Vice President, 20 at the same time acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, and as the voluntary act and deed of said corporation, and that deponent, at the same time, subscribed his name to said Instrument as an attesting witness to the execution thereof.

JOSEPH H. STEINHARDT.

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

Theodore Silver,
 Attorney at Law of New Jersey.

*Exhibit C. 11.*POSTPONEMENT OF MORTGAGE
LIEN.

Lenox Land Co.,

To

Active Mortgage Co.

10

Dated, July 1st, 1927.

Received in the Register's Office of the County of Essex State of New Jersey, on the 2nd day of September A. D. 1927, at 2:16 o'clock in the afternoon, and recorded in Book 96 of Releases of Mortgages for said County, at pages 148.

Howard S. Dodd,

Register.

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Exhibit C. 11.

THIS INDENTURE, made the Eighth day of June, in the year of our Lord, One Thousand Nine Hundred and Twenty-eight

BETWEEN Lenox Land Co. a corporation of the State of New Jersey, with its principal office in the City of Newark, County of Essex, and State of New Jersey, party of the first part:

30

AND Active Mortgage Company, a corporation of the State of New Jersey, having its principal office in the City of Newark, County of Essex, and State of New Jersey of the second part:

WHEREAS Apex Building Co. a corporation did by Indenture dated April 26, 1927 mortgage to Lenox Land Co. a corporation, certain premises

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Exhibit C. 11.

in the City of Orange County of Essex, and State of New Jersey.

10 FIRST TRACT: BEGINNING at a point on the southerly side of Willow Street, at a point distant easterly three hundred and twenty nine feet and fifteen hundredths of a foot (329.15') from the southeasterly corner of Scotland and Willow Streets; thence along said Willow Street, south forty seven degrees thirty minutes east fifty feet (50') to the proposed extension of Lincoln Avenue; thence along said proposed extension, south forty two degrees thirty minutes west one hundred and one feet (101') to land of Joseph Wilde; thence along his line, north forty seven degrees thirty minutes West fifty feet (50') to the southeasterly corner of lot #6 on a Map of property of Abraham Baldwin; thence along said lot, north forty two degrees thirty minutes east one hundred and one feet (101') to said Willow Street and place of Beginning. Excepting therefrom so much as was heretofore taken by the City of Orange for the widening of Lincoln Avenue.

30 SECOND TRACT: BEGINNING on the southerly side of Willow Street at a point therein distant two hundred and seventy nine feet and fifteen one-hundredths of a foot (279.15') southeasterly from the southeasterly corner of Willow Street and Scotland Road, formerly Scotland Street; thence (1) south forty two degrees thirty minutes west one hundred and one feet (101') more or less to land now or formerly of Joseph Wilde, deceased; thence (2) along his line south forty seven degrees thirty minutes east fifty feet (50') to land now or formerly of William E. Bell; thence (3) along that line, north forty two degrees thirty minutes east one hundred and one

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Exhibit C. 11.

feet (101') to said Willow Street; thence (4) along said Willow Street north forty seven degrees thirty minutes west fifty feet (50') to the Beginning.

which said mortgage was given to secure the sum of \$14,500, and was recorded on

in the Register's Office of Essex 10
County, in Book Q 60 of Mortgages for said
County, on Page 497, and

WHEREAS said Apex Building Co. a corporation have this day executed a mortgage to Active Mortgage Company, a corporation party of the second part, to secure the sum of Fifteen thousand dollars, covering the same premises, which said mortgage is about to be recorded in the Essex County Register's Office, and

WHEREAS it is the desire and intention of the 20
parties hereto that the mortgage of the party of the second part shall be a lien against the said premises prior and superior to the mortgage of the party of the first part, notwithstanding the prior execution and recording of the mortgage of the said party of the first part, and

WHEREAS it is the desire of the party of the 30
first part, to subject said mortgage to the lien of the mortgage of the party of the second part, and to make it subsequent thereto, and entitled to payment after the mortgage of the party of the second part:

Now THEREFORE in consideration of the sum of One Dollar lawful money of the United States of America to the party of the first part in hand paid by the party of the second part, receipt whereof is hereby acknowledged, and in consideration of the premises and other good and valuable consideration, the party of the first part does hereby covenant and agree to and with the 40

Exhibit C. 11.

party of the second part, that the said mortgage covering said premises, and held by Lenox Land Co. a corporation, shall be subsequent and subject to the mortgage of the party of the second part, above referred to and that the mortgage of the party of the second part, for \$15,000 covering said premises, shall be and is hereby declared to be entitled to priority of payment out of any and all funds arising from the sale of the said mortgaged premises.

IN WITNESS WHEREOF the said party of the first part has hereunto affixed its corporate hand and seal this eighth day of June, 1928.

LENOX LAND CO.,
By Louis Koppelon,
Vice-President.

Signed, Sealed and Delivered
in the Presence of

Attest:

Joseph H. Steinhardt,
Secretary.

(SEAL)

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

BE IT REMEMBERED that on this eighth day of June in the year of our Lord One Thousand Nine Hundred and Twenty-eight, before me the subscriber, A Master in Chancery of New Jersey personally appeared Joseph H. Steinhardt, who being by me duly sworn on his oath, says that he is the Secretary of the Apex Building Co. the grantor named in the within instrument; that Louis Koppelon is the Vice President of said corporation; that deponent well knows the corporate

Exhibit C. 11.

seal of said corporation; and the seal affixed to said Instrument is such corporate seal and was thereto affixed, and said Instrument signed and delivered by said President, as and for his voluntary act and deed and as and for the voluntary act and deed of said corporation, in presence of deponent, who thereupon subscribed his name thereto as witness. 10

Joseph H. Steinhardt.

Sworn and subscribed before me,
at Newark, New Jersey, the date
aforesaid

SAMUEL ROESSLER,
A Master in Chancery of New Jersey.

20

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

BE IT REMEMBERED that on this 23rd day of July in the year of our Lord One Thousand Nine Hundred and Twenty-eight, before me, the subscriber, Attorney at Law of New Jersey personally appeared Joseph H. Steinhardt, who, being by me duly sworn on his oath, says that he is the Secretary of the Lenox Land Company the grantor named in the within instrument; that Louis Koppelon is the Vice-President of said corporation; that deponent well knows the corporate seal of said corporation; and the seal affixed to said Instrument is such corporate seal and was thereto affixed, and said Instrument signed and delivered by said President, as and for his voluntary act and deed and as and for the voluntary act and deed of said corporation, in 30

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Exhibit C. 11.

presence of deponent, who thereupon subscribed his name thereto as witness.

JOSEPH H. STEINHARDT.

Sworn and subscribed before me,
 at Newark, New Jersey the date
 10 aforesaid.

Theodore Silver,
 Attorney at Law of New Jersey.

POSTPONEMENT OF MORTGAGE.

Lenox Land Co. a corporation,

To

Active Mortgage Company, a corpora-
 20 tion,

Dated, June 8, 1928.

Received in the Register's Office of the County of Essex, N. J., on the 25th day of June A. D., 1928, at 2:22 o'clock in the afternoon, and Recorded in Book 102 of Releases of Mortgages for said County, on pages 213-214.

Howard S. Dodd,
 30 Register.

Received in the Register's Office of the County of Essex, N. J., on the 25th day of July A. D., 1928, at 9:12 o'clock in the forenoon, and Re-recorded in Book 102 of Releases of Mortgages for said County, on pages 433-434.

Howard S. Dodd,
 Register.

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Exhibit C. 12.

Exhibit C. 12.

MEMORANDUM OF AGREEMENT

Made this 9th day of January, one thousand nine hundred twenty-eight, BETWEEN Apex Building Co., a corporation, party of the first part; the undersigned creditors of the Apex Building Co., parties of the second part; Lionel P. Kristeller, receiver of Apex Building Co., party of the third part; Louis Wortzel and Nathan Weinstein, owners of all the shares of stock of the Apex Building Co., parties of the fourth part; and Philip Wilensky, Joseph H. Steinhardt and Henry F. Schmidt, trustees, parties of the fifth part, WITNESSETH:

WHEREAS, the party of the first part is erecting an apartment house on the southwest corner of Lincoln avenue and Willow street, Orange, New Jersey on a plot of land more particularly described as follows:

FIRST TRACT: BEGINNING at a point on the southerly side of Willow street at a point distant easterly 329.15 feet from the southeasterly corner of Scotland and Willow streets; thence along said Willow street south 47 degrees 30 minutes east 50 feet to the proposed extension of Lincoln avenue; thence along said proposed extension south 42 degrees 30 minutes west 101 feet to the land of Joseph Wilde; thence along his line north 47 degrees 30 minutes west 50 feet to the southeasterly corner of lot #6 on a map of property of Abraham Baldwin; thence along said lot north 42 degrees 30 minutes east 101 feet to said Willow street and place of BEGINNING. Excepting therefrom so much as was heretofore taken by the City of Orange, N. J., for the widening of Lincoln avenue;

Exhibit C. 12.

SECOND TRACT: BEGINNING on the southerly side of Willow street at a point distant 279.15 southeasterly from the southeasterly corner of Willow street and Scotland Road, formerly Scotland street; thence (1) south 42 degrees 30 minutes west 101 feet more or less to
 10 land now or formerly of Joseph Wilde, deceased; thence (2) along his line south 47 degrees 30 minutes east 50 feet to land now or formerly of William E. Bell; thence (3) along that line north 42 degrees 30 minutes east 101 feet to said Willow street; thence (4) along said Willow street north 47 degrees 30 minutes west 50 feet to the BEGINNING, and

WHEREAS, the undersigned creditors of the Apex Building Co., parties of the second part, have furnished material and labor, or either on said
 20 building and have claims against the party of the first part and against the said building in the amounts set opposite their several names, and

WHEREAS, Lionel P. Kristeller, receiver and party of the third part, has been appointed to act as receiver by order of the Court of Chancery of the State of New Jersey, and

WHEREAS, a petition in Bankruptcy has been filed in the United States Court for the District
 30 of New Jersey against the Apex Building Co., party of the first part, and

WHEREAS all the parties hereto deem it for the best interests of the creditors that the proceedings in the Court of Chancery and in the United States Bankruptcy Court against the party of the first part, be dismissed and that the Apex Building Co. be re-invested with title to its aforementioned property, now therefore,

WITNESSETH, that for and in consideration of
 40 the premises and One dollar (\$1.00) to the par-

Exhibit C. 12.

ties in hand paid, and other good and valuable consideration and the conditions as herein set forth is it agreed that:

1. Louis Wortzel and Nathan Weinstein, parties of the fourth part agree to transfer, set over and assign all their right, title and interest in and to 200 shares of stock in the Apex Building Co. said shares being all the shares issued and outstanding to the trustees, parties of the fifth part, to hold said shares of stock in trust for the purposes as hereinafter set forth: 10

2. The trustees, parties of the fifth part, are hereby authorized and empowered to complete the said building now under construction and to cause payment to be made therefore and to borrow money on security thereof on Bond and Mortgage or otherwise; to sell or convey the said land and building upon such terms and for such price as the said trustees deem expedient; to use the proceedings of such loan, loans or sale to pay for the completion of the said building; to pay the taxes on same; water, rents, insurance charges, interest on mortgages and the principal on mortgages according to their priority; counsel fees to such counsel as it may be necessary to employ; and to pay the balance in hand to the creditors of the Apex Building Co., parties of the second part, in just proportion as the amount of the respective claim of each creditor bears to the total amount available for the payment of creditors; to rent and manage the said building and in all ways to act as the owners of said premises until such time as all of the said creditors shall have been paid in full or the trustees deem it expedient to sell said premises as aforesaid. 20 30

3. If there shall be realized a sum greater than will be sufficient to pay the creditors of the 40

Exhibit C. 12.

Apex Building Co., parties of the second part, and the charges as set forth in paragraph 2 of this agreement in full, then said surplus shall be paid to the Apex Building Co., party of the first part.

10 4. The undersigned creditors, parties of the second part, do hereby remise, release, and forever quit-claim unto the said Apex Building Co., party of the first part, and its successors and assigns, all and all manner of liens, claims and demands whatsoever, which we, or any or either of us, now have or could or might have on or against the said building and land by reason of the premises, so that the said Apex Building Co., its successors and assigns and all other persons interested therein, shall and may have, hold
20 and enjoy the same, freed and discharged from all liens claims and demands whatsoever, which we, or any or either of us, now have or might or could have on or against the same, if these presents had not been made; and we do further severally agree to execute any further paper or document necessary to release such several claims to effectuate the clearing of the title of the premises above set forth as intended hereby.

30 5. The creditors and all other parties to this agreement herewith agree that the petition in bankruptcy and the Chancery proceedings now pending against the Apex Building Co. be dismissed and the receiver appointed by the Court of Chancery of the State of New Jersey be discharged without further notice to him, and herewith waive notice of any and all applications for the dismissal of said proceedings and agree that this instrument shall be considered as a consent
40 to the dismissal of the said proceedings in the Court of Chancery of the State of New Jersey

Exhibit C. 12.

and in the United States District Court for the District of New Jersey.

6. The trustees do hereby accept the trust created by this agreement and covenant faithfully to perform the terms hereof, and comply with its provisions.

10

7. The trustees, as at any time constituted, notwithstanding any vacancy, shall have the power, rights and interests of the trustees as herein originally appointed. In the event that any of said trustees shall die, resign or become otherwise disqualified from acting, the remaining trustees may fill any vacancy, and such additional and succeeding trustee shall have and shall exercise all the power and authority under this agreement and trust as was previously possessed by a trustee as originally appointed. The majority vote of the trustees shall constitute the final determination of the trustees upon any matter in which all of the trustees shall not be unanimous.

20

8. The said trustees shall have the right, on behalf of the creditors to hear and determine any and all claims and demands made by any of the creditors with reference to transactions had by them with the debtor and shall have the right to compromise, arbitrate, and adjust any and all such claims in such manner as the trustees may deem for the best interests of all creditors.

30

9. Trustees shall not be liable for the selection of any depository in which a bank account may be opened, nor shall said trustees be liable for any error of judgment or mistake at law or for anything but their own individual wilful misconduct.

10. The trustees shall at all times keep a correct statement of all receipts, disbursements, col-

40

Exhibit C. 12.

lections of rent, payment of interest, taxes and all other transactions involving their trust, which account shall at all times be open to all creditors, and the trustees from time to time make a true report of their trust to all creditors, provided that such report shall be rendered at least once every

10 six months until their trust is fulfilled. The creditors agree that they will take no action either at law or in equity against the debtors or the trustees until the fulfillment of the trust, except for misconduct on the part of said trustees.

11. Upon the execution of this agreement, the parties hereto do remise, release and forever discharge, and by these presents do for themselves, their heirs, executors, administrators, successors and assigns, remise, release, and forever discharge

20 the said Apex Building Co., its successors and assigns of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or in equity, which against the said Apex Building Co., the undersigned ever had, now have

30 or which they, their heirs, executors, administrators, successors or assigns hereafter can, shall or may have for or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of these Presents.

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

Exhibit C. 12.

Signed, sealed and delivered
in the presence of

APEX BUILDING CO. INC.,
By Louis Wortzel, Pres.

LOUIS WORTZEL,
By Nathan Weinstein, 10
Sec. and Treas.

PACIFIC ENGINEERING EQUIPMENT
CORP.,
E. A. Hamilton.

J. P. YOUNG & SONS, Inc.
Per Morris H. & Chas. E. Cohn, Attys.

HENRY B. GEDDES CO.
Per Leo. J. Fischgrund, Atty. 20

MEMORANDUM OF AGREEMENT

Made this 9th day of January, one thousand nine hundred twenty-eight, BETWEEN Apex Building Co., a corporation, party of the first part; the undersigned creditors of the Apex Building Co., parties of the second part; Lionel P. Kristeller, receiver of Apex Building Co., party of the third part; Louis Wortzel and Nathan Weinstein, owners of all the shares of stock of the Apex Building Co., parties of the fourth part; and Philip Wilensky, Joseph H. Steinhardt and Henry F. Schmidt, trustees, parties of the fifth part, WITNESSETH: 30

WHEREAS, the party of the first part is erecting an apartment house on the southwest corner of Lincoln avenue and Willow street, Orange, New Jersey, on a plot of land more particularly described as follows: 40

Exhibit C. 12.

FIRST TRACT: BEGINNING at a point on the southerly side of Willow street at a point distant easterly 329.15 feet from the southeasterly corner of Scotland and Willow streets; thence along said Willow street south 47 degrees 30 minutes east 50 feet to the proposed extension of Lincoln avenue; thence along said proposed extension south 42 degrees 30 minutes west 101 feet to the land of Joseph Wilde; thence along his line north 47 degrees 30 minutes west 50 feet to the southeasterly corner of lot #6 on a map of property of Abraham Baldwin; thence along said lot north 42 degrees 30 minutes east 101 feet to said Willow street and place of BEGINNING. Excepting therefrom so much as was heretofore taken by the City of Orange, N. J., for the widening of Lincoln avenue;

SECOND TRACT: BEGINNING on the southerly side of Willow street at a point distant 279.15 southeasterly from the southeasterly corner of Willow street and Scotland Road, formerly Scotland street; thence (1) south 42 degrees 30 minutes west 101 feet more or less to land now or formerly of Joseph Wilde, deceased; thence (2) along his line south 47 degrees 30 minutes east 50 feet to land now or formerly of William E. Bell; thence (3) along that line north 42 degrees 30 minutes east 101 feet to said Willow street; thence (4) along said Willow street north 47 degrees 30 minutes west 50 feet to the BEGINNING, and

WHEREAS, the undersigned creditors of the Apex Building Co., parties of the second part, have furnished material and labor, or either on said building and have claims against the party of the first part and against the said building in the amounts set opposite their several names, and

Exhibit C. 12.

WHEREAS, Lionel P. Kristeller, receiver and party of the third part, has been appointed to act as receiver by order of the Court of Chancery of the State of New Jersey, and

WHEREAS, a petition in Bankruptcy has been filed in the United States Court for the District of New Jersey against the Apex Building Co., party of the first part, and 10

WHEREAS, all the parties hereto deem it for the best interests of the creditors that the proceedings in the Court of Chancery and in the United States Bankruptcy Court against the party of the first part, be dismissed and that the Apex Building Co. be re-invested with title to its aforementioned property, now therefore,

WITNESSETH, that for and in consideration of the premises and one dollar (\$1.00) to the parties in hand paid, and other good and valuable consideration and the conditions as herein set forth it is agreed that: 20

1. Louis Wortzel and Nathan Weinstein, parties of the fourth part agree to transfer, set over and assign all their right, title and interest in and to 200 shares of stock in the Apex Building Co. said shares being all the shares issued and outstanding to the trustees, parties of the fifth part, to hold said shares of stock in trust for the purposes as hereinafter set forth: 30

2. The trustees, parties of the fifth part, are hereby authorized and empowered to complete the said building now under construction and to cause payment to be made therefore and to borrow money on security thereof on Bond and Mortgage or otherwise; to sell or convey the said land and building upon such terms and for such price as the said trustees deem expedient; to use the proceedings of such loan, loans or sale to pay 40

Exhibit C. 12.

for the completion of the said building; to pay the taxes on same; water, rents, insurance charges, interest on mortgages and the principal on mortgages according to their priority; counsel fees to such counsel as it may be necessary to employ; and to pay the balance in hand to the

10 creditors of the Apex Building Co., parties of the second part, in just proportion as the amount of the respective claim of each creditor bears to the total amount available for the payment of creditors; to rent and manage the said building and in all ways to act as the owners of said premises until such time as all of the said creditors shall have been paid in full or the trustees deem it expedient to sell said premises as aforesaid.

3. If there shall be realized a sum greater than

20 will be sufficient to pay the creditors of the Apex Building Co., parties of the second part, and the charges as set forth in paragraph 2 of this agreement in full, then said surplus shall be paid to the Apex Building Co., party of the first part.

4. The undersigned creditors, parties of the second part, do hereby remise, release, and forever quit-claim unto the said Apex Building Co., party of the first part, and its successors and assigns, all and all manner of liens, claims and

30 demands whatsoever, which we, or any or either of us, now have or could or might have on or against the said building and land by reason of the premises, so that the said Apex Building Co., its successors and assigns and all other persons interested therein, shall and may have, hold and enjoy the same, freed and discharged from all liens claims and demands whatsoever, which we, or any or either of us, now have or might or

40 could have on or against the same, if these presents had not been made; and we do further sev-

Exhibit C. 12.

erally agree to execute any further paper or document necessary to release such several claims to effectuate the clearing of the title of the premises above set forth as intended hereby.

5. The creditors and all other parties to this agreement herewith agree that the petition in bankruptcy and the Chancery proceedings now pending against the Apex Building Co. be dismissed and the receiver appointed by the Court of Chancery of the State of New Jersey be discharged without further notice to him, and hereby waive notice of any and all applications for the dismissal of said proceedings and agree that this instrument shall be considered as a consent to the dismissal of the said proceedings in the Court of Chancery of the State of New Jersey and in the United States District Court for the District of New Jersey.

6. The Trustees do hereby accept the trust created by this agreement and covenant faithfully to perform the terms hereof, and comply with its provisions.

7. The Trustees, as at any time constituted, notwithstanding any vacancy, shall have the power, rights and interests of the trustees as herein originally appointed. In the event that any of said trustees shall die, resign or become otherwise disqualified from acting, the remaining trustees may fill any vacancy, and such additional and succeeding trustee shall have and shall exercise all the power and authority under this agreement and trust as was previously possessed by a trustee as originally appointed. The majority vote of the Trustees shall constitute the final determination of the Trustees upon any matter

Exhibit C. 12.

in which all of the Trustees shall not be unanimous.

10 8. The said Trustees shall have the right, on behalf of the creditors to hear and determine any and all claims and demands made by any of the creditors with reference to transactions had by them with the debtor and shall have the right to compromise, arbitrate, and adjust any and all such claims in such manner as the trustees may deem for the best interests of all creditors.

20 9. Trustees shall not be liable for the selection of any depository in which a bank account may be opened, nor shall said trustees be liable for any error of judgment or mistake at law or for anything but their own individual wilful misconduct.

30 10. The Trustees shall at all times keep a correct statement of all receipts, disbursements, collections of rent, payment of interest, taxes and all other transactions involving their trust, which account shall at all times be open to all creditors, and the Trustees from time to time make a true report of their Trust to all creditors, provided that such report shall be rendered at least once every six months until their trust is fulfilled. The Creditors agree that they will take no action either at law or in equity against the debtors or the Trustees until the fulfillment of the Trust, except for misconduct on the part of said trustees.

40 11. Upon the execution of this agreement, the parties hereto do remise, release and forever discharge, and by these presents do for themselves, their heirs, executors, administrators, successors and assigns, remise, release, and forever discharge the said Apex Building Co., it suc-

Exhibit C. 12.

cessors and assigns of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or in equity, which against the said Apex Building Co., the undersigned ever had, now have or which they, their heirs, executors, administrators, successors or assigns hereafter can, shall or may have for or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of these Presents. 10

12. It is further understood and agreed that the parties hereto by remising, releasing and discharging their respective claims against the Apex Building Co. does not thereby release or discharge or waive any guarantee or endorsement or security which any of said parties have for their respective claims and hereby reserve any and all rights under said endorsement guarantees and endorsements. 20

13. It is hereby understood and agreed that the mortgage held by the Lenox Land Co. in the amount of \$14,500 will be postponed to the \$165,000 Building and Loan Association and the Lenox Land Co. agree to execute any papers desired by the said Building & Loan Association postponing said mortgage, and agree to extend the period of payment of said mortgage for six months from date hereof. 30

IN WITNESS WHEREOF, the corporations hereto have caused these presents to be signed by their proper officers, and their seals affixed, and the 40

Exhibit C. 12.

individuals to this agreement have hereunto set their hands and seals, the day and year first above written.

Signed, sealed and delivered in the presence of:

- 10 Hoffman Plumbing Co. (Seal)
C. J. Hoffman, Pres.
- Brick and Tile Corp. (Seal)
402 Broad St., Newark, N. J.
Larry H. Laraver, Vice Pres.
- Robert A. Ebert, Inc. (Seal)
357 So. Orange Ave., Newark, N. J.
Robert A. Ebert, Pres.
- 20 Simon Bennet Corp. (Seal)
333-335 Jeliff Ave., Newark, N. J.
By M. Simon, President
- A. R. Weich (Seal)
91 Broom St., Newark
Per H. R. Weich
- J. Schlein (Seal)
659 So. 20th, Newark, N. J.
By H. Schlein
- 30 Rounborn Asuyscor (Seal)
269 Ave. B., Bayonne, N. J.
- Irvington Plbg. Sup. Corp. (Seal)
123 Coit St., Irvington, N. J.
H. J. Schmidt, Pres.
- Belmont Lumber Co. (Seal)
Midland Ave., Garfield, N. J.
Benedict Skarsby, Pres.
- 40 Builders Supply Co. of N. J. (Seal)
457 Peshine Ave., Newark, N. J.
Max H. Tuchoshes, Pres.

Exhibit C. 12.

John S. Geiger's Sons (Seal)
 83 Hartford St., Newark, N. J.
 Charles F. Geiger, Treas.

M. Ward Plumbing Supply Co. (Seal)
 Michael Ward, Pres.

Cedar Grove Sand & Gravel Co. (Seal) **10**
 c/o J. M. Degnan, Union Bldg., Newark, N. J.
 By Joseph M. Degnan, Secty.

Oschwald Brick Works, Inc. (Seal)
 972 Broad St., City
 Paul Oschwald, Pres.

The O-V-T Co., Inc. (Seal)
 813 Frelinghuysen Ave.
 Arthur Oschwald, Pres.

John Volow (Seal) **20**
 533 So. Orange Ave., Newark

Meyugeller Roofer (Seal)
 353 Lyons Ave., Newark, N. J.

U. S. Steel & Wire Co. (Seal)
 30 Clinton St., City
 A. M. W. Rusino, Prop.

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*Exhibit DH. 1.***Exhibit DH. 1.****JUDGMENT ROLL.****ESSEX COUNTY CIRCUIT COURT.**

10	HENRY R. ISENBERG Co., INC., a corporation of New Jersey, <i>Plaintiff,</i> <i>vs.</i> APEX BUILDING Co., a corpora- tion of New Jersey, <i>Builder and Owner,</i> <i>and</i> ACTIVE MORTGAGE COMPANY, LENOX LAND Co., WARRANTY BUILDING & LOAN ASSOCIATION, corporations of New Jersey, Mortgagees, <i>Defendants.</i>	}	<i>Action at Law. On Mechanics' Lien.</i>
20			
30			
40			

October 22, 1928—Lien claim filed.

October 22, 1928—Summons and complaint issued.

November 19, 1928—Answer filed by defendant, Lenox Land Co.

November 20, 1928—Notice of motion to strike complaint filed by Active Mortgage Company.

November 30, 1928—Reply to answer of Lenox Land Co.

December 4, 1928—Order filed striking complaint and for summary judgment in favor of Active Mortgage Company.

December 21, 1928—Judgment for plaintiff against Apex Building Co. and Warranty Building & Loan Association entered.

Exhibit DH. 1.

IN THE OFFICE OF THE CLERK OF THE
COUNTY OF ESSEX.

HENRY R. ISENBERG Co., INC., a corporation of New Jersey, <i>Claimant,</i>	}	10
<i>vs.</i>		
APEX BUILDING Co., <i>Owner and Builder,</i> and		}
ACTIVE MORTGAGE COMPANY, LENOX LAND Co., WARRANTY BUILDING & LOAN ASSOCIATION, corporations of New Jersey, Mortgagees, <i>Defendants.</i>	}	20

COUNTY OF ESSEX, ss.

BE IT KNOWN that Henry R. Isenberg Co., Inc., of the City of Newark, in said County, claims a lien upon the building and lands hereinafter described, pursuant to the provisions of "An Act to secure to mechanics and others, payment for their labor and materials in erecting any building," and the several supplements thereto, for a debt contracted and owing to it for labor performed and materials furnished for the erection and construction of said building as hereinafter set forth, to wit: FIRST. The said building is a five story brick apartment house on a lot of land or curtilage, situated in the City of Orange, in the County of Essex and State of New Jersey, and more particularly described as follows:

30

40

Exhibit DH. 1.

FIRST TRACT:

BEGINNING at a point on the southerly side of Willow Street, at a point distant easterly three hundred and twenty-nine feet and fifteen hundredths of a foot from the southeasterly corner of Scotland and Willow Streets; thence along
 10 said Willow Street, south forty seven degrees, thirty minutes east fifty feet to the proposed extension of Lincoln Avenue; thence along said proposed extension, south forty two degrees thirty minutes west one hundred and one feet to land of Joseph Wilde; thence along his line, north forty seven degrees thirty minutes west fifty feet to the southeasterly corner of lot #6 on a map of property of Abraham Baldwin; thence along said lot, north forty two degrees
 20 thirty minutes east one hundred and one feet to said Willow Street and place of BEGINNING. Excepting therefrom so much as was heretofore taken by the City of Orange for the widening of Lincoln Avenue.

SECOND TRACT:

BEGINNING on the southerly side of Willow Street at a point therein distant two hundred and seventy nine feet and fifteen hundredths of a foot southeasterly from the southeasterly corner
 30 of Willow Street and Scotland Road, formerly Scotland Street; thence (1) south forty two degrees thirty minutes west one hundred and one feet more or less to land now or formerly of Joseph Wilde, deceased; thence (2) along his line south forty seven degrees thirty minutes east fifty feet to land now or formerly of William E. Bell; thence (3) along that line, north forty two degrees thirty minutes east one hundred and one feet to said Willow Street; thence
 40 (4) along said Willow Street north forty seven

Exhibit DH. 1.

degrees thirty minutes west fifty feet to the BE-
GINNING.

SECOND. The name of the Owner of the said land and the estate therein, on which said lien is claimed, is Apex Building Co. who has an estate in fee simple therein.

THIRD. The name of the person who con-
tracted the said debt, and for whom and at whose
request the said labor was performed, and ma-
terials furnished, for which the aforesaid lien is
claimed, is the said Apex Building Co.

10

FOURTH. The following is a bill of par-
ticulars of the aforesaid labor performed and
materials furnished by the said Henry R. Isen-
berg Co., Inc., the amount and kind of labor per-
formed, and of materials furnished, and the
prices at which and times when the same were
performed and furnished, and giving credit for
all the payments thereupon, and deductions that
ought to be made therefrom, and exhibiting the
balance justly due to him from the said Apex
Building Co. viz.:

20

Job on the southwest corner of Lincoln avenue
and Willow street.

Apex Building Co.,
to

30

Henry R. Isenberg Co., Inc.

To tile and marble work as
per contract dated May 3,
1928

\$7,750.00

Credit for work not done
(due to breach of contract
and abandonment by builder
and owner)

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Exhibit DH. 1.

	Tile in main halls, vestibule and lobby	\$1,250.00	
	Marble steps and platforms on main stairs	1,018.00	
	Marble wainscot in vestibule	342.00	
	Marble steps in vestibule ...	81.00	
10	Marble base in lobby	225.00	
		<hr/>	
		\$2,916.00	
	Balance due		\$4,834.00

All the above labor was performed and materials furnished between the twenty-fifth day of May, 1928, and the twenty-third day of June, 1928.

20 HENRY R. ISENBERG CO., INC.,
By MAX KRUEGER,
Pres.

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

30 HENRY R. ISENBERG, of Newark, N. J., of full age, being duly sworn, on his oath saith, that he is the president of the claimant named in the foregoing claim; that the within bill of particulars and statements therein set forth are true; that the same is for labor performed and materials furnished by the claimant in the erection of the building in the said claim described, at the times therein specified, and that the amount, as claimed therein, is justly due and owing from the said Apex Building Co. to the claimant.

HENRY R. ISENBERG (L. S.)

Exhibit DH. 1.

Sworn and subscribed before me
this 22nd day of October, 1928.

MAX KRUEGER,
Attorney at Law of New Jersey.

Filed October 22, 1928, 3:42 P. M.

10

JOHN H. SCOTT,
Clerk.

By H 3.40.

Summons issued on the within lien claim 22nd
day of October A. D., 1928.

JOHN H. SCOTT,
Clerk.

20

The State of New Jersey to Apex
Building Co., a corporation of the
State of New Jersey, with its principal
office in the City of Newark, Essex
County, New Jersey, Active Mortgage
Company, a corporation of the State of New Jer-
sey, with its principal office in the City of Newark,
Essex County, New Jersey, Lenox Land Co., a
corporation of the State of New Jersey, with its
principal office in the City of Newark, Essex
County, New Jersey and Warranty Building and
Loan Association, a corporation of the State of
New Jersey, with its principal office in the City
of Newark, Essex County, New Jersey, defend-
ants. You, Apex Building Co., builder and
Owner and Active Mortgage Company, Lenox
Land Co., Warranty Building & Loan Associa-
tion, mortgagees, are summoned to answer the
annexed complaint of Henry R. Isenberg Co.,
Inc., in an action at law in the Circuit Court in

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Exhibit DH. 1.

and for the County of Essex in which the said Henry R. Isenberg Co., Inc., claims a building lien on a certain building and land of the said Apex Building Co., described in said complaint, and upon which the said Active Mortgage Company, Lenox Land Co., and Warranty Building & Loan Association, hold mortgages of record. And take notice, that unless you file your answer to said complaint with the Clerk of the said Court at Newark within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you.

WITNESS, WILLIAM A. SMITH, Judge of the Essex County Circuit Court at Newark this 22nd day of October, nineteen hundred and twenty-eight.

JOHN H. SCOTT,
Clerk.

MAX KRUEGER,
Attorney.

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Exhibit DH. 1.

reds of a foot from the southeasterly corner of Scotland and Willow Streets; thence along said Willow Street, south forty seven degrees, thirty minutes east fifty feet to the proposed extension of Lincoln Avenue; thence along said proposed extension, south forty-two degrees thirty minutes west one hundred and one feet to land of Joseph Wilde; thence along his line, north forty seven degrees thirty minutes west fifty feet to the southeasterly corner of lot #6 on a map of property of Abraham Baldwin; thence along said lot, north forty-two degrees thirty minutes east one hundred and one feet to said Willow Street and place of BEGINNING. Excepting therefrom so much as was heretofore taken by the City of Orange for the widening of Lincoln Avenue.

20

SECOND TRACT.

BEGINNING on the southerly side of Willow Street at a point therein distant two hundred and seventy nine feet and fifteen hundredths of a foot southeasterly from the southeasterly corner of Willow Street and Scotland Road, formerly Scotland Street; thence (1) south forty two degrees thirty minutes west one hundred and one feet more or less to land now or formerly of Joseph Wilde, deceased; thence (2) along his line south forty seven degrees thirty minutes east fifty feet to land now or formerly of William E. Bell; thence (3) along that line, north forty two degrees thirty minutes east one hundred and one feet to said Willow Street; thence (4) along said Willow Street north forty seven degrees thirty minutes west fifty feet to the BEGINNING.

2. On and after the dates set forth in Schedule A hereto attached and made part hereof, the

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Exhibit DH. 1.

plaintiff sold and delivered the materials and performed the labor mentioned in said schedule in consideration whereof, the said Apex Building Co. agreed to pay the plaintiff the amount in said schedule stated, totaling the sum of Seven Thousand seven hundred and fifty (\$7750.00) Dollars.

10

3. Schedule A annexed hereto and made part hereof shows a net balance due the plaintiff of Four Thousand Eight hundred and thirty-four (\$4834.00) Dollars, after giving credit for deductions made therefrom.

All of the materials and labor as set forth in said schedule A hereto annexed and made part hereof, were furnished and performed in the construction and erection of the building upon the herein described premises between May 25th, 1928 and June 23rd, 1928.

20

4. There is now due and owing the said Plaintiff the just and full sum of Four Thousand Eight hundred and thirty-four (\$4834.00) Dollars, together with interest from June 23rd, 1928, no part thereof having been paid.

5. Said debt is a lien upon the said land and building by virtue of the Statute entitled "An Act to secure to mechanics and others, payment for their labor and materials in erecting any building and making certain improvements to land (Revision of 1898) and the various amendments thereof and supplements thereto.

30

Plaintiff demands as damages the sum of Four Thousand eight hundred and thirty-four (\$4834.00) Dollars, together with interest from June 23rd, 1928, besides costs of suit.

6. Active Mortgage Company, a corporation of New Jersey, is made a party defendant be-

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Exhibit DH. 1.

cause it holds two mortgages of record upon said land, one in the principal sum of Eighty-five Thousand (\$85,000.00) Dollars, dated April 26th, 1927 and recorded in Book Q 60 of Mortgages for Essex County, on pages 599 &c., and the other in the principal sum of Fifteen Thousand (\$15,000.00) Dollars, dated June 8th, 1928, and recorded in Book O 64 of Mortgages for Essex County on pages 416 &c., which mortgages will be cut off by a sale under Plaintiff's said claim.

7. Lenox Land Co., a corporation of New Jersey, is made a party defendant because it holds a mortgage of record upon said land, dated April 26th, 1927, recorded in Book Q 60 of Mortgages for Essex County, on pages 597 &c., to secure the sum of Fourteen Thousand five hundred (\$14,500.00) Dollars, which mortgage will be cut off by a sale under Plaintiff's said claim.

8. Warranty Building & Loan Association, a corporation of New Jersey, is made a party defendant because it holds a mortgage of record upon said land, dated August 17th, 1927, recorded in Book K 62 of Mortgages for Essex County, on pages 142 &c., to secure the sum of One Hundred and Sixty-five Thousand (\$165,000.00) Dollars, which mortgage will be cut off by a sale under Plaintiff's said claim.

MAX KRUEGER
Attorney for Plaintiff.

Exhibit DH. 1.

SCHEDULE A

Job on the southwest corner of Lincoln Avenue
and Willow St.

Apex Building Co.

To Henry R. Isenberg Co. Inc. Dr.

10

To tile and marble work as
per contract dated May
3d, 1928. \$7750.00

Credit for work not done
(due to breach of contract
and abandonment by
builder and owner)

Tile in main halls, vestibule
and lobby \$1250.00

Marble steps and platforms
on main stairs 1018.00 20

Marble wainscot in vestibule 342.00

Marble steps in vestibule 81.00

Marble base in lobby 225.00

\$2916.00

Balance due \$4834.00

To the within named Defendants:

Take notice that if the within Summons and
Complaint be served upon you personally, and
you intend to make a defense, then you must file
an affidavit of merits within ten days after such
service, and must file an answer within twenty
days of such service; and in default thereof,
judgment will be entered against you. 30

(Legal service upon a corporation is deemed
personal service for the purpose of this notice.)

MAX KRUEGER,
Attorney for Plaintiff. 40

Exhibit DH. 1.

ESSEX COUNTY CIRCUIT COURT.

10	HENRY R. ISENBERG Co., INC., a corporation of New Jersey, <i>Plaintiff,</i>	}	<i>Action at Law.</i>
	<i>vs.</i>		
	APEX BUILDING Co., a corpora- tion of New Jersey, <i>Builder and Owner,</i> <i>and</i> ACTIVE MORTGAGE COMPANY, LENOX LAND Co., WARRANTY BUILDING & LOAN ASSOCIATION, corporations of New Jersey, Mortgagees, <i>Defendants.</i>		<i>On Mechanics' Lien. Answer of Defendant, Lenox Land Co.</i>
20			

The defendant, Lenox Land Co., a corporation of New Jersey, with its principal office in the City of Newark, in the County of Essex and State of New Jersey, answering the complaint of the plaintiff, says that:

30 1. This defendant is without sufficient information or knowledge to form a belief as to the allegations contained in paragraphs one, two, three, four, five and six of the complaint, and leaves plaintiff to its proof thereof.

40 2. This defendant admits that it holds a mortgage of record upon the lands described in the bill of complaint dated April 26, 1927 and recorded in Book Q 60 of Essex County Mortgages on pages 597, to secure the sum of Fourteen

Exhibit DH. 1.

Thousand Five Hundred Dollars, but denies that the said mortgage will be cut off by a sale under the complainant's alleged lien claim.

3. This defendant is without sufficient information or knowledge to form a belief as to the allegations contained in paragraph eight of the complaint, and leaves plaintiff to its proof thereof.

10

FIRST SEPARATE DEFENSE

The Plaintiff, Henry R. Isenberg Co. Inc., a corporation of New Jersey, ought not to have or maintain this action as against the said Lenox Land Co., for the reason that the mortgage dated April 26, 1927 and given by the Apex Building Co. and mortgaging the premises described in paragraph one of the bill of complaint, to the Lenox Land Co. to secure the sum of Fourteen Thousand Five Hundred Dollars, and which mortgage said Defendant, Lenox Land Co. holds upon said land and premises, is a purchase money mortgage and was a lien on the premises before any construction work was started on said premises, and that said mortgage is a lien on the said premises prior and paramount to the alleged lien of the plaintiff, Henry R. Isenberg, Inc., a corporation of New Jersey.

20

30

NOTICE OF MOTION

This defendant, Lenox Land Co., reserves the right at or before trial to move to strike out the complaint of the plaintiff, Henry R. Isenberg Co. Inc., a corporation of New Jersey, insofar as said complaint is directed against this defendant, Lenox Land Co., by reason of this defendant not being a proper party to this suit, its interest in

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Exhibit DH. 1.

the premises being paramount and superior to that of the plaintiff and which interests will not be effected by this action of the plaintiff.

EDWARD E. TURKEL

Attorney for defendant, Lenox Land Co.

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ESSEX COUNTY CIRCUIT COURT.

HENRY R. ISENBERG Co., INC.,
a corporation,

Plaintiff,

vs.

APEX BUILDING COMPANY,
Builder and Owner, and
ACTIVE MORTGAGE COMPANY,
et als.,

Defendants.

*Action at
Law.*

*On
Mechanics'
Lien.*

*Notice of
Motion by
Defendant
Active Mort-
gage Com-
pany, to
Strike Out
Complaint.*

20

30 To Henry R. Isenberg Co. Inc., a corporation,
and Max Krueger, its Attorney:

TAKE NOTICE, that on Saturday next, the 24th inst., at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, at the Hall of Records in the City of Newark, before such Judge as may hear Circuit Court motions on that day, I shall move to strike out the plaintiff's complaint insofar as it relates to the defendant Active Mortgage Company, and for summary judgment, on the following grounds, viz:

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Exhibit DH. 1.

A. That said Complaint does not set out a cause of action against the defendant Active Mortgage Company.

B. Because said Complaint insofar as it relates to said defendant Active Mortgage Company is sham and frivolous.

10

PLEASE TAKE FURTHER NOTICE that in support of said motion I shall read and file the affidavit of Samuel Scheckner, a copy of which is herewith served upon you.

Dated November 19, 1928.

Yours truly,

SAMUEL ROESSLER

Attorney of Defendant
Active Mortgage Company.

20

30

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Exhibit DH. 1.

ESSEX COUNTY CIRCUIT COURT.

10	<p>HENRY R. ISENBERG Co., INC., a corporation, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p>APEX BUILDING COMPANY, Builder and Owner, and ACTIVE MORTGAGE COMPANY, <i>et als.</i>, Defendants.</p>	<p><i>Action at Law.</i></p> <p><i>On Mechanics' Lien.</i></p> <p><i>On Motion by Defendant Active Mort- gage Com- pany, to Strike out Complaint.</i></p>
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20

AFFIDAVIT.

STATE OF NEW JERSEY }
COUNTY OF ESSEX. } ss.

SAMUEL SCHECHNER, of full age, being duly sworn upon his oath according to law, deposes and says:

1. I am the President of Active Mortgage Company, a corporation, one of the defendants in the above entitled cause.

2. Said Defendant is the holder of a certain mortgage bearing date April 26, 1927, made by Apex Building Co., a corporation, to Lenox Land Co. a corporation, to secure the principal sum of Eighty five thousand dollars (\$85,000.), which mortgage embraces premises situate at the southwest corner of Lincoln Avenue and Willow Street, Orange, Essex County New Jersey, being the same lands and premises as are described in the Complaint in the above entitled cause. Said

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Exhibit DH. 1.

mortgage was recorded in the Essex County Register's Office in Book Q 60 of Mortgages for said County, pages 599-602. Said mortgage was assigned to said Active Mortgage Company by said Lenox Land Co. by Assignment dated June 30, 1927 and recorded in Book 191 of Assignments for Essex County, page 357.

10

3. Said mortgage recites that it is an advance money mortgage, drawn in pursuance of Section 14 of an Act entitled "An Act to secure to Mechanics and others, payment for their labor and materials in erecting any building, (Revision of 1898)", and the supplements thereto and acts amendatory thereof, and that the funds secured thereby are to be advanced in connection with the erection and construction of a five story brick apartment building in accordance with plans and specifications prepared by Harold Foster Clark.

20

4. All of the funds secured by said mortgage were advanced by said Active Mortgage Company to said Apex Building Co. for the erection of the building upon said land.

5. I further say that substantially all of said funds were advanced by said Active Mortgage Company, prior to the commencement of any work by the Plaintiff upon said building, vis: May 25, 1928. The balance remaining undischarged on May 25, 1928, being the sum of Twenty seven hundred and ninety dollars and sixty three cents (\$2790.63), was paid out between said date and June 1, 1928.

30

6. I further say that said mortgage was given and recorded prior to the commencement of the erection of the building upon said land.

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Exhibit DH. 1.

7. I further say that said Active Mortgage Company is also the holder of another mortgage dated June 8, 1928, made by Apex Building Co. a corporation, to said Active Mortgage Company, to secure the principal sum of Fifteen thousand dollars (\$15,000.) which mortgage was recorded
10 in the Essex County Register's Office in Book O 64 of Mortgages for said County, on pages 416, 418. Said mortgage was given in pursuance of Section 15 of the Mechanics' Lien Act above referred to and the funds secured thereby were advanced in connection with the construction and completion of the five story brick apartment building, upon said land.

8. I further say that on the 8th day of June, 1928, the plaintiff Henry R. Isenberg Co. Inc.,
20 by Henry R. Isenberg, President, executed and delivered to said Active Mortgage Company, a postponement in writing (a copy of which is attached hereto) wherein and whereby the said Henry R. Isenberg, in consideration of said Active Mortgage Company agreeing to advance said sum of Fifteen Thousand dollars (\$15,000.) for the purpose of aiding said Apex Building Co. to erect said building and for and in consideration
30 of the sum of One Dollar to said Henry R. Isenberg Co. Inc., in hand paid, stipulated and agreed to and with said Active Mortgage Company that the afore mentioned mortgage of Fifteen Thousand dollars (\$15,000.) shall be and remain a lien upon said buildings and lands whereon the same are located and as more particularly described in said mortgage, prior and paramount to any claim or lien that the said Henry R. Isenberg Co. Inc. then had or that said Henry R. Isenberg Co. Inc. may have in the future upon or against said
40 building and lands by virtue of the provisions of

Exhibit DH. 1.

an Act entitled "An Act to secure to mechanics and others, payment for their labor and materials in erecting any building (Revision of 1898)" and the supplements thereto and acts amendatory thereof.

9. Annexed hereto is a copy of said postponement. 10

10. I further say that in reliance upon said Postponement said Active Mortgage Company has advanced the funds secured by said mortgage.

11. I believe said complaint, insofar as it relates to the defendant, Active Mortgage Company, is sham and frivolous, and that said complaint does not constitute a cause of action against said defendant. 20

SAMUEL SCHECHNER

Sworn and subscribed to before me at Newark, New Jersey, this 19th day of November, 1928.

Thomas L. Parsonnett,

A Master in Chancery of New Jersey.

WHEREAS, we, the undersigned, have heretofore agreed to furnish materials and/or labor for the construction and erection of the five (5) story brick elevator apartment house, being erected by Apex Building Co., a corporation, hereafter referred to as owner upon the lands described as follows: 30

ALL that certain tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Orange County of Essex and State of New Jersey. 40

Exhibit DH. 1.

FIRST TRACT.

10 BEGINNING at a point on the southerly side of Willow Street, at a point distant easterly three hundred and twenty-nine feet and fifteen hundredths of a foot from the southeasterly corner of Scotland and Willow Streets; thence along said Willow Street, south forty-seven degrees thirty minutes east fifty feet to the proposed extension of Lincoln Avenue; thence along said proposed extension, south forty-two degrees thirty minutes west one hundred and one feet to land of Joseph Wilde; thence along his line, north forty-seven degrees thirty minutes west fifty feet to the southeasterly corner of lot #6 on a map of property of Abraham Baldwin; thence along said lot,

20 north forty-two degrees thirty minutes east one hundred and one feet to said Willow Street and place of BEGINNING. Excepting therefrom so much as was heretofore taken by the City of Orange for the widening of Lincoln Avenue;

SECOND TRACT.

30 BEGINNING on the southerly side of Willow Street at a point therein distant two hundred and seventy-nine feet and fifteen hundredths of a foot southeasterly from the southeasterly corner of Willow Street and Scotland Road, formerly Scotland Street; thence (1) south forty-two degrees thirty minutes west one hundred and one feet more or less to land now or formerly of Joseph Wilde, deceased; thence (2) along his line south forty-seven degrees thirty minutes east fifty feet to land now or formerly of William E. Bell; thence (3) along that line, north forty-two degrees thirty minutes east one hundred and one

40 feet to said Willow Street; thence (4) along said

Exhibit DH. 1.

Willow Street, north forty-seven degrees thirty minutes west fifty feet to the BEGINNING.

WHEREAS, we have already furnished some materials and/or labor, and are about to furnish some materials and/or labor for the construction of the aforesaid building, and

WHEREAS, Active Mortgage Company, a corporation, for the purpose of aiding said owner to erect said building has agreed to loan to said owner, the sum of Fifteen Thousand (\$15,000.) Dollars to be secured by mortgage upon said building and lands, and

10

WHEREAS, Active Mortgage Company, a corporation, has refused to make the payment hereinafter mentioned on account of said mortgage, unless the undersigned execute this instrument.

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Now THEREFORE, the undersigned, in consideration of the said Active Mortgage Company, a corporation, agreeing to advance the aforementioned sum for the purpose of aiding said owner to erect said building, and for and in further consideration of the said Active Mortgage Company, a corporation, advancing to said owner, a payment or payments on account of said mortgage, and for and in further consideration of the sum of One Dollar to each of the undersigned, in hand paid by the said Active Mortgage Company, a corporation, the receipt whereof is hereby severally acknowledged, the undersigned do hereby severally stipulate and agree to and with the said Active Mortgage Company, a corporation, that the mortgage of said Active Mortgage Company, a corporation, given by the owner, and to secure the said loan aforesaid, shall be and remain a lien upon said building and lands whereon the same is located, and as more particularly

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Exhibit DH. 1.

described in said mortgage, prior and paramount to any claim or lien that we, or any of us have at the present time, or that we or any of us may have in the future upon or against said building and lands, as aforesaid by virtue of the provisions of "An Act to secure to Mechanics and
10 others, payment of their labor and materials in erecting any buildings, and in making certain improvements to land," and the several supplements and amendments thereto, or by virtue of any of the Mechanics' Lien Laws of the State of New Jersey, or otherwise, by reason of any materials furnished, sold and delivered, or that shall or may be hereafter furnished, sold and delivered by us, or any of us, or by reason of any labor
20 furnished or performed by us, or any of us, or that may be hereafter furnished or performed by us, or any of us, for the erection and construction of said building.

IT IS HEREBY AGREED and understood that the subordination and postponement herein and hereby effectuated shall in no way be lessened or impaired by the fact that the said Active Mortgage Company, a corporation, its successors or assigns, may pay or advance the principal of said mortgage, or any part thereof, to any person or persons other than such as have or will have performed labor or as have or will have supplied materials in the erection and construction of said building, and we do jointly and severally hereby give our consent that said Active Mortgage Company, a corporation, its successors or assigns by its or their officers, agents, attorneys and representatives may make payment of said principal sum in the manner mentioned in this paragraph, and we hereby agree with said Active Mortgage
40 Company, a corporation, its successors and as-

Exhibit DH. 1.

signs that any such payment made shall have the same force and effect as if the moneys so paid were actually used in the construction and erection of the building upon the above described premises.

And we further stipulate and agree and hereby authorize and empower the said Active Mortgage Company, a corporation, and its attorney, and this shall be their warrant and authority for so doing, to deduct all premiums, back shares, interest and charges, and its counsel to deduct all fees, charges and expenses that shall or may become due during the construction and completion of the said building, until the total sum shall have been paid by the said Active Mortgage Company, a corporation, to the said owners thereof upon completion; that is the sum agreed to be loaned and advanced by the said Active Mortgage Company, a corporation, 10
20

It is distinctly understood and agreed that with respect to said Active Mortgage Company, a corporation, its successors or assigns, this instrument shall at all times be deemed and construed as a release of all right of mechanic's lien, and that at no time and in no event shall the right of mechanic's lien of the undersigned be asserted as against the said mortgage lien of said Active Mortgage Company, a corporation, 30

We hereby jointly and severally for ourselves our personal representatives, successors and assigns waive the provisions of the "An Act to secure to mechanics and others payment for their labor and materials in erecting any building and making certain improvements to land" (revision of 1898), and the several supplements and amendments thereto as to the mortgage of Active Mortgage Company, a corporation, 40

Exhibit DH. 1.

It is hereby agreed and understood that this postponement of lien is delivered unconditionally and without any understanding or agreement had, excepting as is herein expressly provided for.

10 We further represent that in the event that we or any of us are signing this agreement on behalf of a corporation that we have been duly authorized by a proper resolution of said corporation to sign the foregoing agreement, and we further represent that in the event we, or any of us are signing this agreement on behalf of a partnership that we have been duly authorized to sign this agreement on behalf of said partnership; knowing that Active Mortgage Company, a corporation, are advancing said mortgage moneys relying upon the truth of such representations.

20 IN WITNESS WHEREOF, the undersigned individuals have hereunto set their hands and seals, and the undersigned corporations have caused this stipulation to be signed by their respective duly authorized officers this Eighth day of June, Nineteen Hundred and Twenty-eight.
Signed, sealed and delivered in the presence of

(Signed)

HENRY R. ISENBERG CO., INC.,

30

(SEAL) H. R. Isenberg, Pres.

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Exhibit DH. 1.

ESSEX COUNTY CIRCUIT COURT.

HENRY R. ISENBERG Co., INC.,
a corporation of New Jersey,
Plaintiff,

vs.

APEX BUILDING Co., a corpora-
tion of New Jersey, Builder
and Owner, and ACTIVE MORT-
GAGE COMPANY, LENOX LAND
Co., WARRANTY BUILDING &
LOAN ASSOCIATION, corpora-
tions of New Jersey, mort-
gagees,

Defendants.

*Action at
Law.*

10

*On
Mechanics'
Lien.*

Reply.

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Plaintiff replying to the answer filed by the de-
fendant, Lenox Land Co. says that

It denies the first separate defense of said De-
fendant and alleges there is nothing due upon
said mortgage.

MAX KRUEGER,
Attorney for Plaintiff.

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Exhibit DH. 1.

ESSEX COUNTY CIRCUIT COURT.

10

HENRY R. ISENBERG Co., Inc.,
a corporation,*Plaintiff,**vs.*APEX BUILDING COMPANY,
Builder and Owner,

20

*and*ACTIVE MORTGAGE COMPANY, et
*als.,**Defendants.*

30

*Action at
Law.**On
Mechanics'
Lien.**On Motion to
strike out
Complaint
and for
Summary
Judgment.**Order
striking out
Complaint
and for
Summary
Judgment in
favor of de-
fendant Ac-
tive Mortgage
Company.*

This matter coming on to be heard in the presence of Samuel Roessler, attorney for the defendant, Active Mortgage Company, a corporation, and Max Krueger, attorney for the plaintiff, Henry R. Isenberg Co. Inc., a corporation, upon notice of motion to strike out the plaintiff's complaint and for summary judgment in favor of said defendant on the ground that said complaint insofar as it relates to said defendant Active

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Exhibit DH. 1.

Mortgage Company, is sham and frivolous and does not set out a cause of action against said defendant:

And it appearing from the affidavit of Samuel Schechner, in support of said motion, that the said defendant Active Mortgage Company is the holder of a certain mortgage dated April 26, 1927 made by the defendant Apex Building Company, a corporation, to Lenox Land Co. to secure the principal sum of Eighty-five thousand dollars (\$85,000.00) which mortgage embraces the premises situated at the southwest corner of Lincoln Avenue and Willow Street, in the City of Orange, Essex County, New Jersey, as described in said complaint and that said mortgage was given pursuant to Section 14 of an Act entitled, "An Act to secure mechanics and others payment for their labor and materials in erecting any building," (Revision of 1898) and the several supplements thereto and acts amendatory thereof, and that the funds secured by said mortgage was advanced for the erection of the building upon said land and that all of the funds secured by said mortgage was advanced prior to the filing of the mechanics' lien by said plaintiff; and it further appearing from said affidavit that said defendant Active Mortgage Company is also the holder of another mortgage dated June 8, 1928 made by the defendant Apex Building Co. a corporation, to said Active Mortgage Company, to secure the principal sum of Fifteen thousand dollars (\$15,000.) and embracing the same lands and premises as are described in the complaint herein and that the plaintiff Henry R. Isenberg Co. Inc., executed and delivered to said defendant an instrument in writing whereby it postponed and subordinated any lien which it may have

Exhibit DH. 1.

under the provisions of said Act in favor of said last mentioned mortgage; and it also appearing from said affidavit that the funds secured by said mortgage have been advanced by said defendant Active Mortgage Company; and good and sufficient reason appearing for the entry of this

10 order:

It is, on this First day of December, Nineteen Hundred and Twenty-eight, on motion of Samuel Roessler, attorney for said defendant, ORDERED that the complaint filed in this cause, insofar as it relates to the defendant Active Mortgage Company, be and the same is hereby struck out with prejudice to the institution of another proceeding at law based on the same cause of action as is set forth in said complaint; and final judgment is

20 hereby entered in favor of said defendant Active Mortgage Company, a corporation, and against the plaintiff, Henry R. Isenberg Co. Inc.

NELSON Y. DUNGAN,
Circuit Court Judge.

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Exhibit DH. 1.

ESSEX COUNTY CIRCUIT COURT.

47901	HENRY R. ISENBERG Co., INC., a corporation of New Jersey, <i>Plaintiff,</i>	<i>Action at Law.</i>	20
vs.		<i>On Mechanics' Lien by Default.</i>	
APEX BUILDING Co., a corpora- tion of New Jersey, Builder and Owner and ACTIVE MORT- GAGE COMPANY, LENOX LAND Co., WARRANTY BUILDING & LOAN ASSOCIATION, corpora- tions of New Jersey, mort- gagees,		<i>Judgment Entered De- cember 21, 1928.</i>	20
	<i>Defendants.</i>		

Damage	\$4,823.00
Costs	83.13
Total	\$4,906.13

Max Krueger, Attorney of Plaintiff.

Judgment on Mechanics' Lien by Default in the above-entitled action was rendered on the twenty-first day of December A. D. Nineteen Hundred and Twenty-eight in favor of the plaintiff Henry R. Isenberg Co., Inc. and generally against the defendant Apex Building Company, a corporation builder, for the sum of Four Thousand Eight Hundred Twenty-three dollars (\$4,823.00) damage and Eighty-three dollars and thirteen cents costs of suit; specifically to be made of the land and building in the complaint described; and it is further ordered that judgment be also entered that the mortgage of the defendant, Warranty 30 40

Exhibit DH. 1.

Building & Loan Association in the complaint mentioned as subject to the plaintiff's lien claim. Judgment entered and signed December 21, 1928.

WILLIAM S. GUMMERE,
Judge.

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JOHN H. SCOTT,
Clerk.

Book 106, page 239.

ESSEX COUNTY CLERK'S OFFICE.

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

20 I, JOHN H. SCOTT, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey.

30 DO HEREBY CERTIFY, that the foregoing is a true and correct copy of Judgment record in the case of Henry R. Isenberg Co., Inc. v. Apex Building Co., a corp. of New Jersey, Active Mortgage Company, Lenox Land Co., Warranty Building & Loan Association entered and signed December 21, 1928 in Book 106 page 239 of Circuit Court Judgments and the same is taken from and compared with Book 106, page 239 of Circuit Court Judgments and as the same now remains on the files of said office.

(SEAL) IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said Court and County at Newark, N. J., this sixth day of February A. D., 1929.

JOHN H. SCOTT,
Clerk.

40

New Jersey Court of Errors and Appeals

Between

ACTIVE MORTGAGE COMPANY,
a corporation,
Complainant-Appellee,

and

HENRY R. ISENBERG Co., INC.,
Defendant-Appellant.

*On Appeal
from Court
of Chancery.*

REPLY BRIEF ON BEHALF OF APPELLANT, HENRY R. ISENBERG CO., Inc.

ERRATTA.

Counsel for the appellee, at page 7 of their brief, states that on page 6 of the appellant's brief appears an excerpt from an opinion by Mr. Justice Kalisch in the case of *Hollander v. Abrams*, 100 N. J. Eq. 300, and that the last sentence, "Estoppels preclude the assertion of facts not law," does not appear in the text of the opinion.

This is a typographical error. The excerpt from the opinion of Mr. Justice Kalisch on page 6 of the appellant's brief ends with the word "inhibition." The following sentence "Estoppels preclude the assertion of fact, not law," refers to the case of *Moore v. Willis*, 9 N. C. 555, and is found in the footnote in 16 Cyc. 680 under "Estoppels as to Rules of Law." And the next quotation "Quite uniformly it is held to apply only to matters of fact" is a quotation from 10 Ruling Case Law 673, under Estoppel.

There being no oral argument, and the briefs of the appellee having been served on us after

the opening of the Court, we are making reply to the new matter therein contained.

AS TO POINT I.

The doctrine of *res judicata* does not apply. It is elementary that incorporated in the very gravamen of the doctrine of *res judicata* are identity of parties and the character in which they appear, and identity of issues. In the instant case the Isenberg Company was in the law court as a mechanic lien claimant, and the sole issue there presented was its rights under the mechanic lien statute. In Chancery, however, the position of the Isenberg Company was that of creditor, and the issue was its rights as such creditor under the Corporation Act.

Vice-Chancellor Backes did not agree with the doctrine advanced by appellee under this point, and it is obvious that the cases referred to in counsel's brief have no application to a situation such as exists in this cause.

In the case of the *City of Paterson v. Baker*, 51 E. 49, referred to by appellee in his brief on page 7 as the leading case on the subject of *res judicata*, on page 54 of the very same case, V.-C. Van Fleet presents the doctrine in the words of Justice Field:

“But where the second action is upon a different claim or demand, but between the same parties, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually

litigated and determined in the original action, not what might have been litigated and determined, for it is only upon such matters as were actually litigated and determined that the judgment is conclusive.”

The identical phraseology is cited with approval in the case of *Sarson v. Maccia*, 90 E. 433.

Under no theory of law can it be urged that the mechanic's lien action was dispositive of the question involved in this cause (*sub judice*). Solvency or insolvency of the mortgagor corporation were not involved in the law action. In equity, the question was the validity of the mortgages, under Section 64 of the Corporation Act. Contention of counsel for the appellee is untenable.

AS TO POINT II.

We think there is no force to this contention. The Uniform Fraudulent Conveyance Act has certainly no application to Section 64 of the Corporation Act, and we do not think there is anything in the argument that the Fraudulent Conveyance Act supersedes Section 64 of the Corporation Act. If such were the conclusion, we would be inclined to favor the view that this Court would unhesitatingly set so much of the Fraudulent Conveyance Act aside as unconstitutional, as might be required to preserve Section 64 of the Corporation Act. We believe, however, that the conclusion is inescapable that Section 64 of the Corporation Act has never been superseded and is a law of the State today and is recognized as such by our Courts.

AS TO POINT III.

Cope v. Walton, 77 N. J. Eq. 512, affirmed 79 Eq. 165, is not discussed in the brief of appellee, and it is our view that the reason is very obvious, because it is unanswerable as applied to the facts in this case.

AS TO POINT IV.

We would have no complaint to make with regard to the language used under Point IV under certain given circumstances, but unfortunately for the appellee, the facts in this case do not justify the assertion. In the first place, there is not a scintilla of evidence in the record to support the finding of the Court that the complainant was "compelled to lay out the money to complete the building to protect the security of its first mortgage, and the law incorporates the outlay as a lien." The Court cites, to support this statement, the cases in 13 N. J. Eq. 410 and 89 N. J. Eq. 293.

The case of *Vanderhaise v. Hugues*, reported in 13 N. J. Eq. 410, related to a deed of conveyance, absolute in form, where the grantee executed a covenant bearing even date, to re-convey upon the payment of a certain sum within a specified period, and it appeared that the deed was intended as a mortgage to secure the re-payment of certain loans. It also appeared that the grantee held legal title to the premises and was in possession. An accounting was ordered to determine the amount of rents and profits to be received by the grantee, and allowance made for necessary repairs and lasting improvements, and also the costs of insurance and of advertising and other expenses necessarily or reasonably incurred in leasing the premises.

It will be noted that the mortgagee was not in possession in this case, and any voluntary payment on the part of the mortgagee would merely create a relationship of debtor and creditor, if there was a possibility of recovery, and would not entitle a mortgagee to security in the form of a mortgage. This is elementary.

So in the case of *Seacoast Real Estate Company v. American Timber Company*, the Court of Chancery, in an opinion by Vice-Chancellor Foster and reported in 89 N. J. Eq. 293, at page 304 says:

“All the authorities that have come to my notice in cases where the mortgagee is the complainant, limit his right to reimbursement to the money expended for necessary repairs made for the protection or preservation of the property. Where allowance has been granted to a mortgagee as complainant for permanent improvements, it has been based on the fact that such improvements had been made under a mistaken belief of absolute ownership on the part of the mortgagee; or it has been allowed in cases where the mortgagor as complainant sought to redeem and attempt to appropriate the benefit of the mortgagee’s expenditures without compensation.”

In both cases, it will be observed, the mortgagee was in possession, and the character of the improvements were permanent. The character of the improvements related to the then existing property *in esse* at the time when the mortgagee had taken possession and was operating and running the property as his own. In effect there was a legal duty devolving upon the mortgagee to preserve and take care of the real estate while in possession, and it was because of this duty that a recovery was prompted. We do not understand that in either case was the mortgagee

entitled to a priority over existing creditors. The Court merely permitted a recovery for the moneys so advanced for permanent improvements as against the mortgagor as an item of expense which was recoverable in the preservation of the property. It did not create a superior lien to that of the general creditor. It gave the mortgagee no priority. It merely created an obligation constituting the mortgagee a creditor and nothing more.

In the case at bar, there is an attempt to give vitality to a mortgage executed by an insolvent corporation. We say that this position is not tenable, as a matter of law. If the complainant is entitled to a recovery for moneys advanced, it would merely be as a general creditor with all other creditors, and not in the capacity of a mortgagee with a priority. In attempting to sustain this priority, the Court fell into legal error.

We respectfully submit that the evidence does not support either the cases or the statement. The true situation is as follows: That on the strength of representations made by the creditors that they had been promised a mortgage loan of \$165,000.00 by the Warranty Building & Loan Association, the complainant advanced the unpaid balance of the \$85,000.00 mortgage (Case, p. 50, ll. 13-25). As to the \$15,000.00 mortgage, the record discloses (Case, p. 53, ll. 24-28) the following:

“The APEX BUILDING CO. finding that the funds secured by the original mortgage had been exhausted, REQUESTED an additional loan of Fifteen thousand (\$15,000) dollars to enable IT to complete the building.” Epitomized, the complainant in the first instance, advanced the balances of its first mortgage on the strength of

the creditors representations of a promised mortgage loan from the Warranty Building and Loan Association, and in the second instance, at the REQUEST of the mortgagor to enable it, the mortgagor, to complete the building. Clearly, nowhere in the record is there the slightest indication that the complainant of *its own motion*, advanced the disputed moneys, nor that it was *compelled* to advance these moneys for the protection of its securities.

It is very obvious, therefore, from the evidence, that the mortgagee was not compelled to lay out the money to complete the building to protect the security of his first mortgage, but on the contrary the inducing reasons therefor, and the causes which prompted the mortgagee in making the advances, are apparent and lead us to the view that there must have been some substantial money consideration which resulted in this additional speculation.

Respectfully submitted,

MAX KRUEGER,
Solicitor of Defendant-Appellant.

MINTURN & WEINBERGER,
Of Counsel.

The first part of the book is devoted to a general history of the world, from the beginning of time to the present day. The author discusses the various civilizations that have flourished on the earth, and the progress of human knowledge and art. He also touches upon the political and social changes that have shaped the course of history.

The second part of the book is a detailed account of the life and times of the great men of the world. The author describes the lives of the philosophers, the statesmen, the warriors, and the artists who have made their names immortal. He shows how their actions and ideas have influenced the world, and how they have shaped the course of human progress.

The third part of the book is a study of the various religions and philosophies that have been practiced by mankind. The author compares and contrasts the different faiths, and shows how they have shaped the moral and intellectual life of the world. He also discusses the various schools of thought that have arisen in the history of philosophy, and the contributions they have made to human knowledge.

The fourth part of the book is a history of the various nations and peoples of the world. The author describes the rise and fall of the great empires, and the development of the various nations and peoples. He shows how the different cultures and customs of the world have been shaped by their geographical situation, their history, and their interactions with other peoples.

New Jersey Court of Errors and Appeals

Between

ACTIVE MORTGAGE COMPANY, a
corporation,

Complainant-Appellee,

and

HENRY R. ISENBERG CO. INC.,

Defendant-Appellant.

*On Appeal
from Court
of Chancery.*

BRIEF ON BEHALF OF APPELLANT, HENRY R. ISENBERG CO. INC.

Preliminary Statement.

This appellant, Henry R. Isenberg Co. Inc., being a holder of a general judgment in the sum of \$4,906.13, together with interest, finds itself aggrieved by an order made by the Chancellor, on the advice of Vice-Chancellor Backes, as a result of which order or decree this appellant will suffer the loss of the entire amount due to it under its judgment entered on December 21, 1928, and hence this appeal. This appellant's notice of appeal is printed on page 67 of the state of the case, and its petition of appeal on page 68 of the state of the case.

The Facts.

The bill filed in this cause, is to foreclose two mortgages on an apartment house, one for \$85,000 dated April 26, 1927, and the other for \$15,000 dated June 8, 1928, made by the Apex Building Company. On the \$85,000.00 mortgage, the record at page 56 discloses the fact that but \$65,000.00 was advanced on account of the prin-

cipal sum. And so in the opinion of the Court the statement appears:

“It is conceded that the larger mortgage has priority to the extent of \$65,000.00 but the remainder and the second mortgage are claimed to be inferior liens, and the reason for this is that the remainder moneys were advanced after the Apex Company became insolvent.”

A Receiver for the Apex Company, in insolvency was appointed by the Court of Chancery on December 12, 1927, because of the fact that the Apex Building Company was insolvent, having suspended its ordinary business for want of funds to carry on the same. That an order was made on March 2, 1928, by the Court of Chancery, which, amongst other things, provided as follows:

“That the receiver Lionel T. Kristeller be and is hereby discharged as such receiver to take effect upon the carrying out of the following paragraph of this order to wit: on the payment of costs of administration, all of which have been paid. Thereupon Lionel T. Kristeller as receiver executed to the Apex Building Company his deed for the premises in question. His deed is dated April 2, 1928.”

Case, page 52.

In the petition for the discharge of the Receiver, it is recited in paragraph 11 thereof, as follows:

“Your petitioner further shows that it has been brought to his attention that by virtue of the failure to complete said building great losses have been sustained by the creditors in that they will not be able to rent said building in the seasonable period, to wit, in the spring, but if the creditors are permitted to take possession of the building and continue its completion, they will greatly gain thereby and will be able to obtain a loan,

which said loan your petitioner has made arrangements for, to wit, \$165,000, and if the said loan is not accepted within the very immediate future, your petitioner has been informed that it will be cancelled, whereupon your petitioner and the creditors will find it exceedingly difficult to obtain another."

Case, pages 52-53.

The financial status of the Company remained the same, excepting that most of the creditors, by agreement in effect took the building as security for their claims. (See Exhibit C. 12, p. 117 of Case.) The Company had no money either to pay its debts or complete the building.

On June 8, 1928, the Active Mortgage Company acquired its mortgage of \$15,000.00. At that time it knew that there were no further contributions of capital to Apex Building Company; that its debts had not been paid and that it had not the ability to resume its business with safety to the public and advantage to its stockholders (Case, pp. 49-50-55). The debts incurred subsequent to the re-conveyance of the property by the Receiver, in pursuance of agreement Exhibit C. 12, amounted to \$14,000.00, all of which were unpaid. That at the time of the appointment of a Receiver, there were debts amounting to \$51,000.00, exclusive of this item. That it is further admitted that the payment of the debts of the existing creditors at the time of the discharge of the Receiver, were not provided for in compliance with the statute (Case, p. 57).

Henry R. Isenberg Co., Inc., filed a mechanic lien claim for the sum due it, and made a party defendant the Active Mortgage Company, alleging a priority by virtue of the Mechanics Lien Law. On application for summary judgment, the Circuit Court Judge held that the mortgage

was prior to that of the mechanic lien, and dismissed the lien claim insofar as priority is concerned as between the mortgages and the lien claim, and awarded merely a general judgment. The general judgment recovered in that suit is nevertheless a lien on the land, subordinate of record to the complainant's mortgages, and attacks the legality of the securities of the Active Mortgage Company upon the theory that the said mortgage of \$15,000.00 is void under section 64 of the corporation act (C. S. 1638), which declares void as against creditors all transfers of property against corporations when insolvent. And this likewise is true of the unpaid amount due on the \$85,000.00 mortgage, even though the mortgage was dated eight months before insolvency, it appearing from the proofs that the same was not wholly paid out at the time of insolvency.

We respectfully maintain that the Court below erred in fixing the order of priorities as it did and in relegating the position of this appellant's judgment to the position that it did.

THE LAW.

We shall present our argument to the priority of the decree of the Court below under review under two heads, as follows:

1. The Court erred in ruling that the judgment creditor was estopped from setting up section 64 of the Corporation Act. The doctrine of estoppel precludes the assertion of facts, not law.

2. The Court erred in refusing to hold that the mortgage made by the Apex Building Company to the Active Mortgage Company, in the

sum of \$15,000.00 was utterly null and void as against creditors, under section 64 of the General Corporation Act.

POINT I.

The Court below erred in ruling that the judgment creditor was estopped from setting up Section 64 of the Corporation Act. The doctrine of estoppel precludes the assertion of facts, not law.

The learned Vice-Chancellor, in his opinion, stated that the judgment creditor is estopped and can take nothing under the statute, referring to section 64 of the Corporation Act, in view of the conduct of the creditor which he described as follows:

“The construction of the section * * * is not authority for letting in a judgment creditor to contest the validity of a mortgage given after insolvency to sustain the mortgage security towards which the creditor itself extended credit, represented by the judgment, in the common effort to preserve the assets of the company, with knowledge of the insolvency and with notice of and assenting to the mortgage and the object for which it was given.”

With this statement of law, we cannot agree, and we think that the learned Vice-Chancellor fell into error.

It is our view that section 64 of the General Corporation Act declares the public policy of the State. The statute is intended for the protection of creditors. No creditor or group of creditors can possibly circumvent or thwart, by their acts or by their conduct, the effect of the statute. The doctrine of estoppel was never intended to be applied to deny the right of the pro-

tection of the statute declaratory of the public policy of the State.

In the case of *Hollander v. Abrams*, 100 N. J. Equity, at page 300, Mr. Justice Kalisch, speaking for the Court of Errors and Appeals, in discussing the doctrine of estoppel as applied to the statute involving rights of married women in a specific performance suit, says the following:

“We do not concur in the view of the vice-chancellor that a married woman can be estopped from availing herself of the protection of the statute which prohibits her from conveying her real property without her husband joining her in such act. It is a declared public policy of the state that she shall be disabled from doing so, except under certain conditions specially enumerated in the statute. The statute is for the protection of the husband and children, if any, and, therefore, the purpose of the statute may not be permitted to be circumvented or thwarted by any act of the wife. To sanction the view of the court below that a married woman may estop herself from the application of the statute by her fraudulent conduct or otherwise, is to invest her with the power to render the act nugatory. For on this theory any married woman representing herself as a widow can execute a valid conveyance of property, notwithstanding the statutory inhibition.”

“Estoppels preclude the assertion of facts, not law.”

Moore v. Willis, 9 N. C. 555. 10 Ruling Case Law 673, under Estoppel:

“Quite Uniformly it is held to apply only to matters of fact.”

16 Cyc. 679, under Estoppel:

“In the broad sense of the term ‘estoppel’ is a bar which precludes a person from denying the truth of a fact which has in contemplation of law become settled by the acts

and proceedings of judicial or legislative officers, or by the act of the party himself, either by conventional writing or by representations, express or implied in bars."

"A preclusion in law which prevents a man alleging or denying a *fact* in consequence of his own previous act, allegation or denial of a contrary tenor."

66 S. W. 997;

169 Mass. 151, 153;

"The preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or on the part of those under whom he claims."

See Bouvier Law Dictionary for definition of Estoppel.

"An estoppel arises where a man 'has done some *act* which the policy of the law will not permit him to gainsay or deny.'"

See Greenleaf on Evidence, under Estoppel, Chapter 4;

22 N. J. Law 599, 619;

35 N. J. Law 437, 441;

25 N. J. Eq. 194.

The same rule applies to admission as to the legal effect of a contract.

"An admission, in order to constitute an estoppel must relate to a matter of *fact*, and a person will not be estopped by an admission as to the law."

See 16 Cyc. 756 under Estoppel;

2 N. Y. 19.

"The ground upon which the estoppel rests is that the conduct constitutes an implied representation of the truth of the state of facts in question."

Bigelow on Estoppel (5th Ed. p. 570).

So in the case at bar. Statute specifically provides that:

"Whenever any corporation shall become insolvent or shall suspend its ordinary busi-

ness for want of funds to carry on the same, neither the directors nor any officer or agent of the corporation shall sell, convey, assign or transfer any of its estates, effects, choses in action, goods, chattels, rights or credits, lands or tenements; nor shall they or either of them make any such sale, conveyance, assignment or transfer in contemplation of insolvency, and every such sale, conveyance, assignment or transfer shall be utterly null and void as against creditors; PROVIDED, that a bona fide purchase for a valuable consideration, before the corporation shall have actually suspended its ordinary business, by any person without notice of such insolvency or of the sale being made in contemplation of insolvency, shall not be invalidated or impeached.”

The declared policy of the State, under this section, is very clear. Any act coming within the purview of this section shall be utterly null and void as against creditors. The act, therefore, of any creditor or group of creditors, would clearly come within the purview of the foregoing decision. Act or acts ordinarily constituting estoppel, would not and could not deny the right of protection accorded by the statute. The Statute is for the protection of the creditors, if any, and therefore the purpose of the Statute may not be permitted to be circumvented or thwarted by any act of any creditor. To permit such course, would in effect invest a power in the creditor to render the act nugatory.

What the Vice-Chancellor said, in effect, was that creditors, by their conduct, could execute a valid conveyance of property, notwithstanding the statutory inhibition. It is our view that the doctrine of estoppel cannot possibly be applied to the facts in this case, in view of the statute, and in view of the following findings made by the Court:

1. That the corporation was insolvent.
2. While so insolvent, executed a mortgage for \$15,000.00, to the Active Mortgage Company, who had knowledge of the fact of insolvency and the suspension of business.

The Statute declares what shall constitute a valid mortgage: That the mortgagee was a bona fide purchaser, for a valuable consideration, who acquired his mortgage before the corporation had actually suspended its ordinary business, without notice of such insolvency or of the execution of the mortgage being made in contemplation of insolvency. The Active Mortgage Company cannot possibly be said to come within the purview of this exception. There is no legal basis, therefore, for the conclusion of the Vice-Chancellor in the upholding the validity of this mortgage upon the legal theory advanced in his opinion.

POINT II.

The Court erred in refusing to hold that the mortgage made by the Apex Building Company to the Active Mortgage Company, in the sum of \$15,000 was utterly null and void as against creditors, under Section 64 of the General Corporation Act. This same rule of law applies to unpaid balances on the \$85,000 mortgage.

The mortgage executed by the Apex Building Company on June 8, 1928, was utterly null and void under section 64 of the General Corporation Act, and the Active Mortgage Company, the complainant, was not entitled to the decree awarded it by the Court. It is conceded in this case that the Apex Building Company was insolvent, had suspended its ordinary business for want of funds to carry on the same, and a Receiver was in charge from December 12, 1927, until March 2,

1928. The validity of complainant's mortgages to the extent of moneys advanced thereunder, up to the time of the appointment of the Receiver, to wit: the sum of \$65,000.00 (Case, p. 56) is conceded. As to the unpaid balances on the \$85,000.00 mortgage and the \$15,000.00 second mortgage executed, it is our view, under the foregoing section of the Corporation Act, that this fund must be regarded as a creditors' fund for the equal benefit of the existing creditors of the Company, and the failure to so adjudicate by the trial court, constitutes reversible error.

When the Receiver was discharged, the financial status of the Company remained the same, excepting that most of the creditors, by agreement in effect took the building as security for their claims (Exhibit C. 12). The Company had no money either to pay its debts or to complete the building. The agreement C. 12 (Case, p. 117), in paragraphs 4 and 11, released the Apex Building Company from all liability of the creditors, but under paragraph 2 imposed the duty upon the trustees, substituted officers of the Company (Case, p. 119), to complete the building, borrow money

“and to pay the balance in hand to the creditors of the Apex Building Co., parties of the second part, in just proportion as the amount of the respective claim of each creditor bears to the total amount available for the payment of creditors; * * * until such time as all of the said creditors shall have been paid in full or the trustees deem it expedient to sell said premises as aforesaid.”

At that time, the Apex Building Company owed creditors \$51,000 and since increased its obligations by over \$14,000.00 (pp.). All of the then existing creditors did not sign the above agreement (pp. 56-57).

There is no dispute in this cause that the receivership was not dismissed in conformity with section 69 of the Corporation Act (Compiled Statutes 2-1645). In order to have come within the purview of section 69, the following must of necessity appear:

“Whenever a receiver shall have been appointed as aforesaid, and it shall afterwards appear that the debts of the corporation have been paid or provided for, and that there remains or can be obtained by further contributions sufficient capital to enable it to resume its business, the court of chancery may, in its discretion,” &c., &c.

Admittedly, this was not done in this cause.

In the case of *Fleming v. Fleming Hotel Co.*, 70 Equity, p. 509, Vice-Chancellor Bergen said the following:

“It was not made to appear, either to the Receiver or to the Court on the argument, that the debts had been paid or provided for, for I think it doubtful whether the words ‘provided for’ are answered by the extension of the time of payments, but rather, that the payments are to be provided for. There is, however, a more serious and to me insurmountable objection in that it was not made to appear that there was any capital present or obtainable by further contributions to enable the resumption of business with safety to the public and advantage to the stockholders. Such jurisdictional facts being absent, the purpose for which the adjournment was sought would have been fruitless &c.”

It will be observed that in the case *supra*, relief was denied, even though the request was made by at least 97% of the creditors and all of the stockholders.

So in the case of *Bull, et als., v. International Power Company*, 99 Atl. 111, Chancellor Walker,

after outlining the procedure necessary to dismiss the receiver and re-vest the insolvent corporation with its property and franchises, at page 113 says:

“The debts of the corporation have not been paid, nor have they been provided for in any true sense, ‘provided for’ as used in the Act of the Legislature means payment provided for.”

So in the case at bar. Nowhere in the agreement, Exhibit C. 12, or in the Receiver’s proceedings or in the present record, is there a scintilla of evidence that all of the debts of the corporation, from the time of the appointment of the Receiver to date, have been paid or provided for, or that any capital was present or obtainable by future contributions to enable the Apex Building Company to continue its business with safety to the public and advantage to the stockholders. These jurisdictional facts were not mentioned or provided in the decree dismissing the Receiver. All that was done was to put the Company back where it was found.

In the case of *Sullivan v. Newark Lunch Room Co.*, 104 Atl. 222, Vice-Chancellor Lane, upon an application by creditors and stockholders for the dismissal of insolvency proceedings, held:

“Not only are the stockholders and creditors to be considered, but the public generally. If every stockholder and every creditor consented to the plan of re-organization, unless this Court can see that the business can be resumed with safety to the public, it ought not to approve the plan.”

And the Court further remarks:

“New creditors must be assumed to consider that they are dealing with a solvent concern since this Court has permitted the concern to continue, &c.”

And the Court then proceeds to state:

“The Court should at its own motion refuse to approve such plan unless it appears that as a matter of fact the business can be resumed with safety to the public.”

In this connection, we desire to call the Court's particular attention to the following statement made by counsel for the complainant (Case, p. 50):

“I am willing to admit, if it is going to help, that there was no such capital put into the corporation, that our money was used to complete the building and that the Receiver was discharged on the strength of the representations made by the creditors that they had been promised a mortgage loan of One hundred sixty-five thousand (\$165,000.00) Dollars by the Warranty Building & Loan Association which appears in the petition for the discharge of the Receiver, and that we continued to put out money out for the completion of this building.”

How, in the face of this admission made by counsel, the Court can possibly escape the effect of the rule of law so clearly pronounced by the Court of Errors and Appeals in the case of *Cope v. Walton*, 77 N. J. Eq. 512, decided by Chancellor Walker, who was then Vice-Chancellor, and thereafter affirmed by the Court of Errors and Appeals in 79 Eq. 165, we cannot possibly understand. In this case, 77 Eq. 521, Vice-Chancellor Walker says:

“The company was without funds, and, apparently could get none without security. The very fact that it could not undertake the road making unless the entire project was financed by an outsider, was, in itself, a cogent evidence of its financial irresponsibility; in other words, its insolvency.”

So with the case at bar, the complainant was a party to the receivership proceedings—docket

66-397—, knew the financial condition of the Apex Building Company, and knew that the Company had suspended its operation, conceded by admissions of counsel that there was no such capital put into the corporation (Case, p. 50). Applying to these facts, therefore, the principle of law so clearly stated by both Vice-Chancellors Walker and Lane, the conclusion is inevitable that the execution of a mortgage at such a time to a person well knowing the condition of the Company, deals at his peril and must, of necessity come within the purview of section 64 of the General Corporation Act. In our opinion, it was to avoid just such a case that the statute apparently was intended to strike at. To give such a creditor a preference at such a time, would play havoc with the rights of the public generally, and intervening creditors.

Vice-Chancellor Emery, in the case of *Russell & Erwin Mfg. Co. v. Faitoute Hardware Co.*, 62 Atl. 421, involving an assignment of book accounts made by the Company on the same day that the Company had suspended its ordinary business, but before the assignment had actually been made, at page 422 the Court held:

“The first question relates to the time of the making of these assignments, and whether they were made after the corporation actually suspended its ordinary business for want of funds to carry it on. If actually made after such suspension and the company was insolvent at the time, the assignments were not as I read the act, protected by the proviso, *even if the transfer was upon a present valuable consideration and without notice of the insolvent condition of the company.*”

Vice-Chancellor Lane, in *Hoover Steel Ball Co. v. Schaeffer Ball Bearings Co.*, 105 Alt. 500, discussing section 64 of the General Corporation

Act, at page 501 makes the following observation:

“Transfers, &c. are void if made * * *
 (a) when the corporation is insolvent; or
 (b) after it has suspended its ordinary business for want of funds to carry on the same; or (c) if the transfer be made in contemplation of insolvency. A bona-fide purchaser for value is saved, if the transfer, &c. be made when the corporation be insolvent, or if the transfer be made in contemplation of insolvency, if he have no notice, in the first instance of insolvency, and in the second instance, of the sale being made in contemplation of insolvency, provided always the sale shall have been made before the company shall have actually suspended its ordinary business. If the sale be made before the company has suspended its ordinary business, then want of notice is material; if after, want of notice is immaterial.”

And so at the top of page 502, the Court continues:

“But it seems to me on the authority of *Cope v. Walton*, 77 N. J. Eq. 512, affirmed 79 Eq. 165, that at least it must appear, before a corporation, insolvent in the sense of laboring under a general inability to pay maturing obligations, can make, for a present advance, a valid pledge of its assets to a person having knowledge of the condition, that the pledge is in pursuance of some financial scheme which it's reasonable to suppose will result in placing the corporation in a position of solvency as contemplated by the statute; and in this connection I point out that there is a great distinction between a general inability to meet maturing obligations and a temporary embarrassment.”

It is perfectly obvious that *temporary embarrassment* does not prevent a corporation from making a valid pledge of its assets to a pledgee with notice, provided that the effect of such

pledge would result in placing the Company in a position of *solvency*, otherwise clearly such pledge would be void as against creditors.

Reverting again to the facts involved in this case, for the purposes of applying the principle so clearly pronounced by our Court of Chancery, and affirmed by the Court of Errors and Appeals, we have this situation: The Apex Building Company was generally unable to meet its obligations; it was insolvent; it had suspended its operations and it did not provide for payment of its debts; it did not provide or procure any contributions to its capital and thus it remained, from the time of the appointment of a Receiver to the very day of the final hearing of the cause before Vice-Chancellor Backes, as we read and understand the record, and therefore the mortgages of the complainant, Exhibit C. 5 and Exhibit C. 7, to the extent of money advanced in excess of the sum of Sixty-five thousand dollars (\$65,000.00) are void against creditors.

The status of the Apex Building Company, and its condition on June 8, 1928, when it made and executed the mortgage for Fifteen thousand dollars (\$15,000.00) had not changed. It had no funds available or which would enable it to complete the building. The only way that it could raise the money was by mortgage security. All of these facts were known to the complainant. This, therefore, clearly presents a situation on all fours with the case of *Cope v. C. B. Walton Co., supra*, where the Court had occasion to make the following comment:

“itself, a cogent evidence of its financial irresponsibility, in other words, its insolvency.”

There is presented, therefore, for determination, these simple questions:

(a) Is the complainant mortgagee entitled to the protection of his security for the excess sum over \$65,000?

(b) Is the complainant mortgagee entitled to the protection of the mortgage for the \$15,000 under any possible theory, under the statement of facts existing in this cause?

It is our firm opinion and belief that the answer to both of these questions must be resolved against the mortgagee and in favor of the attacking judgment creditor and creditors. Admittedly, Henry R. Isenberg Co., Inc. was a judgment creditor having never received any payment on account of his judgment (see Exhibit D. 1). As to the mortgage of \$85,000.00, it is our opinion that the mortgage is only good to the extent of the payment of \$65,000.00 and that all other advances made after the insolvency of the Company, were made at the risk of the complainant, in the face of section 64 of the Corporation Act. That a mortgage may be good in part and bad as to the residue, seems to be well established.

(See *Reed v. Halois Carbide Specialty Co.*, 64 N. J. Eq. 231.)

An inspection of the complainant's \$85,000.00 mortgage (Exhibit C. 5), shows that the principal was to be advanced in installments, in accordance with the schedule herein contained, which contemplated a completed building, with the proviso that installments may be accelerated by the mortgagor if it believed it advisable so to do. An inspection of the petition and affidavit there-to annexed and filed by the complainant in this cause, asking for sale of the property *pendente lite*, shows that the work to be done by the Apex Building Co. to entitle it to the last six payments aggregating \$15,000.00, *was not done* when the

complainant advanced the full sum of \$85,000.00 and an additional \$15,000.00 on its second mortgage. In other words, \$100,000.00 is alleged to have been paid out to do the work that \$70,000.00 should have done, as per the original schedule.

In this connection, it may be important to also note the following:

The complainant's \$85,000.00 mortgage became due and payable, under its original terms, on January 26, 1928, and prior thereto, for reasons set forth and alleged by it in the bill of complaint. There was no legal obligation compelling the complainant to continue making further advances. Admittedly, the Apex Building Co. at that time was insolvent. The complainant was thoroughly familiar with this situation, and despite all of these factors, and without any obligation, the complainant accelerated its advances, advanced the additional loan of \$15,000.00 and now asks to be protected by asking for a preference which the statute, under section 64, clearly makes null and void unless within the excepted provision. It must be noted that there is no claim on the part of the complainant that they came within the purview of the excepted clause. The Court doesn't attempt, in its opinion, to justify upon that ground. On the contrary the Court only upon the theory that the extension of credit represented by the judgment in the common effort to preserve the assets of the company, with knowledge of the insolvency and with notice of and assenting to the mortgage and the object for which it was given, operating as an estoppel, awards the mortgagee the protection of this security.

This is an attempt to read into section 64 a further exception which does not exist. This, in effect, is giving such a construction and interpretation to the act as to practically destroy the

very object the Legislature had in view, and in our opinion is clearly illegal in that it attempts to contravene the policy of a public statute. Section 64 is a statute that involves public policy and

“The Legislature makes the public policy of the State.”

Bull v. International Power Co., 99 Atl. 111.

To read into this statute the further exception which the Vice-Chancellor attempts to justify his decree on, seems clearly to have been a violation of the doctrine so clearly established in the foregoing case of *Bull v. International Power Co.*, 99 Atl. 111.

In view of all of the evidence, we cannot (this especially in view of the findings of the Vice-Chancellor), justify the decree made by him, which gave priority to the complainant for the advances made beyond the \$65,000.00 and for the \$15,000.00 advanced on the second mortgage, when applying the settled law of this State, as interpreted by our highest courts.

True, the learned Vice Chancellor criticizes the *Cope v. Walton* case as going “beyond the statutory scheme”, it is nevertheless the decision of the Court of Errors and Appeals and supports the provisions of the Statute. It should be noted in this connection that the learned Vice Chancellor erred with regard to his conclusion as to the *Isenberg Co.* “extending credit—in the common effort to preserve the assets of the company, with knowledge of the insolvency and with notice of and assenting to a mortgage and the object for which it was given”. There is nothing in the record, we respectfully submit, which even inferentially establishes any such fact. On the contrary, the *Isenberg Co.* was not one of the

original creditors and certainly had no reason to be interested "in the common effort to preserve the assets of the company", and as stated above, the record does not show any.

Under the *Sullivan v. Newark Lunch Room Co. supra*, Isenberg Co. had a right to believe it was dealing with a solvent concern, and its mere consent to subordinate its right of lien to the mortgage in consideration of receiving payment of the proceeds certainly did not create a situation such as the Vice Chancellor speaks of, and refers to in his opinion.

A statute condemning as utterly null and void as against creditors, a conveyance, transfer, &c., under any and all circumstances, unless within the proviso specifically stated, must of necessity be utterly null and void unless it comes within the purview of the excepted class. The mortgagee was not a bona fide purchaser for a valuable consideration before the corporation actually suspended its ordinary business, without notice of such insolvency, with regard to the moneys advanced in excess of the \$65,000.00, and the mortgage for the \$15,000.00 made on June 8, 1928, and therefore its mortgages may be invalidated or impeached by creditors. The result of such attack, relegates the position of the mortgagee to that of a general creditor to the extent of the moneys advanced in excess of the \$65,000.00 and the \$15,000.00 mortgage.

WHEREFORE it is respectfully submitted that the decree of the Court of Chancery should be reversed, for the reasons above urged.

Respectfully submitted,

MAX KRUEGER,
Solicitor of Complainant-Appellee.

MINTURN & WEINBERGER,
Of Counsel.

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

New Jersey Court of Errors and Appeals

Between

ACTIVE MORTGAGE COMPANY,
a corporation,
Complainant-Appellee,

and

HENRY R. ISENBERG CO., INC.,
Defendant-Appellant.

*On Appeal
from the
Court of
Chancery.*

BRIEF OF COMPLAINANT-APPELLEE.

Facts.

The Apex Building Co., a corporation of the State of New Jersey, was engaged in constructing a large apartment house in the City of Orange, County of Essex and State of New Jersey. It borrowed the sum of eighty-five thousand (\$85,000) dollars from the Active Mortgage Company on its bond secured by a mortgage on the premises, which are more particularly described in the mortgage (Exhibit C. 5, State of the Case, p. 47). This mortgage money was payable in installments and was known as an advance money mortgage, given pursuant to Section 14 of the Mechanic's Lien Act of New Jersey. The mortgage was dated April 26, 1927, and advances were thereafter made from time to time by the complainant, Active Mortgage Company, until the full amount was advanced by the Active Mortgage Company, the mortgagee. This money was all used by the Apex Building Co. in the construction of the building (State of the Case, p. 41).

Subsequently thereto, the Apex Building Co. became financially embarrassed and a receiver

was appointed for the corporation under the corporation act of the State of New Jersey and building operations suspended. In that posture of events the creditors attempted to reorganize the corporation and dismiss the receivership proceedings. As a result of their efforts, the creditors of the Apex Building Co. released the corporation from its indebtedness to them, the debts thereby becoming extinguished, paid the receiver his fees and disbursements and pursuant to the Corporation Act, the Chancellor of the State of New Jersey directed the receiver to reconvey the property to the corporation and the corporation became revested with title to its property by deed of the receiver dated April 2, 1928 (State of the Case, p. 52).

As a result of this the corporation became re-vested with title to its property, free of the debts which had been released by its creditors.

To enable the corporation then to complete the building, the Active Mortgage Company, the complainant herein, loaned the Apex Building Co. an additional sum of \$15,000 on its bond secured by a mortgage on the premises, which were embraced within the terms of the first mortgage of eighty-five thousand (\$85,000) dollars, the full amount of which had theretofore been advanced and used in the construction of the building. The advances under the second mortgage of fifteen thousand (\$15,000) dollars were made to the corporation and used in connection with the construction of the building (State of the Case, p. 41).

The Apex Building Co. thereafter defaulting, the Active Mortgage Company, on August 30, 1928, filed its bill in the Court of Chancery of New Jersey to foreclose both of its mortgages,

one for \$85,000 and the other for \$15,000, respectively (State of the Case p. 16).

Henry R. Isenberg Co., Inc., a defendant, filed an answer and counter-claim admitting the priority of the first mortgage of the Active Mortgage Company to the extent of \$65,000, but attacked the advances of \$20,000 under that mortgage and further alleged that the \$15,000 mortgage was void as to it.

Henry R. Isenberg Co., Inc., was not a creditor of the Apex Building Co. during the period the moneys under the \$85,000 mortgage were advanced by the Active Mortgage Company and used by the Apex Building Co. in the construction of the apartment house. All of the moneys of that mortgage, with the exception of \$2,790.63, had been fully advanced before Henry R. Isenberg Co., Inc., started to supply material and perform work, labor and services on the building embraced in the mortgages (State of the Case, p. 149).

Henry R. Isenberg Co., Inc., performed its work between May 25, 1928, and June 22, 1928. The second mortgage of \$15,000 held by the Active Mortgage Company is dated June 8, 1928. Before the Active Mortgage Company made its payments under that mortgage, it entered into an agreement with Henry R. Isenberg Co., Inc., wherein and whereby Henry R. Isenberg Co., Inc., not only subordinated its mechanic's lien to that of the mortgage of the Active Mortgage Company, but also released its right to a lien and further agreed in this language: "That at no time and in no event shall the right of mechanic's lien of the undersigned (Henry R. Isenberg Co., Inc.) be asserted as against the said mortgage lien of the said Active Mortgage Com-

pany" (State of the Case, pp. 151, 152, 153, 154, 155).

In spite of this postponement or subordination of its mechanic's lien, Henry R. Isenberg Co., Inc., filed a mechanic's lien in the Essex County Clerk's office and issued a summons and complaint thereon pursuant to the statute, and joined as a party defendant therein, the Active Mortgage Company, claiming that the mortgages of the Active Mortgage Company would be cut off by a sale under the mechanic's lien of Henry R. Isenberg Co., Inc. (State of the Case, pp. 141, 142). The Active Mortgage Company moved for a summary judgment against the plaintiff, Henry R. Isenberg Co., Inc., in the Essex County Circuit Court. The Court struck out the complaint of the said Henry R. Isenberg Co., Inc., with *prejudice* to the institution by the said Henry R. Isenberg Co., Inc., of another suit on the same action and entered final judgment in favor of the Active Mortgage Company and as against the plaintiff, Henry R. Isenberg Co., Inc. (State of the Case, p. 158).

In spite of the fact, as hereinabove set forth, that Henry R. Isenberg Co., Inc., had agreed that the said mortgage of the Active Mortgage Company was to be superior to the mechanic's lien of Henry R. Isenberg Co., Inc., in the broadest possible language that could be set forth in an agreement and in spite of the fact that a final judgment was entered in the law court adjudging that the mortgages of the Active Mortgage Company were superior to the lien claim of Henry R. Isenberg Co., Inc., Henry R. Isenberg Co., Inc., has now shifted its position and asserts that the \$15,000 mortgage is utterly null and void and that the Active Mortgage Company is not entitled to protection as to its advances over

\$65,000 on the mortgage of \$85,000 as against the Henry R. Isenberg Co., Inc., even though practically all of its advances had been made before Henry R. Isenberg Co., Inc., became a creditor of the Apex Building Co., the mortgagor of the Active Mortgage Company, on the sole ground that the mortgage is void as against it, a judgment creditor of the Apex Building Co.

The sole question in the case is, therefore, whether the \$15,000 mortgage dated June 8, 1928, and the advances under the \$85,000 mortgage dated April 26, 1927, are entitled to priority of payment over the general claim of Henry R. Isenberg Co., Inc., which was reduced to judgment only as against the Apex Building Co., the mortgagor of the Active Mortgage Co., the complainant-appellee herein.

POINT I.

The issues between the parties have been adjudicated by a court of competent jurisdiction.

There is no doubt but that the doctrine of *res judicata* applies in this case. In the law court, the mechanic's lien creditor attacked the priority of the mortgages of the Active Mortgage Company and asserted that its claim was prior to that of the mortgages, and that the mortgages would be cut off by a sale under the mechanic's lien. The law court decided that the mortgages were prior to the mechanic's lien and would not be cut off by a sale under the mechanic's lien.

In *Sarson v. Maccia*, 90 E. at page 436, the Court held:

“The record of the case exhibits beyond question all the essential elements of a plea of *res judicata*—the identity of the parties, the cause of action, and the subject matter.

The only difference between the suit in equity, decided, and the action at law, pending, is the forum, the form of the remedy and the nature of the relief. * * * Nor, in order to raise the estoppel, is it necessary that the pleadings in the first suit should have counted upon the precise false representations set up as the cause for action in the second. It is enough if the matter was triable in the first suit, and that it was actually litigated and adjudicated."

Taking this language as a test, we find it meets the situation presented in the case at bar. An examination of the judgment roll in the law court (State of the Case, pp. 132 to 160, inclusive), reveals that the plaintiff in that suit (the appellant here) sought to advance his lien claim over the lien of the mortgages. The language he used in his complaint and the form of the complaint was that comprehended by the Mechanic's Lien Act to accomplish that purpose—namely, "that the mortgages of the appellee (the Active Mortgage Company), would be cut off by a sale under its mechanic's lien judgment and execution" (State of Case, p. 142). The issue was squarely raised by the mechanic's lien creditor that the mechanic's lien was entitled to priority of payment as against the mortgagee. The Court decided adversely to it, and it now is seeking that same determination in its appeal from the Court of Chancery, which held, as did the law court, that the mortgages are prior to the mechanic's lien.

As the Court said in *Sarson v. Maccia*, *supra*, at page 436:

"The defendant threw her lot with the Court of Chancery, and after an exhaustive investigation, and upon principles more favorable to her than the law courts could afford, the cause, which she again desires to

litigate, was determined against her; and by that determination she is bound."

Henry R. Isenberg Co., Inc., threw its lot with the law court. The issue was determined against it. It is bound by that decision.

The leading case on the subject of *res judicata* is *City of Paterson v. Baker*, 51 E. 49, where Vice-Chancellor Van Fleet said at page 59:

"The doctrine under consideration is not a mere rule of procedure, limited in its operation, and only to be enforced in cases where a defeated suitor attempts to litigate anew a question once heard and decided against him, *but a rule of justice, unlimited in its operation, which must be enforced whenever its enforcement is necessary for the protection and security of rights and for the preservation of the repose of society.*"

This case was followed in many cases, among them:

Clark Thread Co. v. William Clark Co., 55 N. J. E. 658, and more recently by this Court in

Cleaves v. Yeskel, 104 L. 497, at pages 502 and 503, and

Perth Amboy Dry Dock Co. v. Crawford, 103 N. J. L. 440 at pages 444 and 445.

On page 6 of counsel for the appellant's brief, appears an excerpt from an opinion by Mr. Justice Kalisch, in the case of

Hollander v. Abrams, 100 N. J. E. 300.

The last sentence of the quoted excerpt reads as follows:

"Estoppels preclude the assertion of facts not law."

A careful reading of the text of the opinion does not reveal the quoted sentence as appearing therein.

The appellant seems to have misconceived the theory and the law of estoppel. Estoppel will be raised to prevent a person from denying as a fact, that which *he himself* has previously admitted to be or represented as a fact.

In *Muller v. Thoman*, 145 Atl. 480, Vice-Chancellor Backes said:

“The estoppel, an invention of equity for the promotion of justice, is not inherent in, but springs to the defense of, an action, and arises to disarm one from maintaining a right which otherwise he would have were it not for his voluntary conduct, which precludes him from asserting it against another thereby misled to his injury. Here the complainant was not culpable. *She and the defendants are alike innocent, victims of Ernest's perfidy; and, the equities being equal, the legal estate of the complainant must prevail.*”

What representation has the mortgagee made against which he should be estopped? He made no representations as to the solvency of the mortgagor. As to the mortgagor, who may be termed the common creditor of the appellant and appellee, he was as much a stranger as the appellant. Each loaned something to the mortgagor. The mortgagee loaned money and took a mortgage as security; the mechanic's lien creditor loaned his supplies and his labor and took as security the credit of the corporation and the benefits of the Mechanic's Lien Act. The mechanic's lien creditor, thereafter, subordinated his lien to the lien of the mortgagee, which agreement in simple language means: I agree that your mortgage be paid ahead of my lien claim. It is inequitable for him to attempt to avoid his solemn agreement, and the judgment of the law court.

The appellee can raise no estoppel as against the Active Mortgage Company, the appellant herein, because there were no representations of fact or law made by the Active Mortgage Company to the mechanic's lien creditor.

POINT II.

Section 64 of the Corporation Act has been superseded by the Uniform Fraudulent Conveyance Act of New Jersey. Pamphlet Law 1919, page 500.

Section 64 of the Corporation Act reads as follows:

“Whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, neither the directors nor any officer or agent of the corporation shall sell, convey, assign or transfer any of its estate, effects, choses in action, goods, chattels, rights or credits, lands or tenements; nor shall they or either of them make any such sale, conveyance, assignment or transfer in contemplation of insolvency, and every such sale, conveyance, assignment or transfer shall be utterly null and void as against creditors; provided, that a bona fide purchase for a valuable consideration, before the corporation shall have actually suspended its ordinary business, by any person without notice of such insolvency or of the sale being made in contemplation of insolvency, shall not be invalidated or impeached.”

Sections 2 and 3 of the Uniform Fraudulent Conveyance Act reads as follows:

“2. (1) A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured.

* * *

“3. Fair consideration is given for property, or obligation,

(a) When in exchange for such property, or obligation as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

(b) When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.”

We submit that Sections 2 and 3 of the Uniform Fraudulent Conveyance Act supersede Section 64 of the Corporation Act.

This question has never been determined by any Court of the State of New Jersey, but it has been decided by the Federal Court in the case of

Morrisville Trust Co. v. Moon, 21 Federal Reporter, 2nd series at page 716.

The Circuit Court of Appeals for the Third Circuit which embraces New Jersey had the matter squarely before it and held that Section 64 had been superseded by the Uniform Fraudulent Conveyance Act. The Court said at page 717:

“The trend of legislation is toward uniformity. There is no inherent reason why an individual, while insolvent, should be allowed to secure an antecedent debt by the conveyance of his property, and an insolvent corporation should not be so allowed. The same rule should apply to both in equity, as it does in bankruptcy. The act is intended to secure uniformity, and its provisions are somewhat general. Within the last 25 years the Legislature of New Jersey has passed nine acts intended to create uniformity among the states, in seven of which the word ‘person’ is defined:

- (1) Negotiable Instruments (P. L. 1902, p. 583, 3 Comp. Stat. 1910, p. 3734 at page 3756): "Person" includes a body of persons, whether incorporated or not.' Section 191.
- (2) Sale of Goods Act (P. L. 1907, p. 311, 4 Comp. Stat. 1910, p. 4645 at page 4665): "Person" includes a corporation or partnership or two or more persons having a joint or common interest.' Section 76.
- (3) Bills of Lading (P. L. 1913, p. 244, at page 261): "Persons" includes a corporation or partnership of two or more persons having a joint or common interest.' Section 53.
- (4) Transfer of Shares of Stock in Corporations (P. L. 1916, p. 398, at page 404): "Person" includes a corporation or partnership of two or more persons having a joint or common interest.' Section 22.
- (5) Conditional Sales (P. L. 1919, p. 461): "Person" includes an individual, partnership, corporation, and any other association.' Section 1.
- (6) Partnership (P. L. 1919, p. 481): "Person" includes individuals, partnership, corporations, and other associations.' Section 2.
- (7) Limited Partnerships (P. L. 1919, p. 471): No definition of 'person' or other similar word.
- (8) Fraudulent Conveyances (P. L. 1919, p. 500): No definition of 'person' or other similar word.
- (9) Declaratory Judgments and Decrees (P. L. 1924, p. 312, at p. 314): 'The word "person," wherever used in this act, shall be construed to mean any person, partnership, joint stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever.' Section 13.

It is the duty of courts to interpret, and not legislate; to declare what the Legislature

did say, and not what it should say. If the Legislature did not intend that the words 'he,' 'his,' and 'person,' as used in the act in question, should include corporations, it should have said so expressly, or implication so clear as to be unmistakable.' The court held that Section 64 had been repealed."

This rule of construction is not new and has been heretofore applied in this State in connection with the Crimes Act and the Evidence Act. Section 18 of the Crimes Act of the State of New Jersey, 2 Compiled Statutes, page 1748, provides that:

"Any person who shall willfully and corruptly commit perjury * * * shall be guilty of a high misdemeanor, and punished accordingly; and be thereafter rendered incapable of giving testimony in any court of this State, until such time as the judgment so given shall be reversed."

Section 1 of the Evidence Act of the State of New Jersey, 2 Compiled Statutes, page 2217, reads as follows:

"No person offered as a witness in any action or proceeding of a civil or criminal nature shall be excluded by reason of his having been convicted of crime, but such conviction may be shown on the cross examination of the witness, or, by the production of the record thereof, for the purpose of affecting his credit."

In *State v. Wendel*, 96 N. J. Law, page 495 at page 496, the Court of Errors and Appeals in an opinion by Trenchard, *J.*, held that Section 18 of the Crimes Act of 1898 was abrogated by Section 1 of the Act concerning Evidence, basing his decision on the case of *State v. Henson*, 66 N. J. Law 601 as authority for that conclusion.

If, therefore, a mortgage to secure a past consideration may now be valid under the Uni-

form Fraudulent Conveyance Act, surely a mortgage for a present consideration, without notice of insolvency or to a solvent corporation, is valid.

POINT III.

The mortgages of complainant are valid and subsisting liens even under Section 64 of the Corporation Act.

Assuming that Section 64 of the Corporation Act has not been superseded by the Uniform Fraudulent Conveyance Act, it is submitted that the mortgages of the complainant, Active Mortgage Company, are valid liens under Section 64.

The cases of

Fleming v. Fleming Hotel Co., 70 N. J. E. 509;

Bull v. International Power Co., 99 Atl. 111;

Sullivan v. Newark Lunch Co., 104 Atl. 222,

cited by the appellant are not in point. These three cases relate to the procedure for revesting an insolvent corporation with its assets.

In the case at bar the Court of Chancery re-vested the corporation with its assets long before the appellant ever became a creditor of the corporation. Does the appellant mean to say that the Court of Chancery acted in violation of the Corporation Act or of the decision of the Chancellor in *Bull v. International Power Co.*, *supra*? Is it not a fact that the statute must have been complied with by the corporation because of the fact that the corporation was re-vested with title to its assets by the Court of Chancery? The presumption is in favor of the fact that the Court of Chancery acted in conformity with the law and not in violation and in defiance thereof. If

the appellant is aggrieved by the order revesting the corporation with its assets it should have appealed from that order. It cannot now collaterally attack the order made by the Court of Chancery directing the receiver to reconvey the property to it.

It was, moreover, a proper case for the re-vesting of title to the corporation. The old debts of the corporation had been released and extinguished. New money was obtained to finish the building. A new permanent mortgage had been placed and was of record, the funds of which were to have been paid to the Apex Building Co. on completion of the building (State of Case, p. 142, paragraph 8). It was for that reason that Henry R. Isenberg Co., Inc., made the Warranty Building and Loan Association, the permanent mortgagee, a party defendant in the proceedings in the court of law because the permanent mortgage was of record. Every detail looking toward the successful rehabilitation of the corporation had been presented to the Court of Chancery and the Court of Chancery, exercising its discretion, dismissed the receiver and re-established the corporation, the mortgagor of the complainant-appellee.

In the case of *Hoover Steel Ball Co. v. Schaefer Ball Bearing Co.*, 105 Atl. 500, the situation was radically different from the case at bar. In that case there was a mortgage of all of its assets by an insolvent corporation to a mortgagee who *had actual knowledge of insolvency*.

In the case at bar the mortgagee not only had no notice of insolvency but was entitled to rely on the order of the Court of Chancery which re-vested title to its assets to the corporation, its mortgagor, that its mortgagor was solvent.

The appellant cites the language of Vice-Chancellor Lane on page 15 of his brief as follows:

“But it seems to be on the authority of *Cope v. Walton*, 77 N. J. Eq. 512, affirmed 79 Eq. 165, that at least it must appear, before a corporation, insolvent in the sense of laboring under a general inability to pay maturing obligations, can make, for a present advance, a valid pledge of its assets to a person have knowledge of the condition *that the pledge is in pursuance of some financial scheme which it's reasonable to suppose will result in placing the corporation in a position of solvency as contemplated by the statute*; and in this connection, I point out that there is a great distinction between a general inability to meet maturing obligations and a temporary embarrassment.”

We agree with the language of the Vice-Chancellor in that case because the facts show, first, that the corporation was not insolvent and, second, that the revesting of its title was part of a general plan to rehabilitate it.

In the case at bar, we have this situation:

1. That practically all of the funds of the \$85,000 mortgage had been advanced by the mortgagee to the mortgagor under a mortgage recorded eight months prior to the appointment of a receiver for the mortgagor and prior to Henry R. Isenberg Co., Inc., becoming a creditor of the mortgagor.
2. That there was a present consideration for the \$15,000 mortgage.
3. That the mortgagee had no notice of the alleged insolvency of the mortgagor.
4. That the corporation (the mortgagor) was not insolvent.

5. The corporation had been reconstituted with title to its assets freed from its debts by a valid order of the Court of Chancery and from which no appeal had ever been taken.

6. The dismissal of the receivership was part of a comprehensive plan to rehabilitate the corporation.

This brings this mortgage square within the saving provision of the statute and within the range of the decisions of this court and the Court of Chancery adjudicating a mortgage given under such circumstances as valid. See

Hoover Steel Ball Co. v. Schaefer Ball Bearing Co., 105 Atl. 500;

Flockhart Foundry Co. v. Cox Automatic Pipe Bending Co., 95 N. J. E. 382, affirmed by the Court of Errors and Appeals, 96 N. J. E. 396;

Regina Music Box Company v. F. G. Otto & Sons, et al., 65 N. J. E. 582, where the court said:

“But if the mortgagee advance money to an insolvent company, or to a company contemplating insolvency, and take a mortgage at the time of the making of the advance, then, *if he has no notice*, his security will stand.”

Was this corporation insolvent or contemplating insolvency when it

1. Submitted such a condition as induced the Court of Chancery to dismiss the receivership?
2. Procured an additional loan to enable it to complete the building?
3. Procured a permanent mortgage the funds of which were to be paid when the building was finished?

The answer is apparent that the corporation was neither insolvent nor contemplating insolvency. It contemplated a successful termination of its business affairs.

POINT IV.

The mortgagee is entitled to be reimbursed the moneys advanced for the completion of the building.

The first mortgage of the complainant in the sum of \$85,000 contained the following provision:

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

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

or to create independent contracts for such completion.

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

The mortgagee under this provision could have advanced the \$15,000 paid under the second mortgage and added it to the amount due under the first mortgage. This was a specific agreement between the mortgagor and the mortgagee, of which the mechanic's lien creditor had notice. Is the right of the mortgagee to protect its security and complete the building to be lessened merely because it advanced the money under the second mortgage rather than advancing it under the terms of the first mortgage? The Court below held in the following language:

“Furthermore complainant has a superior equity under its second mortgage. It was compelled to lay out the money to complete the building to protect the security of its first mortgage and the law incorporates the outlay as a lien. *Vanderhaise v. Hughes*, 13 N. J. Eq. 410; *Sea Coast Real Estate Co. v. American Timber Co.*, 89 N. J. Eq. 293. In these cases the mortgagees were in possession but the principle applies.”

We respectfully submit that this is an accurate statement of the law and is equitable in its application to the case at bar, since the mortgagee advanced the money for the sole purpose of enabling the corporation to complete the building, thereby protecting the security of its first mortgage.

POINT V.

The Order of the Court of Chancery should be affirmed.

Respectfully submitted,

SAMUEL ROESSLER,
Solicitor for Complainant-Appellee.

SAMUEL KAUFMAN,
Of Counsel.

POINT V.

The Court of the Court of Directors should be

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