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COMPLAINT.

Essex County Circuit Court

THE "WHITE" DOOR BED COMPANY, a corporation of the State of Illinois, *Plaintiff,* *vs.* U. S. MORTGAGE & TITLE GUARANTY CO., a corporation of New Jersey, and ACROPOLIS REALTY CO., a corporation, *Defendants.*	*Action at Law.* *Complaint.*

The plaintiff, a corporation of the State of Illinois, says that:

1. On or about May 25, 1926, the Acropolis Realty Co., was the owner of certain premises whereon the U. S. Mortgage & Title Guaranty Co., defendant, held a construction mortgage in the sum of three hundred seventy-five thousand ($375,000) dollars.

2. On or about May 25, 1926, the plaintiff entered into a contract with the said Acropolis Realty Co. to supply said Acropolis Realty Co. with merchandise for said premises for the sum of $22,612.50, said contract containing a clause that the said Acropolis Realty Co. shall furnish the plaintiff with a letter from the defendant, U. S. Mortgage & Title Guaranty Co., that said defendant, U. S. Mortgage & Title Guaranty Co., the mortgagee, will pay the plaintiff the sum of

$12,612.50 upon delivery and installation of the aforesaid merchandise.

3. On or about September 21, 1926, the defendant, U. S. Mortgage & Title Guaranty Co., delivered such a letter to the plaintiff, a copy of which is hereto attached and made a part hereof, and marked Exhibit A.

4. Plaintiff has delivered and installed the merchandise in accordance with the terms of the contract in reliance upon the aforesaid letter marked Exhibit A.

5. Plaintiff has demanded payment from the defendant, U. S. Mortgage & Title Guaranty Co., in accordance with the terms of said letter, but defendant, U. S. Mortgage & Title Guaranty Co., has failed and refused to pay said claim.

6. The entire sum of three hundred seventy-five thousand ($375,000) dollars secured by the aforesaid mortgage held by the defendant, U. S. Mortgage & Title Guaranty Co., has become due and payable to the defendant, Acropolis Realty Company, but defendant, U. S. Mortgage & Title Guaranty Co., has failed and refused to pay the plaintiff's claim.

Plaintiff demands as damages against the defendants the sum of $12,612.50, with interest from October 1, 1926, besides costs of suit.

HARRY STEINER,
Attorney for Plaintiff.

EXHIBIT A.

United States Mortgage & Title
Guaranty Company.
972 Broad Street,
Newark, New Jersey.
September 21, 1926.

Title No. 280
The "White" Door Bed Co.
#120 North Wells Street,
Chicago, Illinois.

Gentlemen:

This is to acknowledge receipt of an order issued by the Acropolis Realty Company on us, in your favor, for $12,612.50 to be paid to you direct out of the mortgage monies we have in our possession on a $375,000.00 loan extended by us to the Acropolis Loan extended by us to the Acropolis Realty Company.

We wish to advise that we will make payments direct to you, as requested in this order, but only when the money is forthwithcoming to the Acropolis Realty Company.

Very truly yours,

United States Mortgage and Title
Guaranty Company of New Jersey.
By Arthur Perseley

AP E P

ANSWER OF UNITED STATES MORTGAGE AND TITLE GUARANTY CO.

ESSEX COUNTY CIRCUIT COURT.

THE "WHITE" DOOR BED COMPANY, a corporation of the State of Illinois, *Plaintiff,* *vs.* U. S. MORTGAGE & TITLE GUARANTY CO., a corporation of the State of New Jersey, *Defendant.*	*Action at Law.*	*Answer.*

The answer of the United States Mortgage and Title Guaranty Company of New Jersey, defendant, a corporation of the State of New Jersey, having its principal office at Newark, New Jersey, shows:

1. This defendant admits the allegations of paragraph 1 of the complaint.

2. As to the allegations of paragraph 2 of the complaint, this defendant has not sufficient knowledge or information to form a belief.

3-4. This defendant denies the allegations of paragraphs 3 and 4 of the complaint.

5. As to the allegations of paragraph 5 of the complaint, this defendant admits that a demand for payment has been made of this defendant and payment refused by this defendant. This defendant denies the balance of the allegations of paragraph 5.

6. This defendant denies the allegations of paragraph 6.

This defendant denies that plaintiff is entitled to damages in the sum of $12,612.50, or any other sum, as against this defendant.

AFFIRMATIVE DEFENSES.

This defendant, by way of affirmative defense to the plaintiff's complaint, avers:

FIRST AFFIRMATIVE DEFENSE.

The amount claimed by plaintiff from this defendant represents a partial payment for goods contracted to be furnished by the plaintiff to Acropolis Realty Co., under a contract set up in paragraph 2 of the plaintiff's complaint, and in which contract plaintiff dealt with Acropolis Realty Co. and agreed to the furnishing of said goods in conformity with the terms and conditions upon which Acropolis Realty Co. obtained a mortgage loan from this defendant, notice of which loan was given to the plaintiff, both by the recording of this defendant's mortgage and by express mention in the contract set up in paragraph 2 of the complaint.

That the mortgage loan of this defendant to Acropolis Realty Co. was made upon the terms and conditions of a certain building loan agreement, notice of which was also given to the plaintiff by the recording of this defendant's mortgage and by express reference to said mortgage in the contract set up in paragraph 2 of the complaint.

That among other things, said building loan agreement provided that the materials to be furnished in the erection and construction of the

building covered by this defendant's mortgage should be in strict conformity with the rules and regulations of the Building Department of the City of East Orange and with the Building Code of the City of East Orange; and further provided that only such materials as were in conformity with the rules and regulations of the Building Department of the City of East Orange and with the Building Code of the City of East Orange, and were acceptable to the building authorities of the City of East Orange, should be paid for by this defendant.

That the materials alleged to have been furnished by the plaintiff, and part payment for which this action is commenced against this defendant, are not in conformity with the rules and regulations of the Building Department of the City of East Orange or with the Building Code of the City of East Orange, nor are they acceptable to the building authorities of the City of East Orange, and, on the contrary, the building authorities of the City of East Orange have directed their removal from the building covered by this defendant's mortgage, and said materials in fact have been removed and are no longer upon the premises covered by this defendant's mortgage.

For the reasons aforesaid, plaintiff should not have or maintain its action as against this defendant.

SECOND AFFIRMATIVE DEFENSE.

That on the 21st day of September, 1926, Acropolis Realty Co. gave to the plaintiff an order directed to this defendant, a true copy of which is annexed hereto and made a part of this answer, marked Schedule "I."

That in and by the terms of said order it was expressly provided that the sum of $12,-612.50, therein alleged to be due to the plaintiff from this defendant, should be paid only out of the moneys due Acropolis Reaity Co., and to become due Acropolis Realty Co. from this defendant under its mortgage loan upon the premises covered by this defendant's mortgage.

That by the terms of said mortgage, and the building loan agreement accompanying the same, moneys became due Acropolis Realty Co. only in payment for materials furnished to the building covered by this defendant's mortgage which were acceptable to the building authorities of the City of East Orange, and in conformity with the rules and regulations of the Building Department of the City of East Orange and with its building code.

That the materials alleged to have been furnished by the plaintiff to Acropolis Realty Co., were not in fact acceptable to the building authorities of the City of East Orange, nor were they in conformity with the rules and regulations of the Building Department of the City of East Orange or with the Building Code of the City of East Orange, but on the contrary the same were ordered removed from the building covered by this defendant's mortgage by the building authorities of the City of East Orange, and were in fact removed.

For the reasons aforesaid the plaintiff's action should be dismissed as against this defendant.

THIRD AFFIRMATIVE DEFENSE.

That by reason of the terms, conditions and limitations of the order mentioned in the next preceding affirmative defense, this defendant, if

obligated to the plaintiff at all, was only obligated to the payment of such of the funds represented by the proceeds of this defendant's mortgage loan as were not required for the payment of valid labor and material claims for labor and materials actually furnished to the building covered by this defendant's mortgage, and which were furnished in conformity with the plans and specifications and building loan agreement and acceptable to the building authorities of the City of East Orange, and as remained in the hands of this defendant at the time of the delivery by the plaintiff to said building of materials conforming with the requirements of this defendant's building loan agreement.

That the materials furnished by the plaintiff did not in fact conform to the provisions of this defendant's building loan agreement, and that, therefore, this defendant did not in fact become obligated to the plaintiff.

That for the reason herein asserted the plaintiff's action should be dismissed as against this defendant.

FOURTH AFFIRMATIVE DEFENSE.

That the claim of the plaintiff against this defendant is for materials furnished to Acropolis Realty Co. and to be used in the building covered by this defendant's mortgage.

That in fact no materials have been furnished by the plaintiff to Acropolis Realty Co., but that on the contrary, and in accordance with the terms and provisions of the contract between the plaintiff and Acropolis Realty Co., set up in paragraph 2 of the complaint, said materials are and remain the sole property of the plaintiff.

That for the reason herein asserted the plaintiff's action should not lie against this defendant.

FIFTH AFFIRMATIVE DEFENSE.

That under the alleged letter attached to the plaintiff's complaint it is expressly provided, that the obligation of this defendant, if any, to the plaintiff, arises only when money is forthcoming to the owner out of the proceeds of the mortgage loan of this defendant to Acropolis Realty Co.

Under the terms of this defendant's mortgage and of the building loan agreement, with notice of both of which plaintiff dealt with Acropolis Realty Co. and this defendant, money is not forthcoming to Acropolis Realty Co., out of the proceeds of this defendant's mortgage loan, until such time as Acropolis Realty Co. has fully liquidated all valid claims for labor and materials used in the complete erection of the building covered by this defendant's mortgage.

That Acropolis Realty Co. has not fully liquidated all valid claims for labor and materials used in the complete erection of the building covered by this defendant's mortgage.

That for the reason urged in this affirmative defense the plaintiff's suit should be dismissed as against this defendant.

SIXTH AFFIRMATIVE DEFENSE.

This defendant, by way of further affirmative defense to the plaintiff's complaint, avers:

That the plaintiff has been fully paid the sums due it under its alleged contract with

Acropolis Realty Co., set up in paragraph 2 of the complaint.

SAMUEL D. WILLIAMS,
Attorney for Defendant, United States Mortgage & Title Guaranty Company of New Jersey.

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SCHEDULE "I."

WE, ACROPOLIS REALTY CO., a corporation duly organized under the Laws of the State of New Jersey, do hereby, on this 21st day of September, 1926, assign, transfer and set-over unto the "White" Door Bed Company, 130 North Wells Street, Chicago, Illinois, a sum equal to $12612.50, out of the moneys due us and to become due to us from the United States Mortgage & Title Guaranty Company of New Jersey, under its mortgage loan in the amount of $375,000.00 granted to us upon our apartment building at the Southwest corner of North Harrison and William Streets, East Orange, N. J. and we hereby authorize and direct the said United States Mortgage & Title Guaranty Company of New Jersey to pay unto the said "White" Door Bed Company, the said sum of $12612.50, out of said mortgage money, on our behalf, upon the delivery of cabinets and ranges to our aforesaid apartment building and upon the installation of beds and doors in accordance with a contract entered into between us and the "White" Door Bed Company, dated the 25th day of May, 1926.

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IN WITNESS WHEREOF, we have executed this assignment the day and year first above written.

ACROPOLIS REALTY CO.,

By DAVID ROTHBARD,
President.

Attest:

GERTRUDE ARONSTEIN,
Ass't Secretary.

AMENDMENT TO ANSWER.

ESSEX COUNTY CIRCUIT COURT.

THE "WHITE" DOOR BED COMPANY, a corporation of the State of Illinois, *Plaintiff,*	*Action at Law.*
vs.	
U. S. MORTGAGE & TITLE GUARANTY CO., a corporation of the State of New Jersey, *Defendant.*	*Amendment to Answer.*

The defendant, by way of further affirmative defense to the plaintiff's complaint, avers:

That the letter dated September 21, 1926, annexed to the plaintiff's complaint, is not the letter of this defendant; nor was it written by this defendant, nor by one with authority to write it from this defendant; nor by one having authority to undertake or agree on behalf of this defendant, as in said complaint or in said letter alleged; and that, therefore, said letter has no binding effect upon this defendant.

SAMUEL D. WILLIAMS,
Attorney for Defendant.

REPLY.

Filed September 23, 1927.

ESSEX COUNTY CIRCUIT COURT.

THE "WHITE" DOOR BED COMPANY, a corporation of the State of Illinois, *Plaintiff,* *vs.* U. S. MORTGAGE & TITLE GUARANTY CO., a corporation of the State of New Jersey and ACROPOLIS REALTY CO., a corporation, *Defendants.*	*Action at Law.* *Reply.*

Plaintiff in reply to the affirmative defenses filed by the defendant, U. S. Mortgage & Title Guaranty Co., says that it says that it denies every allegation contained therein.

HARRY STEINER,
Attorney of Plaintiff.

JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

43442

THE "WHITE" DOOR BED COMPANY, a corporation of the State of Illinois,
Plaintiff,

vs.

U. S. MORTGAGE & TITLE GUARANTY Co., a corporation of New Jersey, and ACROPOLIS REALTY Co., a corporation,
Defendants,

Action at Law.

On Verdict by a Jury.

Judgment entered May Entered May 31, 1928.

Damages	$13,459.56
Costs	96.92
Totals	$13,556.48

This action was tried before Judge Nelson Y. Dungan with a jury at the Essex County Circuit Court on May 31, 1928.

The cause having been heard and submitted to the jury, they returned their verdict as follows:

They find in favor of the plaintiff, The "White" Door Bed Co., a corporation of the State of Illinois, and against the defendant, U. S. Mortgage & Title Guaranty Co., a corporation of N. J., for the sum of thirteen thousand four hundred fifty-nine dollars and fifty-four cents ($13,459.56) damage.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of thirteen

thousand four hundred fifty-nine dollars and fifty-six cents ($13,459.56) damage and costs ninety-six dollars and ninety-two cents, making in the whole the sum of thirteen thousand five hundred fifty-six dollars and forty-eight cents.

Judgment entered and signed May 31, 1928.

WILLIAM S. GUMMERE,
Judge.

JOHN H. SCOTT,
Clerk.

Book 104 Circuit Court Judgments, page 595.

ESSEX COUNTY CLERK'S OFFICE.

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

I, JOHN H. SCOTT, Clerk of the County of Essex in the State of New Jersey, Do HEREBY CERTIFY that the foregoing is a true and correct copy of all the records in the case of the "White" Door Bed Company, a corporation, plaintiff vs. U. S. Mortgage & Title Guaranty Co., *et als.*, together with a copy of the judgment record entered in Book 104, Circuit Court Judgments, page 595, prepared for removal to the Court of Errors and Appeals, and the same is taken from and compared with original copies of all records on file in my office and as the same now remains on the files of said office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said county at Newark, N. J., this 26th day of June, A. D., 1928.

(SEAL)

JOHN H. SCOTT,
Clerk.

NOTICE OF APPEAL.

Filed June 12, 1928.

ESSEX COUNTY CIRCUIT COURT.

THE "WHITE" DOOR BED COMPANY, a corporation of the State of Illinois, *Plaintiff,* *vs.* U. S. MORTGAGE & TITLE GUARANTY CO., a corporation of the State of New Jersey, *Defendant.*	*Action at Law.* *Notice of Appeal.*

To Harry Steiner, attorney of plaintiff:

SIR:

PLEASE TAKE NOTICE, that the defendant in the above-entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the grounds to be specified in the reasons to be hereafter served.

Respectfully yours,

SAMUEL WILLIAMS,
Attorney for Defendant.

Service of the within notice of appeal is hereby acknowledged this 11th day of June, 1928.

HARRY STEINER,
Attorney for Plaintiff.

GROUNDS OF APPEAL.

ESSEX COUNTY CIRCUIT COURT.

THE "WHITE" DOOR BED COMPANY, a corporation of the State of Illinois, *Plaintiff-Appellee,* *vs.* UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY OF NEW JERSEY and ACROPOLIS REALTY COMPANY, *Defendant,* *and* UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY OF NEW JERSEY, *Defendant-Appellant.*	*Action at Law.* *Grounds of Appeal.*

To Harry Steiner, Esq., attorney for plaintiff-appellee:

TAKE NOTICE, that the following are the grounds of the appeal taken by the United States Mortgage and Title Guaranty Company of New Jersey from the whole of the judgment entered in this cause:

1. The trial court admitted in evidence, over objection, a letter purported to have been written by the United States Mortgage and Title Guaranty Company of New Jersey to plaintiff, to which no number appears to have been given, but which, apparently, should be Exhibit P. 3.

2. Because the trial court permitted the following question to be asked and answered over objection:

> "Q What I want to know is, had they been prepared, how much would it cost to have put the beds on? A I would say it would cost probably 50 cents apiece for beds, 75 cents at the outside."

3. Because the trial court refused to permit the following question to be asked of plaintiff's witness, Bancroft, on cross examination:

> "Q You know that the building authorities of the City of East Orange would not permit the installation of that cabinet as it is shown there. Is that right?"

4. Because the trial court refused to permit the following question to be asked of plaintiff's said witness:

> "Q Your company has a chattel mortgage on this?"

5. Because the trial court refused to permit the following question to be asked of plaintiff's said witness:

> "Q Have you filed a lien claim?"

6. Because the trial court refused to permit the following question to be asked of plaintiff's said witness:

> "Q What did you have to do to fabricate the two units that were in stock?"

7. Because the trial court refused to permit the following question to be asked of plaintiff's witness, Perselay, on cross examination:

> "Q And in making these payments on this loan, to which your attention has been directed by Mr. Newman, what was the form of the payment? I mean, how was the check made?"

8. Because the trial court refused to permit the following question to be asked of plaintiff's said witness:

"Q Did you ever draw any checks? In fact, did you ever make any order?"

9. Because the trial court refused to grant the motion, on behalf of the defendant-appellant, that the plaintiff-appellee be non-suited as to defendant-appellant.

10. Because the trial court refused to permit the witness, Blanchard, to be asked the following question:

"Q Was the materials enumerated in the contract between Acropolis and the 'White' Door Company delivered?"

11. Because the trial court refused to permit the following questions to be asked of plaintiff's said witness:

"Q How were they drawn? A All checks were made payable to the Acropolis.

Objected to.

Q After the building was finished?

Objection sustained."

13. Because the trial court refused to permit the following question to be asked of plaintiff's said witness:

"Q As to the time, as of March 1, apparently 1927, when the last payment was made on this mortgage loan to the Acropolis Realty Company, was the building completed?"

14. Because the trial court refused to permit the following question to be asked of plaintiff's said witness:

"Q At that time were there, to your knowledge, any unpaid material or labor bills or lien claims on the building?"

15. Because the trial court refused to permit the following question to be asked of plaintiff's said witness:

"Q Do you know why they were finishing the building?"

16. Because the trial court refused to permit the following question to be asked of plaintiff's said witness:

"Q Was the proceeds of the mortgage sufficient to complete the building?"

17. Because the trial court refused to admit in evidence a mortgage made by Acropolis Realty Company to defendant-appellant, marked D. 1 for identification.

18. Because the trial court refused to admit in evidence an agreement between the Acropolis Realty Company and the defendant-appellant with respect to the mortgage loan and the distribution of the money to be loaned.

19. Because the trial court refused to permit the witness, William H. Kessler, assistant building inspector of East Orange, to testify that the materials mentioned in Exhibit D. 1, the contract between the "White" Door Bed Company and the Acropolis Realty Company, upon which the suit is founded, were never approved in the building plans for the building contemplated in the agreement of building marked D. 1 for identification; that they were never approved by the building department, and installation thereof was prohibited as being contrary to the Building Code of East Orange, and that they were not, in fact, installed or used, with the exception of one sample upon which the ruling of the inspector was made, and that said sample was then taken out and removed from the building.

Grounds of Appeal.

20. Because the trial court refused to permit the witness, Saul Cohn, to be asked or answer the following question:

"Q What was that?"

referring to the established policy of the defendant-appellant with respect to construction loans, with reference to assignments or orders.

21. Because the trial court refused to permit the witness, Perselay, to be asked the following question:

"Q Were there any lien claims on this building after December (September) 21, 1926, before the loan of the United States Mortgage & Title Guaranty Company was all paid out?"

22. Because the trial court refused to permit the said witness to be asked the following question:

"Q Can you say during that period, from September 21 (1926), how many lien claim suits there were satisfied?"

23. Because the trial court refused to direct the verdict in favor of defendant-appellant.

24. Because the trial court charged the jury as follows:

"I think a proper construction of those words is, that if, after the time this letter was written funds from the mortgage loan became available, because of the progress of that building to be applied to that building, out of those funds this $12,612.50 should be paid, after and when the contract of the plaintiff had been fully or substantially performed * * *"

25. Because the trial court charged the jury as follows:

"* * * And if and when that situation arose, then it became the duty of the defend-

ant, under letter of September 21st, for the defendant to apply to the plaintiff's bill that amount, and its failure to do that made it liable for that amount, with interest, unless the parties themselves gave a different construction of this letter."

26. Because the trial court charged the jury as follows:

"If you find in this case that the plaintiff performed its contract with the Acropolis, then it was entitled to recover from the Acropolis Realty Company the full amount of the contract; or, if it was prevented from performing this contract by the failure of the Acropolis to furnish the openings and doors provided for, but furnished the material, it would be entitled to recover from the Acropolis the full amount, or if not permitted by the Acropolis, and it has substantially performed its contract except the putting up the beds on the doors, then it might recover from the Acropolis the contract price, less what it would cost to install those beds on the doors, and if there was money available in the hands of the U. S. Mortgage Title & Guaranty Company, or to use the words of the contract, 'If there was money forthcoming to the Acropolis Realty Company from the United States Mortgage & Title Guaranty Company' subsequent to the date of this letter, then it was the duty of the defendant to hold a sufficient amount to pay to plaintiff whatever might be due, that is, $12,612.50, or such portion thereon as would pay the plaintiff for substantial compliance with the contract * * *"

27. Because the trial court, at the request of plaintiff-appellee, charged the jury as follows:

"1. If the jury find from the evidence that the United States Title & Mortgage Co. voluntarily placed Arthur Perselay in such a situation that the plaintiff company with its knowledge of business usages, and the

nature of the business in hand, was justified in presuming that Perselay had authority to write the letter of September 21, 1926, accepting the order to pay the plaintiff the sum of $12,612.50, then the act of Perselay was the act of the United States Title & Mortgage Co., and said company is bound thereby."

28. Because the trial court, at the request of plaintiff-appellee, charged the jury as follows:

"3. If the contract of the plaintiff was performed according to its terms, its right to recover is not affected by the fact that the Building Department of the City of East Orange refused to approve of the installation of the kitchen ranges, as under plaintiff's contract with the Acropolis Realty Co., it was not obligated to install the ranges, but merely to deliver same."

29. Because the trial court, at the request of plaintiff-appellee, charged the jury as follows:

"4. The plaintiff is not bound by the terms of said mortgage executed by the Acropolis Realty Co. to the U. S. Mortgage and Title Company, respecting the obligations to conform with the rules, restrictions, regulations of the executive, administrative or judicial powers having charge of the regulations or supervision of building construction in the City of East Orange, the condition of said mortgage not forming a part of the agreement between the White Door Bed Company and the Acropolis Realty Co."

30. Because the trial court, at the request of plaintiff-appellee, charged the jury as follows:

"5. The provisions of the said mortgage executed by the Acropolis Realty Co., to the U. S. Mortgage and Title Guaranty Company do not in any manner bind the plaintiff in this instance, it being a separate agreement between the Acropolis Realty Co. and the

U. S. Mortgage and Title Guaranty Company, the plaintiff being in nowise a party thereto."

31. Because the trial court charged the jury as follows:

"* * * And on December 2nd, after the notice had been received from the Acropolis Realty Company that the work had been completed, it is an admitted fact that over $12,700 claimed was (in) the treasury of the U. S. Company and has never been paid upon this mortgage."

32. Because the trial court charged the jury as follows:

"* * * if we rely upon the authority which Ward gave to Perselay, it is necessary, first, to find that Mr. Ward had the authority, or apparent authority, to authorize Ward to write this letter."

33. Because the trial court charged the jury as follows:

"It may not have been that Mr. Perselay had the authority, but if Mr. Ward had the authority to sign this letter, and you find it to be a fact that Mr. Ward sent Mr. Bancroft to Mr. Perselay with the statement that Mr. Bancroft said he did, then that might confer upon Mr. Perselay the authority to write a letter which he otherwise might not have had."

34. Because the trial court refused the request of defendant-appellant to charge the jury as follows:

"5. That the plaintiff accepted from the owner the order P. 2, and from this defendant the letter P. 3 with express notice of the terms and conditions of the mortgage agreement between this defendant and the owner, and was by the terms of its contract, with the owners and of the order and the

letter bound by those terms and took nothing that the owner did not have or could not take."

35. Because the trial court refused the request of defendant-appellant to charge the jury as follows:

"6. That if the owner under its mortgage agreement with this defendant could not require of this defendant that this defendant pay for materials not conforming to the building code of East Orange, and the jury is satisfied that all or any part of materials furnished by the plaintiff were not such as to comply with that building code, then the plaintiff cannot recover from this defendant."

36. Because the trial court refused the request of defendant-appellant to charge the jury as follows:

"8. That if under its mortgage agreement with this defendant the owner could not require of this defendant that it pay to the owner any part of the proceeds of this defendant's mortgage loan, or if under the terms of said mortgage no part of the proceeds of said loan became due or was forthcoming to the owner until the building of the owner was completed and fully paid for—freed of liens or claims for materials or labor furnished—and if the jury is satisfied that said building was never completed by the owner and was never freed of liens or claims before the proceeds of this defendant's mortgage loan was exhausted, then the plaintiff cannot recover as against this defendant."

37. Because the trial court refused the request of defendant-appellant to charge the jury as follows:

"9. That unless the jury is satisfied that plaintiff did not manufacture all or any

part of the materials alleged by it to have been furnished until after the date of the letter P. 3, Sept. 21, 1926, then the plaintiff cannot recover for the undertaking of this defendant would lack consideration."

38. Because the trial court refused the request of defendant-appellant to charge the jury as follows:

"10. That unless the jury is satisfied that none of the materials of the plaintiff were delivered prior to September 21, 1926, the date of the letter P. 3, there can be no recovery as against this defendant, for in such case the undertaking of this defendant would lack consideration."

39. Because the trial court refused the request of defendant-appellant to charge the jury as follows:

"11. If the plaintiff has failed to satisfy the jury that it has in every respect performed the terms of its contract with Acropolis Realty Co., owner, there can be no recovery as against this defendant."

40. Because the trial court refused the request of defendant-appellant to charge the jury as follows:

"12. The failure (if any) of the owner to provide door openings or doors for the hanging of the beds as provided in the contract, does not relieve the plaintiff as against this defendant of the obligation of performing all things provided in its order P. 2—the acts or omissions of the owner not being binding upon this defendant and the plaintiff being bound as respects this defendant to the exact terms and conditions of the order which it either drew or accepted from the owner and which underlies and is the basis for the letter P. 3 upon which it sues this defendant."

Grounds of Appeal.

41. Because the trial court refused the request of defendant-appellant to charge the jury as follows:

> "13. Payments made by the defendant to materialmen or laborers who had furnished material or performed labor for or in the erection of the building in question in order to procure the completion of said building do not constitute money 'forthcoming to the Acropolis Realty Co.,' under the terms of Exhibit P. 3."

Respectfully,

REED & REYNOLDS,
Attorneys for Defendant-Appellant.

TESTIMONY.

ESSEX COUNTY CIRCUIT COURT.

Tuesday, May 29, 1928.

THE "WHITE" DOOR BED CO., of the State of Illinois, *vs.* U. S. MORTGAGE & TITLE GUARANTY CO., a corporation of the State of New Jersey.	*Action at Law.*

Before Hon. Nelson Y. Dungan, *J.*, and a jury.

For the plaintiff appears Harry Steiner; Jacob L. Newman, of counsel.

For the defendant appear Samuel D. Williams and Reed & Reynolds (by Hugh B. Reed).

(A jury is called and sworn.)

Mr. Newman opens in behalf of plaintiff.

Mr. Williams opens in behalf of defendant.

FRED WILLIAM BANCROFT, JR., sworn in behalf of plaintiff.

Direct examination by Mr. Newman.

Q Where do you reside? A New York City.

Q Are you connected with the White Door Bed Company? A I am.

Q How long have you been connected with that company? A Five years.

Q And you were then connected with it in the month of May, 1926? A Yes, sir.

Q (Showing witness paper.) I show you contract between the Acropolis Realty Company and the White Door Bed Company and ask you whether that signature of Mr. White of the White Door Bed Company is his signature? A Yes, sir.

Q And is this the signature of Morris Melz? A Yes, sir.

Q Was that contract entered into between the parties? A Yes, sir; dated May 25, 1926, between the White Door Bed Company and the Acropolis Realty Company.

Mr. Newman: I offer that in evidence.
(Marked Exhibit P. 1.)

Q After that contract was entered into, and directing your attention to the clause under the word "terms": "Twelve thousand six hundred and twelve dollars and fifty cents is to be paid upon delivery of cabinets and ranges to building and the installation of beds on doors provided by the buyer. Seller shall not be obligated to deliver until buyer shall furnish to the seller a letter from the mortgagee (U. S. Mortgage & Title Guarantee Co.), that the mortgagee will pay to the buyer said sum of $12,612.50 upon delivery of cabinets and ranges and the installation of the beds as above." What did you do, if anything, bearing that in mind? A I secured an order from the Acropolis Realty Company against the loan of the United States Mortgage Title & Guaranty Company.

Q What did you have with you at the time you went to the U. S. Title Mortgage & Guaranty

Company? A I had an order by their president and witnessed, I believe, an order against the loan for $12,000.

Q (Showing witness paper.) Is this the order you refer to dated September, 1926? A Yes.

Mr. Newman: I offer in evidence an order made by the Acropolis Realty Company on the 21st day of September, 1926.

(Marked Exhibit P. 2.)

A I went to the office of the U. S. Mortgage & Title Guaranty Company with that order and my contract and a copy of it, and I asked Mr. Saul Cohn, who they told me was in Europe. Another man standing there was a Mr. Ward.

Q What in his office? A I believe he is vice-president. Mr. Ward read my contract and order and said it was nothing that he could attend to.

Q Just repeat that? A Mr. Ward read the contract through and the order against the loan and he said Mr. Perselay would give me the order.

Q He said that Mr. Perselay would give you the order that you required? A Yes, sir.

Q Did he introduce you then to Mr. Perselay? A No, he directed me a way to get there. It was out in the back of the offices there.

Q And he made this statement to you after you had shown him your order and he had read the contract? A Yes, sir.

Q (Showing witness paper.) Do you know whether this is a copy of the contract that you left there at that time?

Objected to.

Q Is that the contract that you had with you, would you say? A I won't say that is the contract. I will say it is a copy, or one like it.

Q After you had this conversation with Mr. Ward, did you see Mr. Perselay? A Yes, sir.

Q What did you do with your contract and order? A I showed it to Mr. Perselay and told him that Mr. Ward had told me that he would give me a letter and order explaining that order.

Q (Showing witness paper.) I show you a letter dated September 21, 1926, and ask you whether Mr. Perselay gave you that order? A He did.

Mr. Williams: I object to the characterization of that as an order.

Q At that time, what did you do with the contract and order dated May 25th, with the Acropolis Realty Company? A They took the order. I won't say they took the contract, but they said they had it in their files.

Q He said he had it locked up in their files? A Yes, sir.

Mr. Newman: I offer in evidence this letter dated September 21, 1928.

Mr. Williams: I object to this letter insofar as it is offered for the purpose of binding the mortgage company, the defendant, on the ground that Perselay, who wrote such a letter, had not the authority. In other words, I don't deny that Perselay wrote the letter, signed it, that that is the letter.

The Court: I think, as far as the admission is concerned, it now appears that the

company, in the case where a man comes in and asks for the president, and he is not there, and he is told to consult Mr. Perselay, vice-president, that that is in the line of their business.

Mr. Williams: I don't concede that an acceptance of this paper is any part of the business of the mortgage company. I don't think it would be part of their business because they would be putting one mortgage over another. It was money that was due to the builders, which was the mortgagee, and I submit that the loan was not made to the owner, that the mortgage was made to the owner.

The Court: (After argument.) I will overrule the objection and admit the letter.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q After that contract was drawn was it performed according to its terms?

Objected to as a conclusion.

The Court: That is nothing that appears that this witness knew anything about the transactions, except these negotiations with the U. S. Mortgage & Title Guaranty Company.

Q Did you go up to the building where this work was to be done in accordance with the terms of the contract? A I did, several times.

Q Can you say of your own knowledge that the goods called for in the contract was installed?

Objected to.

The Court: It may be answered.

Q Can you say, of your own knowledge, whether the equipment was installed in accordance with the terms of the contract? A Yes, sir.

Q You say the equipment was installed according to the terms of the contract? A Yes, sir.

Q The specifications provided, according to this contract, that you were to furnish seventy-two white china closets. Did you furnish them? A Delivered them on the sidewalk, as per contract.

Q It also provided that you were to put in twenty-seven white dressing cabinets? A Those were delivered, according to the contract.

Q And it provided that you were to put in seventy-two buffet cabinets? A Yes, sir.

Q And further provided that you were to deliver seventy-two white door beds? A Yes.

Q Did that include installation? A No, sir; everything was done with the exception of the installation of the beds.

Q Why were the beds not installed? A The doors were completely ready.

Q Did the contract provide the doors should be completely ready? A The contract provided that the doors should be erected.

Q Will you point out in the contract where it so provides? A It says, "Upon delivery of cabinets and ranges to the building and the installation of beds and doors provided by the buyer."

Q And those doors were not provided by the buyer; is that it?

Objected to as leading.

Q Tell us why you couldn't install the beds? A The doors were not erected.

Q And who were to erect the doors? A The Acropolis Realty Company.

Q Was everything else in connection with the contract, as stated therein, performed? A It was.

Q Can you tell us what it is attached to the erection of the doors and the beds? A It called for deliveries to the building and after all the hardware and doors were to be put in.

Q I am trying to ascertain. You mean that it would be— A It says "Prices including delivery of beds and openings for same prepared by buyer."

Q Were the openings prepared? A They were not.

Q What I want to know is, had they been prepared, how much would it cost to have put the beds on?

Objected to.

Objection overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A I would say it would cost probably fifty cents apiece for beds—seventy-five at the outside.

Mr. Newman: I call for letter dated November 30, 1926, directed to your company by the bed company.

Mr. Williams: I have made a search for that. I can give you a copy.

Saul Cohn, direct.

Q (Showing witness paper.) I show you a letter dated November 30, 1926, and ask you whether you know that letter was written to the U. S. Mortgage & Title Guaranty Company? A Yes, sir.

Q That is a correct copy, carbon copy? A Yes, sir. I know the individual who wrote that letter. Here is a reply, "Replying to your letter of November 30,"—

Objected to.

Objection sustained.

Q I didn't ask you that. Do you know whether it was received by the U. S. Mortgage & Title Guaranty Company? A I know that they replied to it.

Q (Showing witness another paper.) I show you a letter of December 2, 1926, and ask you whether that letter was received by the White Company? A Yes, sir.

(The paper referred to is offered in evidence and marked Exhibit P. 4.)

Mr. Newman: May I withdraw this witness to prove this letter?

The Court: Yes.

(The witness is temporarily withdrawn.)

SAUL COHN, sworn in behalf of plaintiff.

Direct examination by Mr. Newman.

Q You are Vice-president and General Manager of the U. S. Mortgage & Title Guaranty Company? A I am.

Saul Cohn, direct.

Q (Showing witness paper.) I show you a letter dated December 2, 1926, and ask you if you replied to a letter received from the White Company dated November 13, 1926? A This letter indicates it.

Q (Showing witness another paper.) I show you a carbon copy of a letter dated November 13, 1926, and ask you if that is a copy of the letter you refer to? A I believe it is. I will hesitate to say I recognize it. It must have been.

(The letter referred to is offered in evidence and marked Exhibit P. 5.)

Q Mr. Cohn, I show you a letter dated December 13, 1926, signed by you as Vice-president in which you refer to a letter of December 6th. That is your letter, of course? A Yes.

Q (Showing witness another paper.) I show you a carbon copy of a letter dated December 6th to your company, and ask you whether you recall replying to that letter of December 13th, and, to the best of your recollection, that is a copy of the letter you received? A I am sure that is the letter I dictated—that is, the letter of December 13th. It is very hard for me to say.

Q What is your best judgment on the matter? A I receive so many letters.

Q But you refer to this letter? A It would seem that is what I refer to.

(The letter referred to is offered in evidence and marked Exhibit P. 6.)

Cross examination waived.

FRED WILLIAM BANCROFT, Jr., resumes the stand.

Direct examination (continued) by Mr. Newman.

Q Has any part of this contract price been paid? A Not one cent.

Cross examination by Mr. Williams.

Q Your contract with the White Door Company was executed when? A The actual date of the signing—I couldn't tell you the date.

Q You have the contract there? A That doesn't prove its actual signing of the contract. This is dated the 25th day of May, 1926, but I can't say it was signed on that date.

Q Was it or wasn't it? A I can't tell you.

Q Was that contract executed on the 25th day of May? A I don't know.

Q You were there? A I certainly was.

Q Can you say why you are uncertain about the date of its execution? A It is a matter of a couple of years ago.

Q There is no certainty about the date when you received this letter of September 21st? A There is the date on it.

Q There is the date on it? A This is entirely out of my mind.

Q There is a date on the contract? A My signature is not on the contract.

Q And there is a signature on the letter of September 21st, is there not? A Yes, sir.

Q And you said that you could remember the date on it because the date was on it. Now, I call your attention to the fact that this letter bears date the 25th of May, and ask you if that

does not bring to your mind that date? A It was very close to it.

Q You were there when it was executed? A Yes, sir.

Q Do you know this to be the original that was left with the Acropolis Realty Company? A Yes, sir; that is the original.

Q And that was left with the Acropolis Realty Company? A I don't know that it was the Acropolis Realty Company—had two copies.

Q Did you take your copy away? A We make copies of other contracts.

Q You took your copy away? A I always take a signed copy.

Q Did you take a copy of this contract with you? A Yes, sir.

Q Did you leave a copy with the Acropolis Realty Company? A Two copies.

Q It was executed in Mr. Rothbard's office in the Military Park building? A That is right.

Q What was your connection with the White Door Bed Company on the 25th of May, 1926? A I was a selling representative for Mr. Charles C. White.

Q And who was Mr. Charles C. White with reference to the White Door Bed Company? A Mr. Charles C. White is the inventor of the White equipment and sales agent in New York and New Jersey of the White Company's goods.

Q So you represented in New Jersey the White Door Bed Company; is that right? A Yes, sir.

Q And you were negotiating this contract with the Acropolis? A Not entirely.

Q Did anybody else? A Mr. White.

Q You were present when the contract was executed? A I was.

Q Were you familiar with all the details of the contract? A Yes, sir.

Q For how long prior to the executing of this contract had you been representing the sales agent of the White Door Bed Company? A About two years.

Q You knew at the time this contract was executed that the U. S. Mortgage & Title Guaranty Company had a mortgage on this property, didn't you? A I did.

Q And that is recited in the contract, isn't it? A That is recited in the contract, yes, sir.

Q Did you ever look at that mortgage? A No, sir.

Q You never examined it? A No, sir.

Q Up to the time when you have spoken of, September 21, 1926, had you ever been to the office of the mortgage company? A No, sir.

Q You made no attempt to familiarize yourself with the terms of the mortgage? A No.

Q Were you alone when you went to the mortgage company office? A I was.

Q What sort of a looking gentleman is Mr. Ward? A He is a rather tall man, with gray hair.

Q Had you ever met him before? A I had not.

Q How do you know that it was Mr. Ward? A He left a desk with a name on, if I recall it, "Mr. Ward."

Q Is that the only basis for your statement of declaring you talked to Mr. Ward? A No, sir; I asked him after what his name was.

Q And he said his name was Ward? A Yes, sir.

Q You had previously seen one of these little desk plates? A That is my memory. I have not been there in a couple of years.

Q How long were you at the U. S. Mortgage & Title Guaranty Company? A Possibly fifteen minutes.

Q And you said Mr. Ward directed you where to go to the office of Mr. Perselay in the building? A Yes, sir.

Q Where did you find him? A He said to go out in the corridor and go to the back door of the corridor.

Q Where did you go to find Mr. Perselay? A In the rear of the offices where Mr. Ward is located, a separate space in the back.

Q Had you ever seen him before? A No, sir.

Q Just what did you say to Mr. Ward when you introduced yourself? A I gave Mr. Ward my card, showed him my order and contract, and told him I wanted to file this order and get an agreement to pass that money.

Q You wanted to file an order and an agreement to pay that money? A The $12,000 mentioned in the order.

Q You are speaking now with reference to the order, P. 2? A That is right.

Q Did you ask Mr. Ward whether he knew anything about the contract or the job, the building? A No, sir.

Q Mr. Ward said, as I recollect—you started to say that he didn't know anything about these matters about which you approached him, that is true, isn't it? A No, I don't think so.

Q Isn't that the reason he referred you to Mr. Perselay? A No, sir—but you say it is true—

and he said that Mr. Perselay would take care of it.

Q Didn't he say that it was a matter that he didn't have any knowledge about at all? A No, sir.

Q Didn't he say it is something that he didn't know about? A No, sir.

Q Didn't he say that he had never seen this contract before? A No; he didn't make any statement to that effect.

Q You say that he read the contract? A He looked the contract through. I didn't say he read it verbatim—probably he didn't.

Q Didn't you say that he looked at the contract? A I will say that he looked at it—that he read it.

Q Didn't you say on your direct examination that Mr. Ward read the contract? A If you say he read it, it is in the record.

Q Do you mean to say all of it? A No, sir.

Q You mean to say that he didn't read the contract in detail, but P. 2 he read in detail? A Yes.

Q Which did he read first? A He read the order first.

Q You said you didn't have anyone with you? A No, sir.

Q Did he? A No, sir, he came up to the counter.

Q He was all alone? A There was a lot of men in the office. He came up to the counter. There wasn't anybody standing with him, no, sir.

Q As far as he was concerned he was alone and there were other people in the back office? A Yes, sir.

Q After he finished reading the order did he say anything to you about it? A Yes, sir.

Q What did he say? A He said, "I will send you to Mr. Perselay, he will give you the letter that you require."

Q Had you required a letter? A I had.

Q What was the form of your requisition for a letter? A I gave him this letter of assignment and told him I wanted it, accepting it, and passing the money.

Q Who dictated P. 3? A Which is P. 3?

The Court: That is a letter you got from Mr. Perselay.

The Witness: Mr. Perselay apparently dictated that.

Q You say that he told you that Perselay would give you that letter after he had read the order. Why did you then read the contract? A I beg pardon?

Q You went down there to get a letter on the order, didn't you? A I did.

Q And you said Mr. Ward read the order and told you you could have the letter? A He told me that Mr. Perselay would give it to me.

Q I ask you why you let him read the contract? A They are not attached to each other. This is something that I just got from Mr. Rothbard.

Q How long did he stand reading the contract? A Probably five minutes.

Q Did he go back to Perselay with you? A He didn't.

Q Did you introduce yourself to Perselay? A I did.

Fred William Bancroft, Jr., cross.

By the Court.

Q Did you know Mr. Perselay? A I did.

Q Did you know Mr. Perselay? A I went to talk with Mr. Perselay. Someone said it was Mr. Perselay and I presume it was. His name was on the door and one or two others, I believe.

By Mr. Williams.

Q What did you say to him? A I showed him the papers and the contract and he said that he had a copy of it and told us that Mr. Ward had been over it, Mr. Ward had been over it and given us the letter to pay over the money.

Q You say he has been over it—what do you mean? A He had been over it, had it in my contract.

Q What did Mr. Perselay say? A Mr. Perselay said he would give me the letter and called the girl in to dictate it.

Q What did he say? A He read the order through. He said he had a copy of the contract and I think he left the office and then came back and then dictated the letter.

Q Did he say anything else? A A couple of chance remarks, but I can't recall.

By the Court.

Q Did you ask him for the guarantee? A Yes.

By Mr. Williams.

Q Did he give you one? A I assume so.

Q What did he answer when you asked him for the guarantee? A He said he would see.

Q He would see—what did he say to see? A He went outside for a couple of minutes.

Q Did he tell you when you asked him for the guarantee that he couldn't give you one? A He didn't.

Q Didn't you ask him when he told you that he couldn't give you one you could refer him to an officer who could? A I didn't.

Q Did you ask to see someone in authority? A I didn't.

Q Didn't you later ask him in the letter which you dictated the necessity of your company getting the endorsement of the Acropolis Realty Company on the check? A No, sir.

Q You knew that a check from the funds of the Mortgage Company would be made to the Acropolis Company? A I didn't know it.

Q You didn't know that from the owner? A I didn't.

Q Did Mr. Perselay dictate this letter in your presence? A He did.

Q And was Mr. Ward there when he was dictating it? A He was not.

Q Did you see Mr. Ward when he went out? A I didn't.

Q Did you look for him? A No, sir.

Q You say all of this took you about how long? A Possibly fifteen minutes.

Q Have you never been in the Guaranty Company's office since? A I didn't.

Q Did you have anything more to do with this transaction after September 1st? A As regards the Mortgage & Title Guaranty Company? I will say yes, generally.

Q What did you do after that? A I had a good deal to do with the delivering of the equipment and fulfilling the contract.

Q When were these cabinets delivered? A I can't say, specify the particular dates. We have the records.

Q Were you there when they were delivered? A At some times and at some times, no, sir.

Q Were they delivered on more than one day? A Yes, sir.

Q When was the first one? A I can refer to the papers.

Q I want to know when the first beds were delivered directly. What are those papers you are referring to? A (Indicating.) Those are copies, the letters in our office, and these are copies; these are copies of invoices. The first delivery—here is dated September 30th. I believe that is the first delivery.

Q Why do you say September 30th; that couldn't be right. A I think it was a few days before that, but I don't remember that is the right date.

Q Some of the cabinets, as a matter of fact, had been delivered before September 21st, hadn't they? A I won't say that.

Q Isn't it true that some of the material, possibly not the cabinets, but some of the material contemplated to be delivered under your contract with the Acropolis Realty Company had been delivered prior to December 21st? A I can't answer that. I don't know.

Q You said on your direct examination that part of your work was to attend to the deliveries? A Yes, sir.

Q And in answer to my question you said it was part of your job to see that this contract was fulfilled? A Yes, sir.

Q Isn't it true that some of the material contemplated in this contract was delivered prior to

September 21st? A It is possible, because invoices are frequently dated, going through the office a few days before the material was all delivered.

Q Isn't it true that the first assignment arrived on the sidewalk, as you call it, the first two weeks in September? A I couldn't say.

Q You saw all the deliveries? A I saw some of them.

Q You saw the first delivery? A I won't say the first delivery.

Q Could you tell? A The only way I could tell is by that sheet to go by; that is the only way.

Q Were the beds ever installed? A Yes, sir.

Q By your company? A No, sir.

Q When was the last time that you saw this job? A Three weeks ago.

Q Were the kitchen cabinets installed? A They were.

Q Completely? A Not entirely.

Q Will you explain your answer? A The contract didn't call for those and we didn't install them. The way they were put in. I wouldn't call them complete, the kitchen cabinets, I will say, only.

Q As a matter of fact, the building authorities of the City of East Orange wouldn't allow the cabinets to be put in, isn't that so? A I will say they wouldn't allow the gas ranges to be put in.

Q It is a part of the cabinet? A No, sir.

Q It is not a part of the cabinet pictured in your catalogue? A Yes, sir.

Q That is what I am referring to. Is that the cabinet you furnished for that job?

Mr. Newman: Is that the only cabinet?

Fred William Bancroft, Jr., cross.

Q. Counting that as one page, two pages, three pages, four pages, I ask you to look at the back of the fourth page and tell the Court and jury what the picture is there on that page. A. The picture there is of a cabinet, a refrigerator, storage section, gas range, work shop and the sink is indicated there.

Q. You know that the building authorities of the City of East Orange would not permit the installation of that cabinet as it is shown there; that is right?

Mr. Newman: I object to that as incompetent, immaterial and irrelevant. We didn't agree, according to our contract, to produce anything the authorities of the City of East Orange would approve of.

The Court: Do you agree to that?

Mr. Williams: No, sir.

The Court: You say that was in the contract?

Mr. Williams: I say they made a contract with the Acropolis Realty Company.

The Court: The objection will be sustained.

Defendant's counsel prays an exception ot this ruling of the Court.

Exception noted as ground of appeal.

Q. And you looked at the cabinet the last time you were at the building, saw the cabinet as shown there in the building as a complete unit?

Mr. Newman: I object. It is immaterial because we did not agree to install the cabinets. We merely agreed to deliver them.

The Court: The objection will be overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A It was not.

Q Why wasn't it a complete unit? A Because the cabinet had apparently been disintegrated. The bulk of it was there.

Q What was there? A Part of the storage section and a lining that went around the gas range, practically, that is all.

Q Were the ranges there? A There were ranges there.

Q Were the ranges that were in that unit there? A They weren't in the apartment. They were in the building somewhere.

Q In one apartment? A I will say I saw a range in the apartment.

Q 72 cabinets were not there? A I don't know.

Q Did you count them?

Objected to as immaterial.

The Court: As I see this case, here is what there is to it. The Acropolis Company gave a mortgage to the United States Mortgage & Title Guaranty Company for $275,000. Thereupon they agreed to purchase certain articles from the plaintiff company. Upon that, the plaintiff requested an order from the U. S. Mortgage & Title Guaranty Company upon the moneys which would come due to the Acropolis Realty Company. The order was given, and it was accepted, and a promise by the U. S. Mortgage Com-

pany to pay that money. If the plaintiff in this case furnished what was ordered, and the defendant knew what was ordered, because they had a copy of the contract, if it waived its contract with the Acropolis Company, then under the letter P. 3, if there was money which thereafter became due from the United States Mortgage Company to the Acropolis Realty Company, the United States Company was obligated to pay that money to this plaintiff. That is all I can see in this case.

Mr. Williams: If money was due the Acropolis Realty Company from the mortgage company, what I have been trying hard to say to your Honor is that money became due to the Acropolic Company.

The Court: That would make no difference. You are putting an element in this case which you cannot properly go into.

Q You say you didn't count them? A No.

Q How closely have you been in touch with that building before you counted the crates? A It is a year ago, three months, I just stopped in there.

By the Court:

Q I understand you to say that you have personal knowledge that all the 72 were delivered there? A What our records show.

Q You say that is all you know about it? A Yes, sir.

Q Do you know that 72 cabinets were delivered there? A Yes, sir, I will say they were.

Fred William Bancroft, Jr., cross.

By Mr. Williams.

Q How can you say that when you admitted to me that you were not there when lots of the deliveries occurred and you also admitted that you didn't count the different cabinets? A I saw the president of the company that manufactured those cabinets and I personally had occasion to visit the factory, and if I did not see the cabinets go out I saw the billings or the receipts.

Q Then your knowledge is based on facts of material leaving Chicago? A No, sir. New York City, on trucks.

Q Did you witness the leaving from your plant in New York City of every article of the contract? A No, sir, I didn't say that.

Q What does your explanation mean? A Are you questioning delivery?

Q (Question read.) A I didn't.

Q Did you witness the delivery at the job in Harrison street, East Orange, of all the material contemplated in this contract? A I didn't.

Q Can you remember whether you used in your conversation with Mr. Perselay the word "Guarantee"? A I think personally I did.

Q How did you use it, in what connection? A I had left a guarantee of being sure of getting our money.

Q Later, in answer to a question of mine, you said you got a letter? A I did.

Q Did you tell Perselay anything about your conversation with Mr. Ward? A Yes, sir.

Q What did you tell him about that? A I told him that Mr. Ward had looked at the order and the contract and said that Mr. Perselay would give me the letter.

Q You say he said he would give you an order? A I assume a letter is an order.

Q That is what you thought you got? A I had hoped so.

Q That is what you thought at the time? A I assumed that I got an order to pay that money.

Q You wouldn't call it a guarantee? A I would, yes,

Q Did you take any part in the dictation? A No, sir.

Q Did he dictate it in your presence? A Yes, sir.

Q Didn't you suggest to Mr. Perselay the using of the word "guarantee"? A I don't believe I asked him for a guarantee.

Q You said you did? A I didn't—did I?

Q You have testified in great detail to conversations that you had with Mr. Ward personally in September, 1926, and I ask you whether in your conversation with Mr. Perselay you requested that he give you a guarantee of payment of $12,612.50? A I will say again that it is my best idea—I knew I wanted to be sure to get the money.

Q Did you ask Ward for a guarantee? A I will have to answer the same way, that I knew what I wanted to get and he knew what I wanted.

Q He only knew what you wanted, and you only knew what the order said? A Yes, sir.

Q Did you tell Ward what it was? A Yes, wanted to be sure of getting our money and that we wanted a letter, so the word "guarantee" might have been used.

Q Did you say the same thing to Mr. Perselay? A I think a few words differently but the same idea.

Q Don't you remember? A Yes, sir.

Q You asked Mr. Perselay to give you the same thing that Mr. Ward had given you? A Yes, sir.

By the Court.

Q Do you see Mr. Ward in the room? A No, sir, I don't.

Q Do you see Mr. Perselay? A Yes, sir.

Q Where? A Sitting right next to the other gentleman.

Q And you don't see Mr. Ward? A No, sir.

Q Have you ever seen him since? A No, sir.

Q Or Mr. Perselay? A No, sir.

Q And you were with the both of them about the same length of time? A I would say I was longer with Mr. Ward than I was with Mr. Perselay.

Q Why? A Because he went over great detail with Perselay; they were two or three minutes away from the office.

Mr. Newman: There is no doubt that Mr. Perselay is in the room?

Mr. Williams: Yes.

Re-direct examination by Mr. Newman.

Q Did you deliver any of this material until you received the order?

Objected to.

The Court: The question may be answered.

Q You didn't deliver any of it? A No, sir, not personally.

Fred William Bancroft, Jr., re-cross.

Q Wasn't there any of the goods delivered before you got the order from the U. S. Mortgage & Title Guaranty Company? A Nothing.

Mr. Williams: I object. This witness may not know of his own knowledge.

Q Do you know whether it was? A I do.
Q Was it? A It was not.
Q Briefly, was there any change about the kitchen cabinet? A There was.
Q Was this change submitted to by the owner? A It was, by him, and the superintendent.
Q You had a little map accompanying the agreement changing somewhat the kitchen cabinets? A Yes, sir.
Q What was the change? A We left out the sink to make room to install the electric compressor to operate the ice box.

Re-cross examination by Mr. Williams.

Q When was the change made? A It is the 29th or the 27th of August. They were very late in improving it. I had an awful argument getting it straightened out.
Q Did you show the change to Mr. Perselay or Mr. Ward? A No, sir; that was taken up with the Acropolis. I knew my people that took the stuff out.
Q As a matter of fact, you have no personal knowledge of the delivery of all the material contemplated in the contract, have you? A I know that everything was delivered.
Q Can you answer that yes or no? A Yes.
Q What is your personal knowledge? A Personal observation.

Q Have you counted the cabinets? A Yes, sir.

Q How many are there there? A There is the full quantity.

Q How many is a full quantity? Were there 72 white china cabinets delivered? A There were.

Q Did you see them delivered? A I have seen them there. They are there now.

Q Were there 26 dressing cabinets? A There were.

Q Were there 72 buffet cabinets? A Yes, sir.

Q 72 white door beds? A 73.

Q Were there 73? A They are all there.

Q You are positive of that? A Yes, sir.

Q And you state that of your own knowledge? A Yes, sir, I have seen a lot of them.

Q I am not asking you that; I am asking— A I have seen them there, yes, sir.

Re-direct examination by Mr. Newman.

Q Were not all those things there three weeks ago? A Yes, sir, practically every one.

Q And weren't they in use? A Yes, sir.

Further cross examination by Mr. Williams.

Q Some of the ranges were never used? A No, sir.

Q Isn't it a fact that the only range furnished by you was put in the janitor's apartment and after its operation it was removed; isn't that true? A No, sir.

Q Isn't it true that not a single one of the ranges pictured in that contract are being used? A No, sir, that is not in use.

Fred William Bancroft, Jr., further cross.

Q Will you say that any of the white door ranges are used in the building? A I have seen them.

Q When? A When they were first delivered.

Q When were they delivered? A The dates are there.

Q Could you approximate the date when you saw them in use? A They were connected up temporarily in one of the apartments.

Q When? A Possibly in December or January, 1926.

Q Was that for the purpose of working? A Yes, sir.

Q That was the purpose of the installation and the use of it? A There was one in use and they had it hitched up there up there I think, in the apartment, and one in the janitor's apartment. I didn't go in any other apartment that time.

Q Your company has a chattel mortgage on this?

Objected to.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Have you filed a lien claim?

Objected to.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

At one o'clock P. M. the Court took a recess for one hour.

AFTER RECESS.

FRED WILLIAM BANCROFT, JR., resumes the stand.

Cross examination by Mr. Williams (continued).

Q You said, as I understood you, that this material was constructed in New York? A All of the kitchen cabinets and the dressing cabinets were all built in New York City, yes, sir.

Q It is true, is it not, that they were made especially for this particular building? A That is true.

Q You were treasurer of the White Company? A No, I said I was treasurer of the company that manufactures these cabinets.

Q These particular cabinets? A Yes, sir.

Q Can you say from your own knowledge of that company when were those cabinets completed, the manufacture of this completed? A I would say shortly before the completion, but we couldn't complete them because of that one department where we had to leave space for that electric compressor.

Q That change was made in August, 1925? A Yes, sir.

Q Excepting the cabinets affected by that change when were the others manufactured? A Some of them may have been held in stock several months.

Q What was in that wasn't stock except the kitchen range? A I would say that everything was stock except the kitchen range.

Q Were the dressers that went as part of the door bed, were they stock? A Yes, sir. We made some slight changes in the details, but

otherwise they were stocked. The door was changed, that is all.

Q Will you say with the exception of the cabinets all of the materials that were mentioned in this contract were completed when this change was made? A Yes, sir.

Q I say, were they ready for delivery? A Yes, I would say practically.

Q When were the kitchen cabinets completed? A I don't remember the date, but as soon as they could get ready after that date.

Q And that change was made on what date in August, 8/27/26; is that right? A No, sir.

Q But you say they were started the day something was signed? A Yes, sir, signed by the superintendent of the building.

Q It was the day after this was signed—was it right after that date, 8-27-26 that the kitchen cabinets were started? A No, sir, not a thing signed until we got your letter, nothing was actually started.

Q What does this schedule P. 8 show? A Complete contract for kitchen cabinets.

Q And that is substantially like the one you identified this morning on the fourth page of P. 1? A Very true.

Q Is that cabinet made up of individual units? A Yes, sir.

Q How many individual units? A One, two, three, four, five and then this is all separate. There are five units and this here.

Q Would that be seven units? A Yes, sir.

Q How many of the units were in stock? A I would say five.

Q When did you start to make these two units that were not in stock? A That we can see later.

Fred William Bancroft, Jr., further cross.

Q How long did it take you to complete them? A We delivered them just as soon as we got them ready; the only way I can answer that is the delivery date.

Q What did you have to do to fabricate the two units that were in stock?

Mr. Newman: I oject to that as immaterial.

The Court: I will sustain the ojection to this particular question.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Can you tell which of the several units contemplated in the order was delivered first? A I can if I can see that sheet there. First we delivered a sample for one department. We got those things ready so they could have them.

Q When was that kitchen range that you have just spoken of delivered—I think you said December 30th? A This is dated December 30th. The delivery date wasn't started until September 30th. It might have been invoiced that day.

Q They came from New York by truck? A The ranges came from Illinois by rail.

Q What was it that came from New York by truck? A The kitchen cabinets and the beds came right from Jersey City and the dressing cabinets all came from New York.

Q Didn't you say this morning that this stuff was delivered from New York by truck, that that is the reason that you knew about the delivery? A I did say that.

Q The bigger part of the stuff delivers from New York? A The bigger part of the equip-

ment was delivered from New York. The ranges I had cuts of—

Q But you have answered my question by saying you knew of delivery, that they were shipped by truck from New York? A We shipped an awful lot of it by truck.

Q Did you ship every bit of it? A No, sir, not every bit of it.

Q Then your answer this morning does not relate to all the material? A No, the only exception I would make would be the gas ranges.

Q You say that some of the stuff was shipped from Jersey City? A I have witnesses who have that knowledge.

Q Then you don't know when they were delivered there? A Yes, sir, I do.

Q Of your own knowledge? A Of my own knowledge, that I was there at the building.

Q When they were all delivered? A I was there.

Q Were you there when they delivered the dresser cabinets? A Yes, sir.

Q Were you there when all were delivered? A Yes, sir.

Q And the dresser in the bedroom behind the door, were you there when they were all delivered? A No, sir.

By Mr. Newman.

Q You saw them all there? A They were all there, yes, sir.

Arthur Perselay, direct.

ARTHUR PERSELAY, sworn in behalf of plaintiff.

Direct examination by Mr. Newman.

Q What position did Mr. Ward hold with the U. S. Mortgage & Title Guaranty Company? A Vice-president.

Q How much money did the U. S. Guaranty Title & Mortgage Company have on hand on the 21st day of December, 1926, on account of the $750,000 mortgage loan that it had made to the Acropolis Realty Company located on the corner of Harrison street and William street, East Orange?

Objected to.

Objection overruled.

Defendant's counsel prays an exception to this ruling of the Corut.

Exception noted as ground of appeal.

A I couldn't tell you the exact amount.

Q About, approximately? A I haven't the slightest idea except from this list.

Q Look at the list? A I would have to add it up.

Q Was it a hundred or two hundred thousand dollars? A One guess is just as good as the other. It would be a mere guess.

Q Haven't you your records here? A Yes, I have checks and things.

Q Didn't you prepare that at our request? A I didn't; Mr. Garvey, our accountant did.

Q Didn't you have charge of this fund, didn't you disburse this fund? A Only to a certain extent.

Q Do you know how much the loan was for? A Yes, sir.

Q How much was the fund? A $375,000.

Q Wasn't the fund disbursed under your direction? A No, sir.

Q Under whose direction was it? A Mr. Blanchard's.

Q Did he write out the checks? A No, sir.

Q Who did? A Mr. Garvey.

Q Did you prepare that statement for us? A No, I asked Mr. Garvey, our accountant, to do that. I am not an accountant.

Q Do you know whether there was any money on hand to go in this mortgage loan in September, 1926? A Yes, sir.

Q About how much was it? A I couldn't tell you.

Q Can't you tell us within a hundred thousand dollars of it? A No, I couldn't.

Q Go back to your books and look it up? A From this list I can give you an idea. I would say, according to here, about $20,000—wait a minute—

Q In September, 1926, I am trying to find out what you disbursed in September, 1926? A I would say a hundred thousand dollars.

Q If you figured it inaccurately you might find a great deal more? A Possibly.

Q And, in any event, the balance of the fund of $100,000 there was, subsequently after the 21st day of September, 1926, disbursed on account of this mortgage loan for the Acropolis Realty Company from time to time?

Mr. Williams: I object. In the first place it is not shown that it would be competent to show who it was disbursed to.

A No, it didn't call for the Acropolis Realty Company.

Q But it went out of this fund on account of the mortgage? A Correct.

Q So after September 21, 1926, did you disburse the balance of the money, a hundred or thousand or more to various persons who were entitled to receive payment? A Yes, sir.

Q Will you tell me on December 2, 1926, you had any funds on account of the mortgage loan? A I had $7,900, roughly.

Cross examination by Mr. Williams.

Q You were asked whether you had charge of the disbursing of money in this mortgage loan. Did you? A (No answer.)

Q Who did disburse the money? A Mr. William L. Blanchard.

Q What office did he have at the time of this loan of the mortgage company? A He was our chief appraiser, the man in charge of passing on the payments of the contract loans.

Q How were payments made? A He would inspect them, the terms on which we were to make a payment, come down and make out vouchers, telling to whom the checks should go and the amount, and after Mr. Garvey would check that up he would turn it over to me.

Q And in making these payments on this loan to which your attention has been directed by Mr. Newman, what was the form of the payment —I mean, how was the check made?

Mr. Newman: I object to that as immaterial.

The Court: How is this cross examination? I will sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Who do you say made those checks? A Mr. Garvey.

Q And he is what? A I think his official title is auditor of the U. S. Mortgage. He has charge of the books.

Q Did you say that he drew the checks? A Yes.

Q Did you ever draw any checks, in fact, did you ever make any order—

Mr. Newman: I object. It is not cross examination.

The Court: Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Re-direct examination by Mr. Newman.

Q I understand you to say that Mr. Blanchard inspected the progress of the work for the mortgage company; is that correct? A That is right.

Q And after he had inspected it and found the building was sufficiently advanced, he would make out an order and check? A Yes, to whom the check should be paid.

Q And then the checks were turned over to you to disburse? A Yes, sir.

Q How was this money paid? A He would make out an order himself and then issue a

voucher to the accounting department telling them to issue a check for blank dollars, whoever it was to go.

Q So his position would be that the company paid on his order or his report? A It would be on order.

PLAINTIFF RESTS.

Mr. Williams: I move for a non-suit, first, on the ground that the plaintiff has failed to show authority in Mr. Perselay to write the letter P. 3, or to sign or deliver the letter P. 3 upon which this suit is based, and it is made a part of the complaint in this case. Second, on the ground that the plaintiff has failed to show, assuming for the purpose of the motion for the moment, authority in Perselay to write the letter P. 3, lack of consideration for the making of the terms upon which it is sought to charge him. Third, the plaintiff in this case is bound by the terms of this contract, both to furnish materials for the building which were in accordance with this defendant's mortgage, and in our view that it is bound by the terms of this defendant's mortgage; in effect, that it could not have from us money to which the mortgagor, the Acropolis, would not be entitled to, in other words, money paid for materials acceptable to the building department and furnished in accordance with the code of the City of East Orange. Also, that the plaintiff has failed to show that subsequently to September 21, 1926, that there became moneys due from the Acropolis, money out of which the plaintiff could have

payment of the order that it received from the Acropolis, that order being predicated on the money to grow due, and it being the contention of the defendant it could only be paid or, rather, we can only be charged with the payment in the event that the payment shows that the Acropolis was entitled to have the money on September 21st, and subsequent thereto, and that this they failed to show. And on the further ground that the plaintiff has failed to show a performance of this contract in accordance with the terms of the contract—that is to say, he has failed to show a delivery of all the materials to the job in East Orange and installation of all the beds, as provided in the contract, before September 1, 1926, and the delivery was there mentioned in their contract.

The Court: The motion will be denied.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

WILLIAM L. BLANCHARD, sworn in behalf of defendant.

Direct examination by Mr. Williams.

Q Mr. Blanchard, are you connected with the U. S. Mortgage & Title Guaranty Company? A I am.

Q In what capacity? A Assistant treasurer and appraiser and passing on loans.

Q What is your business other than your connection with this company? A Mason and building contractor.

Q How long have you been a mason and building contractor? A Forty-five years.

Q In this vicinity? A Yes, sir.

Q Did you have anything to do with a loan to the Acropolis Realty Company? A Yes.

Q How? A I made all the payments after the third week from the date of the signing of the mortgage up until some date in December, 1926, when my son took it on after that.

Q Did you ever see the contract marked in evidence here between the Acropolis and the White Door Bed Company? A Yes, sir.

Q When? A Since the delivery of the goods or since the beginning of this suit.

Q Are you familiar with the plans and specifications of this building in East Orange? A I am.

Q To which these goods were delivered? A I am.

Q Are you familiar with the plans and specifications for that building? A I am.

Q Was the materials enumerated in the contract between the Acropolis and the White Door Company delivered?

Objected to.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Did you ever see a representative of the White Door Company with reference to this contract? A Not until after the delivery of the goods, never prior to that time.

Q Did you ever see any of the materials in their contract on the job at Harrison street, East Orange? A Yes, sir.

Q When? A Some time in October, I think it was. I kept no records at all of the date of the delivery or anything in regards to it.

Q Can you say what other materials you did see in October? A I saw the ranges, the beds, cabinets, had to direct men to move them several times so we could complete the building in portions where they were located, where they were stored.

Q Did you ever see any of the beds installed in the building? A There were no beds at all when I left for my winter vacation February 1, 1927.

Q Did you have charge of the making of payments on account of this loan? A I made all the payments excepting the last $3,000.

Q How were the payments made? A All checks were drawn directly to the Acropolis Realty Company, and before any officer signed them they were endorsed on the back of them to whom they should go. Some of them went to the United States Mortgage Title & Guaranty Company for interest on account of the mortgage.

Q Where did the rest go? A The individuals or firms whose names are on the back; on these it appears that my endorsement on the back, which was drawn in cash, and paid to mechanics who were working on the building.

Q You mean payroll? A Payroll once a week.

Q Made to whoever drew the checks, indicating how and when to draw? A I gave them a slip of paper. I gave them to men and also sometimes I gave them so much money in toto, and they were divided up among the different contractors who were working on the building and turned over to them.

Q Were you constantly on the building, on the job, during the progress of the work? A Yes, sir, I judge every day, and I stopped there nights, stopped there morning and afternoon.

Q Your mortgage was recorded? A That I couldn't say as to that.

Q (Showing witness paper). I show you what purports to be a mortgage between the Acropolis and U. S. Title & Guaranty Company, recorded on the 5th of June, 1926, in the Essex County Register's office, in Book D 57 of mortgages, 569, and also recorded in Book 457 of chattel mortgages for Essex County on page 70, and ask you if that is the original mortgage?

Mr. Newman: I object to that as immaterial.

A I would say it is the stamp of the county.

Q Is that the mortgage under which the payment which you have testified to was made? A If this contains the agreement—

Mr. Newman: I object to the agreement.

The Court: That date will be stricken out. The only question is whether you know that is the mortgage.

Mr. Newman: We will admit that it was the mortgage and, if it is material, the object of it.

Q Had any payments been made by the United States Mortgage to the Acropolis? A Direct?

Q Yes. A No.

Q How were they drawn? A All checks were made payable to the Acropolis—

Objected to.

Q After the building was finished?

Objected to.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q As to the time, as of March 1st, apparently 1927, when the last payment was made on this mortgage loan to the Acropolis Realty Company, was the building completed?

Objected to.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q At that time were there, to your knowledge, any unpaid material or labor bills or lien claims on the building?

Objected to.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Are you a member of a contracting firm? A Yes, sir.

Q What is the name of it? A William L. Blanchard Company.

Q Did they have anything to do with the installation of the bed as to the contract with the White Door Bed Company? A They did.

Q What did they do? A After I left for my winter vacation they went in there in the month of February, 1923, and started to construct the beds.

Q Up to that time had any of the beds been installed? A No, sir.

Q Do you know when they completed these beds? A They didn't complete them.

Q What was it necessary to do in order to install one of the beds at this time by the White Company? A It was necessary to attach the hardware that is specified as to the door.

Q What would it cost to do that? Was hardware there? A According to plans and specifications, it was to furnish and there was enough in bills charged against the Blanchard Company for furnishing it. I was absent at time and I imagine—

Q Tell me what it would cost to install the beds, assuming that the hardware was there? A I wouldn't want to estimate. I have never seen one bed put in in forty-five years.

Q Would you say fifty cents would cover that? A No, sir; I have had too much experience with non-union labor to do that.

Q Were any of the beds installed at the time when you left for the South in February of 1927? A No, sir.

Q At that time can you say who was furnishing the building?

Objected to.

The Court: I suppose he means when he left?

A Yes, sir; I know.

Q Who was it?

Objected to.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A Chalfonte Realty Company, Mr. Alex Isserman.

Q What interest had they? A At that time second mortgagees on the building.

Q Did you agree, the Blanchard Company, to install the beds for the Chalfonte Realty Company? A They commenced it, started them.

Q Do you know why they were finishing the building?

Objected to.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q You said that none of the money was paid to the Acropolis Realty Company. Why was that? A We only pay any mortgage money from the United States only to the borrower.

Q Was the Acropolis the borrower? A Yes, we loaned it to them, but they had no money coming to them. We always made our payments to another party. On the face of the check is the Acropolis, yet they never got any of the money direct.

Q Why? A It went to the people who furnished labor and materials on the building.

Q Was the proceeds of the mortgage sufficient to complete the building?

Objected to.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q After September 21, 1926, the date of the letter in evidence, in this case P. 3, was there any money forthcoming to the Acropolis? A No.

Q After September 21, 1926, was there any money came to the Acropolis?

The Court: He has already said that at no time any money was paid to them.

Mr. Williams: I want to offer the recorded mortgage which I showed to the witness and the building contract.

Mr. Newman: I object to the offer of the mortgage.

The Court: I do not see how it is material.

(The papers referred to are marked Exhibit D. 1 for identification and D. 2.)

Mr. Williams: I want to offer the bond that accompanied the agreement and the building and loan agreement, all of them executed on the same day as the mortgage.

Objected to.

Mr. Williams: I offer the bond in evidence.

Objected to.

The Court: That will be admitted.

(The paper referred to is marked Exhibit P. 9.)

Mr. Williams: I offer the agreement. It is the agreement upon which the mortgage

loan is made and outlines the method by which the payments under this mortgage are to be made and the proceeds of the mortgage loan.

Objected to.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Cross examination by Mr. Newman.

Q As I understand it, you had charge? A Yes, sir.

Q Did you from the start? A The building was erected before the United States Mortgage Title & Guaranty Company ever came in to it, as far as the foundation and steel form was concerned that I had nothing to do with.

Q After the United States Company came into it you took charge at once? A I took charge at once.

Q You remember making a check to Reed Lathing Company on September 10, 1926, signed by Lehman and Dawson? A I have my papers here.

Q As a matter of fact, outside of a few checks which were directed to Shears Construction Company and W. J. Pursin Company and Reed Lathing Company, these checks were all made direct? A I didn't know those checks were sent to the company.

Q But all that you certify to go out, they were made to the Acropolis and turned over to the material men? A And some to the U. S. Company for interest and insurance.

Q Do you remember when you first started to examine the building as it progressed? A I think it was around July, 1926, somewheres in that neighborhood.

Q And you continued to make payments until what date? A I think around the 1st of December, 1926.

Q After the 1st of December, 1926, you left the job in the hands of your son? A No, sir.

Q February? A February.

Q Didn't you continue to make payments in December and January? A I had no money, I had no funds.

Q So you disbursed the money up until December, 1926; that is right? A About that date.

Q And you started, as near as you can recall, in December, 1926? A The latter part of June, 1926.

Q You made disbursements continuously on the job? A Yes, sir.

Q And in December? A Well, possibly.

Q Those disbursements in September, October, November and the early part of December were made to your order? A Yes, sir.

Q And were made to people who did work on the building? A Yes, sir.

Q And to the Acropolis? A Only as to name, no actual money ever went into what company.

Q I say, the checks were addressed to the Acropolis and went to the people who did the work? A Yes, sir, with possibly a few exceptions, with the name being on the back as endorser at the time.

Q And it was either made to the Acropolis or it was endorsed? A Yes, sir.

Q It was up to the point where there was only about seven or eight thousand dollars left in your hands? A Yes, sir.

Q So you disbursed the $375,000 to the Acropolis from time to time, commencing in July to September 26th, when there were just a few at the start? A Just a few at the first.

EDWARD T. WARD, sworn in behalf of defendant.

Direct examination by Mr. Reed.

Q You are connected with the U. S. Title & Guaranty Company? A Yes, sir.

Q In what capacity? A Vice-president.

Q How long have you been vice-president? A Since the inception of the company, about three years.

Q You were on September 27, 1926? A Yes, sir.

Q Do you recall Mr. Bancroft? A No, sir.

Q Did you ever see him at your office? A Not that I can remember.

Q He said he came to your office in September 21, 1926, and he had an order, Exhibits P. 1 and P. 2, and a contract between the Acropolis and the White Door Bed Company, and he says he showed this to you and that you read that. Can you tell me whether or not that occurred? A I don't recollect them; I don't recognize them.

Q Don't recognize those two exhibits? A No.

Q You said that after you had read the order and inspected the contract that he asked you for

a letter directed to the White Door Bed Company agreeing to pay the sum of twelve thousand and odd dollars mentioned in the order—what do you say as to that—as part of the proceeds from a mortgage loan of the U. S. Title & Guaranty Company. What have you to say about that? A I don't know anything about it.

Q Did he say that to you? A Not that I know of.

Q He says further that you told him to go to Mr. Perselay and that he would give him a letter such as he wanted agreeing to pay the White Door Bed Company out of this loan the sum of money mentioned in the order. A I don't see how that could be—

Q Did that happen? A No, it didn't.

Q What department have you charge of in the U. S. Mortgage Title & Guaranty Company? A Charge of the sales and contact man.

Q Do you have anything to do with the payment of money? A Not a thing.

Q Did you at any time, in any case, direct the payment or signing of an order for payment of money? A No.

Mr. Newman: I object to that.

The Court: Objection sustained. I do not think it is a question of what he thinks, but what he had the power to do.

Q In understand you said you did not? A I did not.

Q You say you are in charge of the sales? A Yes, sir.

Q Sales of what? A Sales of securities through insurance companies, private charges, and so forth.

Edward T. Ward, cross.

Q And you added "contact." What do you mean by contact? A I go out and call on the people and make the contact and get them interested and later may get the sale.

Q Of what? A Sale of mortgages.

Q Had you anything to do with the making of payments under mortgage loans? A No, sir.

Q Or the direction of payments of loans? A No, sir.

Cross examination by Mr. Newman.

Q You are the vice-president of the company? A Yes, sir.

Q September, 1926, Mr. Cohn was on his vacation, was he not? A I really can't answer that. I imagine he was away every year.

Q When he was away you were in charge of the office? A Not necessarily. I was there every day.

Q You represented Mr. Cohn in his business quite considerably, didn't you? A No, because I am not a lawyer.

Q I didn't ask you that. What I mean, you acted as the general manager of the company while he was away? A No, sir.

Q When Mr. Cohn was away did you take his place? A Where I could.

Q When anybody came to see Mr. Cohn didn't they come to you? A No, sir.

Q Were you in general charge of the office in September, 1926? A I wouldn't say I was. Whenever I could.

Q Who was president? A Mr. Lehman.

Q Was he active? A He is very active.

Q Is he away a great deal? A In the summer he is away.

Q As a matter of fact, Mr. Lehman had his own office in the building and transacted his own business not connected with the company? A Yes.

Q Is that so? A Yes.

Q And he isn't at the company all the time? A No.

Q And the company is wholly under the charge of Mr. Cohn and yourself, isn't that so? A And Mr. Blanchard.

Q Is he an active man? A Yes, sir.

Q September, 1926, you had a desk in the front office with your name on it? A Yes, sir.

Q And at that time did you know there was a loan granted to the Acropolis Realty Company? A Yes.

Q You were familiar with that fact? A Yes.

Q And didn't people come in to see you with reference to the loan at different times? A They may have.

Q When they would come in, who would you refer them to? A Mr. Blanchard, on that matter.

Q And when they wanted a payment of money you referred them to Mr. Blanchard? A Always, if I happened to see them.

Q You did see some of them? A I suppose so.

Q And Mr. Blanchard is in and out? A He is there most of the time. In September, 1926, he was there most of the time.

Q Do you know, as a matter of fact, whether he was inspecting this building that was being erected? A Yes, that was part of his duties, go out, the same as mine.

Q Will you swear that Mr. Bancroft was not there during the month of September—you wouldn't swear to it? A I wouldn't swear to it.

Q And it might not be possible? A It might be possible.

Q Your memory is not very good? A Pretty good.

Q If you did have a conversation you wouldn't remember the details of it? A Probably not.

Q Who had charge of disbursing the money after orders were given? After Mr. Blanchard orders money paid who disburses it? A Mr. Garvey.

Q He draws the checks? A Yes, sir.

Q And delivers them to Mr. Blanchard? A Either he or Mr. Perselay.

Q And Mr. Perselay, I suppose, pays out this money? A Yes, sir.

Q And after examining the titles under the direction of Mr. Blanchard and Mr. Garvey? A I don't think he examines titles.

Q He disburses the money under their order? A Yes, sir.

Q That is his function? A Yes, sir.

Q Do you recall that this gentleman came in September, 1926, and you told him to go and see Mr. Perselay? A No, sir.

Q You don't recall that at all? A No, sir.

Q That might have occurred? A Possibly.

Q But you don't recall it? A No, sir.

Q And you don't recall saying to him that Mr. Perselay should give him an order for a certain sum of money? A Absolutely, not on that.

Q That might have occurred? A No, sir; I don't think it did.

William H. Kessler, direct.

Q You are quite sure about it? A I don't think it could occur.

Q You are quite sure that it didn't occur? A No; I am not.

By Mr. Reed.

Q I understand you to say that you are not sure of whether you sent Mr. Bancroft to Mr. Perselay and Mr. Perselay would give him an order? A I said it might have occurred; I have no recollection of the fact. In fact, I don't see how I could have sent Mr. Bancroft—

Q I want to know if you would remember if you had sent him to Mr. Perselay and got an order? A I don't remember that.

Q That could have happened? A I don't think it possibly could have happened.

WILLIAM H. KESSLER, sworn in behalf of defendant.

Direct examination by Mr. Wlliams.

Q What is your business? A Assistant Building Inspector, East Orange.

Q And were you Assistant Building Inspector in East Orange in 1926? A Yes, sir.

Q Have you had anything to do with the inspection in course of construction with the apartment house of the Acropolis Realty Company? A Yes, sir.

Q Were there filed in your department plans of that building by the owner? A Yes.

Q Was there a permit issued for the erection of the building? A Yes, sir.

Q And was it issued on the plans?

Mr. Newman: I object to that as immaterial.

Mr. Williams: I offer to prove by this witness, he having the plans with him, that the materials shown in D. 1 were never approved in those plans, that they were never approved by the Building Department and installation was prohibited as being contrary to the building code of East Orange, and that they were not, in fact, installed and used except for one sample, upon which the ruling of the inspector was made, and that then that one was taken out.

Mr. Newman: I object to that as incompetent, irrelevant and immaterial. It is not a part of our contract.

Mr. Williams: We wish to retort the plaintiff was bound by the contract under the order and the letter to furnish materials which would be in accordance with the mortgage agreement, that they were bound to have or furnish materials in accordance with that code.

Objected to.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

WILLIAM L. BLANCHARD, recalled in behalf of defendant.

Direct examination by Mr. Williams.

Q Mr. Blanchard, you have testified that you were in charge, to some extent, in behalf of the mortgagee, of the erection of this building at Harrison and William street, East Orange. Can you say of your own knowledge whether you were at the building when the doors were erected, hung? A The month of November, 1926.

Q Did you at any time have any conversation with Mr. Bancroft about the installation of the beds? A Yes.

Q Can you remember when? A November, 1926.

Q And where? A At the building.

Q And what was the conversation? A He threatened to take away—

The Court: Wait a minute. What was the conversation?

The Witness: He said he was going to take away all the fixtures and I gave him my permission to get them all away.

Q Did he say what he meant by fixtures?

Objected to.

Q Yes or no? A Yes.

Q What did he say? A He said that he would not install the doors and beds unless we assured him of the issuance of a new order, that he would take all cabinets, and so forth, and I told him that they were his property and he could take them.

Saul Cohn, direct.

Cross examination by Mr. Newman.

Q But he did, as a matter of fact, take them? A No, they are still there.

Q Most of them are in use? A No, sir.

Q Outside of ranges a good part of them are in use? A Yes, sir.

Q And your conversation with respect to this matter was December, 1926? A After December 3rd.

Q And your recollection is that the doors were not installed until the latter part of November? A The doors were all primed and painted on December 3rd, the date of the payment to the painter. They were installed at that time.

Q They were already on December 3, 1926? A December 3rd every door was hung and had a priming coat on and that is why I made a payment to the painter.

Q And that is why you can remember it? A No, sir, I remember it before, my payment out for wages when the building was completed. It was something over $14,000.

SAUL COHN, recalled in behalf of defendant.

Direct examination by Mr. Williams.

Q You are connected with the U. S. Guaranty Company? A I am.

Q What capacity? A Vice-president and counsel.

Q And have been connected in that capacity since the organization of the company? A I have.

Saul Cohn, direct.

Q And when was it organized? A It was actively organized in 1925 and began to function in April, 1925.

Q And as general counsel did you have anything to do with the making of the by-laws and the charter and the other organization papers of the company? A I had complete charge of all those matters.

Q Are you familiar in your connection with the matters, with respect to authority of the various officers of the company? A I believe I am.

Q What is the authority under the by-laws of Vice-President Ward?

Objected to.

Q Can you say on September 26th whether Mr. Ward had anything to do with the payments on construction loans?

Objected to.

The Court: The question as it now stands is whether or not as a matter of practice Mr. Ward did anything with the making of these construction loan?

The Witness: He did not, as a matter of fact.

Q Can you remember in September, 1926, you were here in Newark or where you were? A As a rule, in September, I am abroad.

Q I mean September, 1926? A My recollection is I was abroad the best part of September.

Q Who was the president of the company? A Mr. William D. Lehman.

Saul Cohn, direct.

Q Can you remember whether he was in the City of Newark in September, 1926? A I believe I returned the last week in September, and I got safely in Newark, because when he goes abroad I am here and when I go abroad he is here.

Q In September, 1926, Mr. Perselay was employed by your company? A Yes, sir.

Q In what capacity? A He was the closing officer, that is, he has the final charge of loans and details, and I believe he was also nominally called title officer, such as the head of the examining department, which makes the extracts and clearing department, which reads them, and the closing department. They were all denominated as assistant title officers.

By the Court.

Q Why do you say you believe? A When he came originally we had not created any of those denominations, but as we got along the actual running of the business we appointed several men as assistant title officers.

Q What, if anything, did Mr. Perselay have to do with making payments on construction loans? A Mr. Perselay made payments under my general instruction. It was his duty, by a certification by the Engineering Department, of which Mr. Blanchard is the head, to make payments, and to see to it that the rules which were laid down in practice were carried out, to remove encumbrances on the property, that is, the reading department would issue a report and it was his duty to remove those encumbrances and in making those payments it was necessary to remove those things, with the idea that we would have a first lien on each loan so that the prop-

erty owner would get a full loan. He had actual charge, acting under my instructions and under the instructions of Mr. Henry B. Dawson or Mr. Hugh B. Reed, acting as counsel.

Q Do the by-laws or the resolutions of the company refer in any way to the duties to be performed by Mr. Perselay? A They don't.

Mr. Newman: They don't?

The Witness: To the best of my recollection.

Q How did you designate them?

Mr. Newman: I object as to how his duties were regulated. He can tell what he did, but he cannot assume the manner in which the duties were regulated.

By the Court.

Q Who prescribed those duties? A I did.

Q Directed under you? A Directly under my supervision. I was in command of the legal force of the business.

Q What were the powers and authority conferred upon him by you?

Mr. Newman: I object. It was his practice from which we glean what authority he may have had.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A The duties of Mr. Perselay—

Q Prescribed by you? A Prescribed by myself, involving the following in connection with the making of loans by the company.

Q Were they any different as to what his practice was? A Substantially the same, but I can amplify it all. In connection with the making of loans he was instructed to act—

Objected to.

The Court: That will be stricken out.

The Witness: It was his practice to receive a report of the title, to make appointments with the borrowers to come in and execute the necessary documents, to negotiate with the holders of encumbrances such as mortgage liens and defendant's liens on the part of the municipality for the liquidation of the amount due, which amount, if allowed to remain unpaid, constitutes a lien on the property on which we were making a loan. It was his practice to continue all the disbursements down to the moment of closing, so as to discover any intervening liens from the time he received the report from the abstract department until he actually closed the loan. It was his practice, after the loans had continued, and the abstract down to the final closing to record a history of the method of closing on the report which he received from the title department, and it was his practice, in recording the history, to note the removal of every loan which had been designated in the title department. In the process of closing it was his practice to receive every document which I had laid down for him to receive, proper authorities and corporations to borrow the money, post-

ponements and releases of lien claims and numerous other documents which were necessary in the beginning of this business. In that connection, we are interested in purchasing title insurance, that was his duty, to attend to insurance either in the funds of the company or in the office of the attorney of the client, and take in the title that was being examined for the purpose of insurance, and to see that they had been paying it in accordance with the client's instruction, and, again, it was his business to see that all undisclosed liens were removed. That was general work.

By Mr. Williams.

Q Did your company have an established policy with respect to constructions loans, that is, to say, loans on which the proceeds of the loans were paid out as the building was constructed, in reference to assignments for orders—

Objected to.

A Yes.

Q What was that?

Objected to.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Who created the policy of the company in that respect? A I established the policy.

Q In what capacity did you establish it? A As vice-president and general counsel.

Q And was the policy as established reduced to writing in any way? A It was not.

Q How was it communicated to the officers and employees of the company? A By written memoranda and from frequent conferences between Mr. Perselay and myself and Mr. Dawson occasionally.

Q What was the policy?

Objected to.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Was Mr. Perselay, after your instructions, as you have defined them, authorized to accept or honor or in any way issue orders for assignments by your company of the fund by the mortgagor or owners made in favor of those furnishing materials or labor on the building on which your company had a mortgage?

Objected to.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A He was not.

Q Did you have anything to do with the negotiation of the loan of your company to the Acropolis Realty Company, mortgage owner of the property on Harrison street, East Orange? A I did.

Q Were you present when the bond and mortgage and other papers evidencing that loan were executed? A I was.

Q And was the paper marked D. 2 for identification executed at the time the bond and mortgage were executed by the owners? A It was.

Q Was it executed in your presence? A It was in my presence and I drew that document.

Q Do you recognize the signatures of the owner on that paper? A I do, the then owners.

Q Who was the then owner? A The Acropolis Realty Company.

Q Is that paper signed by officers or persons purporting to be officers of the Acropolis Realty Company? A It is.

Q Did you know that it would be such when the paper was executed? A By resolution and by their own representatives.

Q Were they signed in your presence? A They did.

Q And do you recognize their names? A I do.

Mr. Williams: I offer in evidence building and loan agreement which has been marked for identification.

Objected to.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Is that a recorded document? A It is not. It is a document between the borrower and the landlord, which states the method and time in which the loan will be disbursed, stating fully the rights of both parties with respect to the making of payments and the general progress of the construction work. The document is used to amplify the mortgage.

Arthur Perselay, direct.

ARTHUR PERSELAY, recalled in behalf of defendant.

Direct examination by Mr. Williams.

Mr. Williams: May I offer again the testimony of the building inspector?

The Court: The ruling of the Court just made was in view of the testimony of Mr. Kessler, and you have an exception.

Q In 1926 you were employed by the U. S. Mortgage Title & Guaranty Company, the defendant in this case? A Yes, sir.

Q And what were your duties? A My duties were to close loans and to close titles where the titles were guaranteed by our company, to remove all encumbrances that show up on the title report, to hand out the checks for construction loans after they had been designated by the engineering and accounting department.

Q Did you have anything to do with the Acropolis Realty Company? A Yes, the handing out of the checks and the securing of affidavits, that is about all.

Q And did you do any sending out of the checks—what was your practice? A My practice was to get the check from Mr. Garvey and then before handing it over to the material men or contractor to get from him the postponement of the mechanic's lien or a release, as the case may be, in order to protect our company.

Q How long prior to September 26th had you been employed by this company? A I believe since May 1, 1925. The company started in April, that is, the actual functioning of new business, and I came there very shortly after that.

Q From any other institution? A No, at that time I was working in another law office, Mr. Samuel Leber's office.

Q Are you an attorney? A Yes, sir.

Q Of this state? A Yes, sir; I was admitted in 1920.

Q In December, 1926, do you remember having seen Mr. Bancroft, who was on the stand for the plaintiff in this case? A Yes, sir.

Q Where did you see him? A In my office.

Q Had you ever seen him before that day? A Never.

Q Have you ever seen him since? A Not until I seen him in court here.

Q Was he alone? A Yes, sir.

Q What did he say to you? A He came in and introduced himself and gave me his card and said he represented the White Door Bed Company and said he desired to get a guaranty for some of these working beds as he called them.

Q I show you a card and ask you if that is the card that he showed you? A Yes, sir.

Q Did he leave it? A Yes, he left it with me.

Q Did he say anything other than what you had detailed? A No, that is what he told me at first and I told him he would have to see Mr. Blanchard who is handling that job, and I left him in my office and went out to look for Mr. Blanchard in the front office and Mr. Blanchard wasn't there and I went back and told him that I didn't think there was anything that I could do for him, that he would have to wait to see Mr. Blanchard. He then wanted to know why I couldn't do anything for him and I told him I could not legally bind the company on the order or acceptance, that even if I gave it to him it

would be useless. He wanted to know if he could talk to someone in authority about this matter and I told him the only one in the office was Mr. Ward and he asked me if I wouldn't go out and introduce him to Mr. Ward and explain my position to him, and I told him it wouldn't do any good because Mr. Ward couldn't bind the company, because I told him I didn't think anybody in our office could bind the company, as far as guaranty was concerned. We kept on talking and he wanted to know how we were paying on the Acropolis job and I explained to him that all our money was going into the building, that all our checks were going in the Acropolis and by them endorsed to the various contractors, they were endorsed on the back of the check. He then wanted to know if I could give him a letter to his company that, in the event that he delivered the material there, whether we would pay direct to the White Door Bed Company and not the Acropolis Realty Company, and I told him I could see no objections, that I would have to word my acceptance that only when the monies are due to the Acropolis, which means that all the money on the Acropolis was paid for, and that is the kind of an order I gave him.

Q What do you mean, all the money on the Acropolis? A That all the money on the Acropolis job would have to be paid for before his order would have any real effect.

Q What did he say to that? A He said he didn't think his company would accept that kind of an acceptance from us, and I told him that was the best I could do for him, and he finally took that order and went away, and I have never seen him from that day until the other day.

Q When you wrote the letter dated September 26th did you see Mr. Ward? A No, but I

went out to look for Mr. Blanchard and I noticed Mr. Ward at his desk.

Q Did Mr. Ward talk to you that day about the White Door Bed Company? A No, sir.

Q Did he tell you to give Mr. Bancroft an order? A No, sir.

Q Or an acceptance of an order? A No, sir.

Q Did you consult with Mr. Dawson about the conversation you had with Mr. Bancroft before Mr. Bancroft left? A No.

Q Did you consult with any one? A No, I didn't think it was necessary.

Q Mr. Bancroft took the letter? A Yes, he said he didn't think his company would ship on that order, and I said it was the best I could give him.

Q What did Mr. Bancroft have with him in the way of papers, if anything, when he came into your office? A He had that order.

Q Exhibit P. 2? A Yes, he had this.

Q Did he have anything else? A That is all that he showed me.

Q What, if anything, did he leave with you when he left? A The order.

Q Anything else? A No, sir.

Q Did you leave the card that you have on the railing before you? A I believe the card came in before he did, it was brought in.

Q I show you a contract between the White Door Bed Company and the Acropolis Realty Company, Exhibit P. 1, and ask you when you first saw that contract, or a copy of that contract? A I saw that up in your office about two weeks ago when we were preparing the interrogatories that Mr. Newman asked for.

Q Did you have either that contract or a copy of that contract prior to the commencement of this suit? A Why, no, sir.

Arthur Perselay, cross.

Q Do you know whether the copy or the original of that contract was on file by the United States Company prior to the commencement of this suit? A No, we didn't have them. I made a search for it at the time I prepared the interrogatories, I made a search in the files.

Q During your employment by the United States Mortgage Title & Guaranty Company approximately how many loans, construction loans, have been dealt with in the way you have outlined? A Probably fifteen and probably half that much in title policies where we guaranty policies for other people.

Q Have you ever, in the course of your employment, down to a certain time, written such a letter or any letter of the general outline of Exhibit P. 3?

Objected to.

The Court: I am inclined to permit the answer.

A No.

Cross examination by Mr. Newman.

Q You say you are a member of the bar? A That is right.

Q And you have been practicing law how long? A You mean actively engaged?

Q Yes. A I have always been doing title law, if you call that practicing law.

Q You are familiar with title work? A Yes, sir.

Q And you know what an assignment is? A Yes, sir.

Q And you know what an order is? A Certainly.

Q And you have handled from time to time documents and orders, not when you were with the U. S. Mortgage Title & Guaranty Company, but outside of that? A No, sir.

Q You don't know what an assignment of a fund is? A No.

Q Do you know what an order is? A No, sir.

Q But you have seen it and you have had experience? A Certainly.

Q In connection with your employment with the title company you paid out monies? A Yes, sir.

Q And checks were handed to you? A Yes, sir.

Q And the arrangements was made that you could have the material men on hand so the borrower could endorse the check and turn it over to the materialmen? A Yes, sir.

Q And it was done almost constantly, exclusively? A Yes.

Q Notwithstanding that fact, you gave this gentleman this order so he wouldn't require the endorsement of the White Door Bed Company? A Yes.

Q Although it was very easy to have them on hand to endorse the check, wasn't it? A Certainly.

Q And they did it in every case pretty near? A Certainly, but that is just—

Q Don't answer anything except what I ask you. And at the time you gave this letter you told him there was no guaranty? A Correct.

Q You told him you had no authority to give it to him? A Yes, sir.

Q You knew you were doing an illegal and an improper act? A No, sir.

Q Didn't you say it wouldn't have any legal effect to him? A Certainly.

Q Then you was doing an illegal act? A No, I wasn't.

Q And consider it so? A No, sir.

Q Giving a paper that is supposed to have validity and you told him when you gave it to him it had no validity? A No; it is not that at all.

Q You don't consider that you did an improper act by exercising authority which you didn't possess? A I didn't. The letter will speak for itself.

Q The letter says, "This is to acknowledge receipt of an order." A Read the rest of it.

Q You just acknowledged receipt of the order? A Certainly.

Q And you received the order? A Yes, sir.

Q At the time you dictated that letter you didn't have the contract in front of you, did you? A No, sir.

Q You had never seen this contract? A No, sir.

Q You didn't see it until about two weeks ago? A That is right.

Q And yet you issued an order on a contract that you had never seen; is that correct? A I don't quite get that question.

Q Did you ever see this contract until two weeks ago? A No, sir.

Q Then you issued this letter on the strength of an order on a contract which you had never seen? A Yes, mentioned it in this order.

Q You never saw it? A No, sir.

Q You don't know what the contract was for except as expressed in the order? A No, sir.

Q You don't know anything about it in terms? A No, sir.

Q You didn't know what was to be supplied? A No, sir.

Q But still you received this paper? A Yes, sir.

Q And yet you said, "We will make payments direct to you, as requested in this order, but only when the money is forthcoming to the Acropolis Realty Company"? A That is right.

Q You meant by that, according to your testimony, after everybody else was paid? A Yes, sir.

Q You ordered these people to put their merchandise in the building knowing that if there were not sufficient funds they would not be paid? A No, sir.

Q So that on your authority or order you thought this would be paid? A No, I didn't think it was necessary.

Q Did you ever tell the officers of the company? A I didn't think it was necessary.

Q And you want to deceive the officers of the company? A No, sir.

Q Did you want to deceive the White Door Bed Company? A No, sir.

Q So, in any event, you never told any officer of the company you wrote the letter? A I was not in the office after I wrote this letter and he found this letter in my files.

Q What date did the company first learn that you had written this letter? A I would say December, offhand.

Q What year? A 1926.

Q What part of December? A I would say the early part.

Q Who did you tell that you had written this letter? A I didn't tell anybody.

Q You didn't want to keep it a secret after Mr. Blanchard had found it? A No, when he found it he knew I had written it and all the other officers did.

Q Did you talk to Mr. Cohn about the matter? A Yes, sir.

Q So Mr. Cohn was familiar with that early in December? A Yes, sir.

Q You had a copy, you know when demand was made by the White Door Bed Company with the U. S. Mortgage Title & Guaranty Company for this money—you remember that letter? A No, that was handled by Mr. Cohn.

Q But Mr. Cohn at that time was familiar with the fact that you had written this guaranty to get the funds after everybody else was paid? A I still except that it was not a guaranty.

Q What was it? A Just a letter acknowledging an order, but no agreement of payment. No, and every one knows that.

Q What force did you think you would have if you acknowledged an order without agreeing to pay? A Didn't have any force.

Q So the whole thing on your part was an idle gesture; is that correct? A Yes, sir.

Q What was the purpose? A The purpose of that letter was this, that Mr. Bancroft said that he wanted to take a letter of similar nature back with him for the purpose of showing that he wouldn't have to go to the Acropolis Realty Company to get the endorsement of their check if a payment was to be made. I qualified my letter, Mr. Newman, when the money was forthcoming to the Acropolis. I figured this—

Objected to.

Q You figured that was your purpose? A My purpose was this way, exactly as I explained it to Mr. Bancroft, his was one of the loan items to go into that building for all bills for materials when they went in. If any materials were left I could—

Q What was your purpose, that is all I am interested in? A If there were any funds left after the completion of the building they were entitled to it and they could assign it to anybody they liked.

Q Do you mean they would assign and get the money? A Certainly.

Q And you didn't say, "After the completion of the job," and you understand the English language? A Yes, sir.

Q Notwithstanding that you had issued this letter you had paid out thousands of thousands of dollars and never called the attention of the officers of the company? A Yes.

Q And the first time when they learned about the letter was in December, when they found it among the files? A Yes, when you were notified by your client.

Q And as I understand, you had never seen Mr. Bancroft before? A No, sir.

Q And he came there and didn't tell you what the terms of the contract was? A No, sir.

Q Didn't even state to you at that time that he wouldn't do the work unless he received some guarantee or assurance from your company that you would pay the claim? A He told me that he didn't think the firm would ship unless they got some assurance of assignment.

Q And you had never seen the man before and not knowing anything about this contract

you were ready to help him? A I couldn't see anything objectionable about it.

Q At that time he didn't make any mention of the fact that he wouldn't ship the Acropolis Realty Company when this contract provided, "The mortgagee will pay to the buyer the said sum of $12,612.50 upon delivery of the cabinet ranges and the installation of the beds as above." A Had he he would never have gotten the letter.

Q Why was it the sum of $12,612.50 was given? A Because it was in the order given us.

Q Do you understand that was on account of his contract? A No, sir.

Q And you didn't care, did you? A Oh, yes.

Q As a title officer disbursing moneys to various persons who are furnishing the material or doing work on the building, are you not decidedly interested in their contract and the amount that will be due thereon? A No, sir.

Q And the nature and extent of them? A No, sir.

Q If you are not interested at all how did you get a postponement or a release or a payment on account of how the matter stands? A What do you mean?

Q How would you know? Suppose you paid the party something on account? A We have to check up those things and what the mechanics' lien claims are.

Q Without knowing whose the mechanics' liens are, did you have a record before you of every contractor on the job? A That is what I say.

By the Court.

Q Did you make a record of this? A No.

Arthur Perselay, cross.

By Mr. Newman.

Q You didn't make any record of it, although you knew he was supplying materials? A I didn't at the time I wrote the letter.

Q He was supplying materials? A Yes, sir.

Q Do you think that he would have supplied materials without giving him the letter? A Yes.

Q Then why did you give him the letter? A I gave it to him at his own solicitation, I told him that is the reason I wrote it.

Q If anybody comes into your company and asks for a letter you just give it to him? A Not any more.

Q You did in this case? A Yes, sir.

Q And you didn't see the contract or anything else? A No, sir.

Q You are still employed there? A Yes, sir.

Q You made a mistake this time, as I understand it, but you are not going to do it again, is that what you say? A We profit by our experience.

Q I show you a letter dated December 2, 1926, and ask you if you were present when that letter was dictated? A Offhand, I would say not.

Q Do you know anything about the letter? A No, I believe I got a telegram, not a letter.

Q Were you present when he dictated this letter? A No, sir.

Q Do you know anything about it? A No, sir.

Q I am referring to Exhibit P. 6. In your testimony on your direct examination you stated that on the 2nd day of December you had on hand some $7000 odd dollars. Kindly figure it up and see if it is not $12,750.82 that you had on hand? A When it comes down to those figures,

Arthur Perselay, re-direct.

I didn't prepare this statement. I can only give it to you assuming that it is correct.

Q I assume that if it came to the U. S. Mortgage, Title & Guaranty Company and they handed this to you of course it is correct? A They make mistakes sometimes.

By the Court.

Q Do the individual records show what was due? A I can bring up the books and show what was actually due, if anything.

Re-direct examination by Mr. Williams.

Q Was there any lien claims on this building on September 21, 1926? A No, sir.

Q Where there any lien claims on this building after December 21, 1926, before the lien of the U. S. Mortgage Title & Guaranty Company was all paid out?

Objected to.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Q Were there any moneys paid out by you on the part of the Mortgage Company in satisfaction of lien claims of the Acropolis Realty Company subsequent to September 21, 1923?

Mr. Newman: I object to that question.

The Court: The question may be answered.

A Do you mean filing of mechanic's lien suits?

The Court: The question is, was there money paid out in satisfaction of liens subsequent to September 21st?

A All our money is paid out.

Q Can you say during that period from September 21st, how many lien claim suits there were satisfied?

Objected to.

Objection sustained.

Q Look at the list Mr. Newman has referred to and tell the Court and jury whether or not, with the exception of the payment of interest and insurance, what the payments shown on that statement were. A These payments, with the exception of interest and insurance, were made solely in satisfaction of liens accrued by people who have furnished material or labor on the job located at Harrison and William streets, in East Orange.

The Court: The answer is improper, I think.

The Witness: There were no actual lien claims filed, as I recall it, until after we made our final payments, or pretty close to it.

Q The last payment mentioned there is to whom? A Isserman.

Q Who is Isserman? A He is at present one of the owners of the building.

Q At that time was he? A He was the second mortgagee. He was attempting to straighten out the various lien claims.

Q And what is the payment there? A The final payments $3,877.48.

Saul Cohn, direct.

Q Why was that paid? A In lieu of some small lien claims, payrolls and oil for the building, janitor service and the like of that.

Re-cross examination by Mr. Newman.

Q That payment through Mr. Isserman represents the balance paid? A I haven't got the date.

Q Some time in January, January 26, 1927? A Yes, sir.

SAUL COHN, recalled in behalf of defendant.

Direct examination by Mr. Williams.

Q (Showing witness paper.) I show you some typewritten sheets and ask you what they are?

Mr. Newman: I will admit that the 13th and 14th section with relation to the president and vice president are proper copies of the by-laws and that there is no provision in the by-laws of the title officer.

Q Can you remember when you first talked to Mr. Perselay about Exhibit P. 3, a communication to the White Door Bed Company? A I can't fix the date, but it was on the occasion of receiving the communication from the White Door Bed Company.

Q That is the letter of November 30th, P. 5? A On the occasion of receiving this communication I am quite sure that I first learned of the writing of the letter of December 21st.

Saul Cohn, cross.

Q What is in your right hand? A Exhibit P. 5.

Q And in your left hand is what? A P. 3.

Q And it is dated when? A November 30, 1926.

Cross examination by Mr. Newman.

Q You received a letter of November 30th and you wrote this letter marked P. 4? A Yes, sir.

Q In that letter you say nothing about Mr. Perselay at all, do you? A No, sir.

Q At that time you were fully aware of the letter that Mr. Perselay had written? A I have a recollection of receiving a letter, but whether it was this letter or a subsequent letter or telegram I don't remember.

Q You were aware that Mr. Perselay had written a letter? A I didn't see it until after the letter or telegram came. I think subsequent to that letter he made a full statement.

Q At the time you saw this letter of November 30th do you know that it had been written? A I didn't know on that date that Mr. Perselay had written that letter. Their letter didn't disclose it to me.

Q They say in this letter November 30th, "There is an item in our favor of $12,612.50." You didn't know that Mr. Perselay had signed any paper? A I didn't know.

Q You say that there were no more funds on hand at the time. Where did you get that information from? A The cashier.

Q As a matter of fact, it has been testified there was over $12,000 on hand December 2nd? A Well, I was misinformed.

Q And that the money had not been paid out to Mr. Isserman until sometime after January, 1927, you were mistaken about that? A I wasn't mistaken.

Q You were misinformed? A I sent the letter to the cashier's office and got the information and the letter.

Q Then you were sure about it until you got the information? A Yes, sir.

Q December, 1926, on the 13th day of December, do you remember writing a letter? A I do.

Q At that time were you officially informed of Mr. Perselay's letter? A Yes, sir.

Q You don't mention anything about this matter in your communication there? A I didn't.

Q You didn't say anything in this letter about his authority or anything about having the right to write that? A I had talked to Mr. Perselay and received a statement from him that he made today.

Q You also stated to him that you had a National Surety Bond. That refers to a bond to complete the building and that you were amply protected; is that correct, is that what you mean to say? A As I said, whether you are amply protected by a surety bond is always a question.

Q You say on orders received from time to time the funds representing the loans had gone into the structure. To what orders do you refer? A The blanket order.

Q You said in September, 1926, you were away. A I believe I was until about the last week in September.

Q As a matter of fact, Mr. Lehman is not actively engaged in business with this company? A I would say that he is active part of the time. He is not nominally president.

Q I mean by that you had the largest share of work? A I gave it more attention in quantity of time than Mr. Lehman does.

Q As a matter of fact, Mr. Lehman isn't there constantly, even when he is in Newark? A That is so.

Q He has his own private business? A Correct.

Q And Mr. Ward is there a greater part of the time with you? A He spends some time with the U. S. Trust Company.

Q And when you are out people are referred to Mr. Ward, is that so? A It doesn't appear that way. People are referred to whatever department it is in. People will refer to the title department—

Q When you are not there, isn't the person, the vice president, Mr. Ward, isn't it for him to ascertain what the character and the nature of their business is? A No, sir, we have a counter man and he distributes inquiries wherever they belong.

By the Court.

Q Are there several vice presidents? A Yes, sir.

Q Who is the vice president of the bank to take the place of the president? A We have not delineated a vice president to act for the president. If anything happens to—

Q You mean Mr. Ward has the same authority that you have? A Yes, sir, we have three vice presidents who act for the president. We have no delineation of vice president at all.

Q Section 14, does that mean that there has never been any special authority given by the directors to the vice president to take over the

duties of the president upon his absence? A To my knowledge, there is no specification on that subject. It is a temporary matter.

Q So you have given nobody authority by by-law or resolution to act for the president? A To my recollection, we have never given authority to any vice president to perform the president's duties.

Q And he has prescribed those duties in what manner? A By agreement between himself and the vice president to lay out the services to be performed and the authority assumed by the vice president.

Q Nothing in writing, but by way of understanding? A Yes, sir.

Q So there is absolutely nothing on the records of the U. S. Mortgage Company prescribing any duties? A That is correct.

Q The vice president? A That is correct.

By Mr. Newman.

Q. Then, as a matter of fact, the vice president or vice presidents do in the absence of the president whatever is necessary in the operation of the business? A The vice president in practice don't act just that way.

Q I want to know in the absence of yourself, for example, and Mr. Lehman, does the vice-president do whatever is necessary in the regular business of the company? A I would say yes to that.

By Mr. Williams.

Q You have a business aside from officer in this company? A Yes, sir; we have a law office to which I don't give very active attention. I

spend only a very small part of my time there, but I am a member of the firm.

Q Do you spend more or less time in your law practice than Mr. Lehman does in his business. A I will say I spend more time.

By the Court.

Q Is the U. S. Mortgage & Title Guaranty Company incorporated under the trust act or general incorporation? A It was incorporated under the insurance laws. It is an insurance company, engaged in the business of insurance. It is purely an insurance company.

Q That is, it is incorporated under the Insuranct Act? A Yes, sir.

ALEX ISSERMAN, sworn in behalf of defendant.

Direct examination by Mr. Williams.

Q What is your business? A Real estate and mortgages.

Q Were you the second mortgagee? A The South Orange Realty Company.

Q Do you remember receiving from the Mortgage Company $3,877.48? A Yes.

Q Some time early in 1927? A Yes, sir.

Q And do you remember what month it was? A I believe in January, 1927.

Q What was that made for? A To pay the architect for his expenses, besides I put up some more money to pay him.

Mr. Newman: You mean to complete the building?

The Witness: No.

Q What were you doing with the building at that time? A I started to go in this building to complete the building.

Q Did this come under your mortgage? A The second mortgage.

Q When did you start to do that?

Objected to.

The Court: The question may be answered.

A The 9th of February, 1927.

Q And at that time can you remember whether or not the door beds in question in this suit were installed? A No, they were on the floor.

Q Did you install them? A Yes, sir.

Q You mean, you had somebody do it for you? A Yes, under my supervision.

Cross examination waived.

DEFENDANT RESTS.

FRED WILLIAM BANCROFT, Jr., recalled in behalf of plaintiff in rebuttal.

Direct examination by Mr. Newman.

Q Mr. Perselay testifies that when you saw him in September, 1926, you asked him for a guarantee; is that so? A It is.

Q You did ask him for a guarantee? A Yes, sir.

Q He says also that you told him to see Mr. Blanchard and personally left the office to find Blanchard and also told you that he could not give you such a guarantee. Did he say that?

The Court: He says that he told Mr. Perselay to see Mr. Blanchard.

A He didn't.

Q Did he tell you that he didn't have authority to give you a mortgage? A No, sir.

Q And that his letter could not bind the company, that action could only be by action of the board? A Yes, sir.

Q The only object of giving you this letter direct was so you wouldn't have to get the endorsement of the Acropolis Realty Company? A No, sir.

PLAINTIFF RESTS.

DEFENDANT RESTS.

Mr. Williams: I move for the direction of a verdict in favor of the defendant on the ground, first, that the defendant has sustained the burden of showing authority in the witness Perselay—

The Court: Are there any reasons to be added to your motion for a non-suit?

Mr. Williams: Upon the same ground as already urged for the non-suit, and upon the additional ground that a failure of the plaintiff to complete the performance of those things undertaken by it in its order P. 2, predicated upon some act or omission of the owner in failing to have certain things done, or having certain things done improperly,

would not relieve the plaintiff as against this defendant from a full performance of that part of his contract written in the order P. 2, the contract between the owner and the plaintiff, of course, one to which this defendant was a stranger the order being drawn by the owner or by the plaintiff and was used by the plaintiff and brought to this defendant, and that order provided that payment should be made when the door beds were installed. It said nothing about installing by the plaintiff, it said nothing about the defendant furnishing doors or hardware or any other thing in the installation of those beds. The plaintiff had a contract which I submit he must perform before he can require that we perform ours, irrespective of how hard that may be on his part, because of the omission of the Acropolis or whatever happened to be in charge of the building, it being our theory that we are not bound to furnish the door openings or doors, or any other thing. We have no contract with the plaintiff other than this order and the letter Exhibit P. 3. Neither the order or the letter, Exhibit P. 3, charges us with the duty of doing anything. Certainly they do not charge us with the furnishing of doors or door openings, or do they charge us with the obligation to pay until these beds were installed, and that the plaintiff is not excused or relieved from the installation of beds because the Acropolis Company or someone else did not furnish door openings, and that is not an excuse for a full performance of that contract.

The Court (After argument.) I will deny the motion for the direction of a verdict.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Williams sums up in behalf of the defendant.

Mr. Newman sums up in behalf of the plaintiff.

CHARGE.

The Court charges the jury as follows:

DUNGAN, *J.* Gentlemen of the Jury: In 1906 the Acropolis Realty Company was building an apartment-house in East Orange, of which that company was the owner, upon which the defendant, the U. S. Title Mortgage & Guaranty Company, had taken a mortgage for $375,000, to be paid as the building progressed, the practice being to make payments to materialmen and laborers upon orders of Mr. William L. Blanchard, appraisal officer of the U. S. Guaranty Title & Trust Company. He would inspect the building, determine the progress of the work, and how much, in view of the progress of the building, be paid by the U. S. Mortgage & Title Guaranty Company, and would then so indicate by an order which he would send to the U. S. Company. A check would then be made to Acropolis Company, endorsed by it to such materialmen and laborers, and it was required by the U. S. Company that it should be made payable to materialmen and laborers before the check was actually delivered to the Acropolis Realty Company.

Under date of May 25, 1926, the Acropolis Realty Company entered into a contract with the

White Door Bed Company, which is the plaintiff in this suit, "White" being a name. It does not mean a white door, but "White" is the name of the person who invented this particular bed. They entered into an agreement under that date with the White Door Company to furnish certain cabinets and door beds, and by this agreement it was provided that the seller—that is, White—shall not be obligated to deliver until the buyer shall furnish to the seller a letter from the mortgagee, the U. S. Mortgage & Title Guaranty Company, that "the mortgagee will pay to the buyer the said sum of $12,612.50," which was part of the consideration of the contract, "upon delivery of cabinets and ranges and the installation of the beds." The contract provided that the delivery of this material should be F. O. B. the sidewalk in front of the building, that is, the delivery of the cabinets and beds was accomplished when they were placed upon the sidewalk in front of this building. Thereupon, and apparently in pursuance of this provision which I have just read, the plaintiff obtained from the Acropolis Realty Company, this assignment and order, which says: "We, Acropolis Realty Co., a corporation duly organized under the laws of the State of New Jersey, do hereby, the 21st day of September, 1926, assign, transfer and set over unto the "White Door Bed Company, 130 North Wells street, Chicago, Illinois, a sum equal to $12,612.50 out of the money due us and to come due to us from the United States Mortgage & Title Guaranty Company of New Jersey, under its mortgage in the amount of $375,000, granted to us upon our apartment building at the southwest corner of North Harrison and William streets, East Orange, N. J., and we hereby authorize and direct

the said company, U. S. Mortgage & Title Guaranty Company of New Jersey to pay unto the said "White Door Bed Company the said sum of $12,612.50, out of said mortgage money, on our behalf, upon the delivery of cabinets and ranges to our aforesaid apartment building and upon the installation of beds and doors in accordance with a contract entered into between us and the White Door Bed Company, dated the 25th day of May, 1926." Thereupon, the representative of the plaintiff company took his assignment and order to the U. S. Mortgage & Title Guaranty Company and obtained this letter dated on the same day, September 21, 1926, which reads as follows: "This is to acknowledge receipt of an order issued by the Acropolis Realty Company on us, in your favor, for $12,612.50, to be paid to you direct out of the mortgage money we have in our possession on a $375,000 loan extended by us to the Acropolis Realty Company. We wish to advise we will make payments direct to you, as requested in this order, but only when the money is forthcoming to the Acropolis Realty Company." Thereafter, Mr. Bancroft says, the plaintiff company proceeded to fulfill its contract with the Acropolis Realty Company, and says it did forward all the materials called for by it to the building in accordance with the terms of the contract. However, there is a provision in this contract that the beds are to be installed upon the doors—that is, to use the words of the contract: "Bed prices include delivery at building site and hanging of beds provided openings have been prepared by the buyer to receive same." By openings, it appears to mean openings for the beds. Admittedly the doors were not to be hung by the plaintiff, and Mr. Bancroft admittedly says that the openings

or doors were not furnished. If that be true, that the Acropolis Company, with whom the contract was made, failed to provide the openings and the doors upon which the beds could be hung, of course, the plaintiff could not hang them, and this would entitle the plaintiff to recover the amount of the contract, if it was the failure of the Acropolis Realty Company to furnish the opening to put up the beds. Even if that were not true, and if there was a practical completion the White Door Bed Company would be entitled to recover, less the amount required to complete it, and, if Mr. Bancroft is right, it seems to be a minor matter out of a contract of $22,612.50. He says that if these doors were finished it would cost to install those seventy-two beds, $36 to $48. Mr. Blanchard said it would cost more than that, but he does not tell us how much it would cost. So the only amount given in this case for installing the beds on the fifty to seventy-five cents for seventy-two doors, which would seem inconsequential, as compared with the contract price of $12,612.50. The testimony is that since that time —that is, if I understand Mr. Blanchard's testimony, practically all of this material had been used except the gas ranges, about which there appears to have been some difficulty with the Building Department of the City of East Orange. The mere fact that nothing else was put in by the plaintiff company, if the plaintiff was prevented from putting in the beds by the defendant company, or anybody else, makes no difference in the case here, because the contract, as I have already called to your attention, did not provide for anything but the furnishing of the beds. The plaintiff fulfilled its contract, it is claimed, with the exception of the installation of the beds. Under

date of November 30, 1926, the plaintiff wrote this letter to the U. S. Title & Guaranty Company: "Re your file No. 280. In a loan of $375,000 made by your company to the Acropolis Realty there is an item in our favor of $12,612.50. Inasmuch as shipment of the equipment was made quite some time ago we will appreciate remittance without further delay." And right here, it seems that everything called for by the contract was furnished by the plaintiff company, cabinets and beds, and all that the plaintiff omitted to do was to hang these beds upon the door. In reply to this letter of November 30th the defendant company says: "Replying to your letter of November 30th would say that we exhausted, during the progress of the building owned by the Acropolis Realty Company, the entire amount of our loan. We understand that the owners are arranging to secure an additional loan and we would suggest that you secure from them an appropriate order for these funds." There is nothing said in this letter you will observe but that everything has been furnished; nothing said in this letter about the authority of signing this letter of December 21st, Exhibit P. 3. Whereupon the plaintiff caused this letter to be written: "We were surprised to receive your letter of December 2nd advising that the loan of $375,000 made to the Acropolis Realty Company had been exhausted and that you are therefore unable to take care of our claim, until an additional loan was secured. We are surprised at this state of affairs. Your letter of September 21st gave us to understand that you were holding $12,612.50 out of the loan to pay the obligation due this company. Shipment was made on your representation that the funds were in your possession,

therefore must look to you for immediate settlement for the $12,612.50 still due." The defendant company makes reply to that under date of December 13th saying: "Replying to your favor of the 6th instant, woulld say this company did not assume any obligation to you to pay the amount of your account. We made a mortgage loan of $375,000 which we were assured by the borrower was ample to complete the structure. We also required a National Surety Company bond which was agreeable to the borrower. We advised you that these funds would be paid when forthcoming to the borrower. During the process of the work we have expended the amount of our loan. On orders received from time to time the funds representing our loan have gone into the structure. We are advised by the borrower that he is raising additional mortgage funds to take care of claims. As soon as this has been accomplished we will take the matter up with you." There is nothing said in this letter that these goods have not been furnished or that the contract has not been entirely completed or suggesting the lack of authority of the person who signed this letter on the 21st day of September. It is an admitted fact in this case that on the 21st day of September, when this letter was dated and signed, there was $100,000 or more which had not been paid by the U. S. Company to the Acropolis or upon its order or upon this building, and on December 2nd after the notice had been received from the Acropolis Realty Company that the work had been completed, it is an admitted fact that over $12,700, claimed was in the treasury of the U. S. Company and has never been paid upon this mortgage. It is insisted upon behalf of the defendant that its interests were safeguarded when it put in

this letter of September 21st these words; "but only when the money is forthcoming to the Acropolis Realty Company." It becomes the duty of the Court to advise you in its application to this case, what that word "forthcoming" means. It is insisted that it means that if there was money left over due to the Acropolis Realty Company, after everybody else had been paid, that then the plaintiff in this case would receive this money, and the first part of it I will call your attention again: "This is to acknowledge the receipt of an order issued by the Acropolis Realty Company on us, in your favor for $12,-612.50, to be paid to you direct out of the mortgage money we have in our possession on a $375,-000 loan extended by us to the Acropolis Realty Company. We wish to advise that we will make payments direct to you as requested in this order, but only when the money is forthcoming from the Acropolis Realty Company." Does that mean that if everything else is paid, that this plaintiff will be paid this money? I think a proper construction of those words is, that if, after the time this letter was written funds from the mortgage loan became available, because of the progress of that building to be applied to that building, out of those funds this $12,612.50 should be paid, after and when the contract of the plaintiff had been fully or substantially performed, and if and when that situation arose, then it became the duty of the defendant, under letter of September 21st, for the defendant to apply to the plaintiff's bill that amount, and its failure to do that made it liable for that amount, with interest, unless the parties themselves gave a different construction of this letter. It is a well-known principle of law that where the parties themselves have given to a

contract a certain construction, that construction is binding upon the parties as well as the Court, so if there was a different construction given by the parties themselves to this letter of September 21st, which is really a contract between the parties, then that construction is binding upon you and me; and it is insisted on behalf of the defendant that there was a different construction put upon this contract because of the testimony of Mr. Perselay, by whom it was signed. Mr. Perselay says that when Mr. Bancroft came to the place of business of the Mortgage Company he was at the office and that Mr. Bancroft gave him a card, and said that he desired to get a guarantee. He said he told him that he would have to see Mr. Blanchard; that he went out personally to find Mr. Blanchard, but could not, and he told Mr. Bancroft that he, Perselay, could not pay the money by signing the order. He said he told him that Mr. Ward was the only one in; Mr. Ward was the vice-president, but Mr. Perselay told him that no one present at that time in the company could legally bind the company, and he said he explained how he was paying out the money. He said that Mr. Bancroft asked him if he would give him a letter that they could pay direct to White and not the Acropolis, and he told him that he would have to word that acceptance to say that he could only pay when the money would be due to Acropolis, and he says this is the reason that he told Mr. Bancroft that all the money on Acropolis would have to be paid before this order would have any effect, and to this Mr. Bancroft agreed. Mr. Bancroft tells an entirely different story as to how this transaction took place. He says that he went with this order to the U. S. Company and inquired for Mr. Saul

Cohn, who it appears was in charge of such matters as this. He was told Mr. Cohn was in Europe, and he was then directed to Mr. Ward, who was vice-president of the company. He said that Mr. Ward read the order, looked over the contract, and told him if he would go to Mr. Perselay, Mr. Perselay would give him what he wanted, and he directed him how to get to Mr. Perselay. He said he did go to Mr. Perselay and he showed him the contract and order and told him what Mr. Ward had said, and he gave him the letter of September 21st and said they had a copy of the contract. However, the defendant insists that the letter of September 21st, signed by Mr. Perselay, was not signed under the circumstances stated by Mr. Bancroft, that it has not been shown in this case that there was any authority given to Mr. Perselay for signing, and that is an important question in this case.

Reading from the defendant's first request to charge I would say: "That before the plaintiff can recover from this defendant, the jury must be satisfied by the greater weight or fair preponderance of the evidence that Perselay had authority, express or implied, to bind the defendant by the letter of December 21, 1926, P. 3.

Reading the second request to charge: "That authority cannot be implied from a single or isolated act of the employees or agent or unless the act is naturally related to the duties or functions ordinarily exercised by a person in the office or employment in question and under scrutiny."

Quoting the third request: "That unless the jury is satisfied that Perselay had authority to write the letter P. 3, in the usual course of his employment, was exercising authority delegated to him by the officers of the company, or used

by him with their knowledge for so long a period as justify the public in believing that he had the authority to write the letter—the plaintiff cannot recover from this defendant."

Quoting from the plaintiff's request to charge: "If the jury find from the evidence that the United States Title & Mortgage Company voluntarily placed Arthur Perselay in such a situation that the plaintiff company, with its knowledge of business usages and the nature of the business in hand, was justified in presuming that Perselay had authority to write the letter of September 21st, 1926, accepting the order to pay the plaintiff the sum of $12,612.50, then the act of Perselay was the act of the U. S. Mortgage & Title Company, and said company is bound thereby." I charge you that with the qualification which I have already stated, unless there was a different construction put upon this contract by Bancroft and Perselay. You will recall something I omitted to mention when I was speaking about what Mr. Perselay said, Mr. Perselay said that Mr. Bancroft agreed to the qualification that until everybody else had been paid and there was money available to the realty company his company should not be paid. Mr. Ward, on this subject of authority, denied the circumstances—that is, denied them partly—he did not deny everything that Mr. Bancroft said took place between him and Mr. Ward. What he did say was that he never saw Bancroft, that he remembers, that he recognizes P. 1 and P. 2, that he did not say to Bancroft what Mr. Bancroft says he did. ("That I know of," were his words), and he is sure he did not tell him to go to Perselay and he would give him what he wanted, all of which is to be taken into consideration by you in determin-

ing what was said, and of course, if we rely upon the authority which Ward gave to Perselay, it is necessary, first, to find that Mr. Ward had the authority, or the apparent authority, to authorize Ward to write this letter.

It may not have been that Mr. Perselay had the authority, but if Mr. Ward had the authority to sign this letter, and you find it to be a fact that Mr. Ward sent Mr. Bancroft to Mr. Perselay with the statement that Mr. Bancroft said he did, then that might confer upon Mr. Perselay the authority to write a letter which he otherwise might not have had.

To sum up in a few words what I have said, I will try to make it a little more understandable. If you find in this case that the plaintiff performed its contract with the Acropolis, then it was entitled to recover from the Acropolis Realty Company the full amount of the contract; or, if it was prevented from performing this contract by the failure of the Acropolis to furnish the openings and doors provided for, but furnished the material, it would be entitled to recover from the Acropolis the full amount, or if not permitted by the Acropolis, and it has substantially performed its contract except the putting up the beds on the doors, then it might recover from the Acropolis the contract price, less what it would cost to install those beds on the doors, and if there was money available in the hands of the U. S. Mortgage Title & Guaranty Company, or to use the words of the contract, "If there was money forthcoming to the Acropolis Realty Company from the United States Mortgage Title & Guaranty Company" subsequent to the date of this letter, then it was the duty of the defendant to hold a sufficient amount to pay to plaintiff whatever might

be due that is, $12,612.50, or such portion thereon as would pay the plaintiff for substantial compliance with the contract, provided you find it to be established in this case that Mr. Perselay, who signed this agreement, had authority to sign it, and to bind the company.

The fifth, sixth, eighth and ninth, the tenth and the twelfth requests on behalf of the defendant I decline to charge except as I have charged.

I have charged the first four. The seventh is: "That even if the jury is satisfied and Perselay had authority to write P. 3, the plaintiff cannot recover from this defendant unless the jury is also satisfied, by the greater weight or fair preponderance of the evidence, that on and after September 21, 1926, there was in the hands of this defendant sufficient of the proceeds of the mortgage loan of this defendant forthcoming to the Acropolis Realty Company, owner, out of which the plaintiff might have been paid." That I charge you. That is substantially what I have said.

The eleventh request is: "If the plaintiff has failed to satisfy the jury that it has in every respect performed the contract with the Acropolis Realty Company, owner, there can be no recovery as against this defendant." That I charge you.

The thirteenth request I decline to charge.

The plaintiff's first and second request I have charged. The third request is: "If the contract of the plaintiff was performed according to its terms, its right to recover is not affected by the fact that the Building Department of the City of East Orange refused to approve of the installation of the kitchen ranges, as under plaintiff's

contract with the Acropolis Realty Company it was not obligated to install the ranges, but merely to deliver the same." That I charge you.

The plaintiff's fourth request is: "The plaintiff is not bound by the terms of said mortgage executed by the Acropolis Realty Company to the U. S. Mortgage Title & Guaranty Company, respecting the obligation to conform with the rules, restrictions, regulations of the executive, administrative or judicial powers having charge of the regulations or supervision of building construction in the City of East Orange, the condition of said mortgage not forming a part of the agreement of the White Door Bed Company and the Acropolis Realty Company." That I charge you.

The fifth request is: "The provision of the said mortgage executed by the Acropolis Realty Company to the U. S. Mortgage & Title Guaranty Company do not in any manner bind the plaintiff in this instance, it being a separate agreement in which the Acropolis Realty Company and the U. S. Mortgage & Title Guaranty Company, the plaintiff being in nowise a party thereto." That I charge you.

My attention is called to the fact that nothing was said about interest. The plaintiff waives interest up until January 1, 1927, and they ask that interest be entered from January 1, 1927, to this date, May 28, 1928, amounting to $1,072.06, at six per cent., making altogether $13,845.64, which should be the amount of your verdict, if you find a verdict in favor of the plaintiff.

(The jury retires.)

Exceptions to Charge.

Mr. Newman: I would like to take an exception to that part of the Court's charge where the Court said that the parties might, by their own act put a construction upon the contract because of the alleged conversation between Mr. Perselay and Mr. Bancroft.

Exception noted as ground of appeal.

Mr. Newman: And also to that part of your Honor's charge where you said that whatever Mr. Perselay's construction was, if it was assented to as to when the money became due—or whatever your Honor said on that point.

Exception noted as ground of appeal.

Mr. Williams: I would like to take an exception to your Honor's refusal to charge my requests No. 5 and 6 and 8, 9, 10 and 12 and 13, and to the qualifications of the eleventh request, and to the charging of the plaintiff's third, fourth and fifth requests, that it made no difference as to the failure of the plaintiff to install the beds.

Exception noted as ground of appeal.

Mr. Williams: And to that part of your Honor's charge in which you said that if the plaintiff complied with all of its contract—whatever your Honor said on that subject.

Exception noted as ground of appeal.

Mr. Williams: And to that part in which your Honor said the plaintiff would be entitled to the difference if that became available.

Exception noted as ground of appeal.

Mr. Williams: And to that part of your Honor's charge in which you said that after September 21, 1927, there should be paid or withheld for the benefit of the plaintiff such funds as became available, that the funds should have

been paid if the plaintiff had completely or substantially complied with his contract.

Exception noted as ground of appeal.

Mr. Williams: And also an exception to your Honor charging the plaintiff's first request.

Exception noted as ground of appeal.

Mr. Williams: And also to that part of your Honor's charge in which you say Perselay and Bancroft were acting for the parties. Our contention being that Perselay did not act within the scope of his authority.

Exception noted as ground of appeal.

Mr. Williams: And also to that part of the charge that Ward sent Bancroft to Perselay, our contention being that Ward had no authority to delegate Perselay.

Exception noted as ground of appeal.

Mr. Reed: And an exception to what your Honor said in regard to the letter being written prior to any material being on the property.

Exception noted as ground of appeal.

PLAINTIFF'S REQUESTS TO CHARGE.

Plaintiff respectfully requests that the jury be charged as follows:

1. If the jury find from the evidence that the United States Title & Mortgage Co. voluntarily placed Arthur Perselay in such a situation that the plaintiff company with its knowledge of business usages, and the nature of the business in hand, was justified in presuming that Perselay had authority to write the letter of September 21, 1926, accepting the order to pay the plaintiff

the sum of $12,612.50, then the act of Perselay was the act of the United States Title & Mortgage Co., and said company is bound thereby.

2. If you find that Perselay had authority, either actual or apparent, to write letter of September 21, 1926, and said letter was an acceptance to pay the plaintiff $12,612.50 upon the completion of its contract, then you will find that the plaintiff was entitled to receive from the United States Title & Mortgage Co., said sum, provided that amount of money remain on hand under its mortgage loan on September 21, 1926, regardless of what payments were made to the other contractors after said date.

3. If the contract of the plaintiff was performed according to its terms, its right to recover is not affected by the fact that the Building Department of the City of East Orange refused to approve of the installation of the kitchen ranges, as under plaintiff's contract with the Acropolis Realty Co., it was not obligated to install the ranges, but merely to deliver the same.

4. The plaintiff is not bound by the terms of said mortgage executed by the Acropolis Realty Co. to the U. S. Mortgage and Title Company, respecting the obligations to conform with the rules, restrictions, regulations of the executive, administrative or judicial powers having charge of the regulations or supervision of building construction in the City of East Orange, the condition of said mortgage not forming a part of the agreement between the White Door Bed Company and the Acropolis Realty Co.

5. The provisions of the said mortgage executed by the Acropolis Realty Co., to the U. S.

Mortgage and Title Guaranty Company do not in any manner bind the plaintiff in this instance, it being a separate agreement between the Acropolis Realty Co. and the U. S. Mortgage and Title Guaranty Company, the plaintiff being in nowise a party thereto.

10

DEFENDANT'S REQUESTS TO CHARGE.

Defendant respectfully requests that the jury be charged as follows:

1. That before the plaintiff can recover from this defendant the jury must be satisfied by the greater weight or fair preponderance of the evi-
20 dence that Perselay had authority, express or implied, to bind the defendant by the letter of September 21, 1926, P. 3.

2. That authority cannot be implied from a single or isolated act of the employee or agent, nor unless the act is naturally related to the duties or functions ordinarily exercised by a person in the office or employment in question and under scrutiny.

30 3. That unless the jury is satisfied that Perselay had authority to write the letter P. 3, in the usual course of his employment, was exercising authority delegated to him by the officers of the company—or used by him with their knowledge for so long a period as to justfy the public in believing that he had the authority to write the letter—the plaintiff cannot recover from this defendant.

4. That authority in corporation officers or employees is never presumed and that the bur-
40

den of proving it to the satisfaction of the jury is upon the party asserting it, in this case, the plaintiff.

5. That the plaintiff accepted from the owner the order P. 2, and from this defendant the letter P. 3 with express notice of the terms and conditions of the mortgage agreement between this defendant and the owner, and was by the terms of its contract with the owner and of the order and the letter bound by those terms and took nothing that the owner did not have or could not take.

6. That if the owner under its mortgage agreement with this defendant could not require of this defendant that this defendant pay for materials not conforming to the building code of East Orange, and the jury is satisfied that all or any part of materials furnished by the plaintiff were not such as to comply with that building code, then the plaintiff cannot recover from this defendant.

7. That even if the jury is satisfied that Perselay had authority to write P. 3, the plaintiff cannot recover from this defendant unless the jury is also satisfied, by the greater weight or fair preponderance of the evidence, that on and after September 21, 1926, there was in the hands of this defendant sufficient of the proceeds of the mortgage loan of this defendant forthcoming to Acropolis Realty Company, owner, out of which the plaintiff might have been paid.

8. That if under its mortgage agreement with this defendant the owner could not require of this defendant that it pay to the owner any part of the proceeds of this defendant's mortgage loan, or if under the terms of said mortgage no part of

the proceeds of said loan became due or was forthcoming to the owner until the building of the owner was completed and fully paid for—freed of liens or claims for materials or labor furnished—and if the jury is satisfied that said building was never completed by the owner and was never freed of liens or claims before the proceeds of this defendant's mortgage loan was exhausted, then the plaintiff cannot recover as against this defendant.

9. That unless the jury is satisfied that plaintiff did not manufacture all or any part of the materials alleged by it to have been furnished until after the date of the letter P. 3 September 21, 1926, then the plaintiff cannot recover for the undertaking of this defendant would lack consideration.

10. That unless the jury is satisfied that none of the materials of the plaintiff were delivered prior to September 21, 1926, the date of the letter P. 3, there can be no recovery as against this defendant, for in such case the undertaking of this defendant would lack consideration.

11. If the plaintiff has failed to satisfy the jury that it has in every respect performed the terms of its contract with Acropolis Realty Co., owner, there can be no recovery as against this defendant.

12. The failure (if any) of the owner to provide door openings or doors for the hanging of the beds as provided in the contract, does not relieve the plaintiff as against this defendant of the obligation of performing all things provided in its order P. 2—the acts or omissions of the owner not being binding upon this defendant and

the plaintiff being bound as respects this defendant to the exact terms and conditions of the order which it either drew or accepted from the owner and which underlies and is the basis for the letter P. 3 upon which it sues this defendant.

13. Payments made by the defendant to materialmen or laborers who had furnished material or performed labor for or in the erection of the building in question in order to procure the completion of said building, do not constitute money "forthcoming to the Acropolis Realty Co." under the terms of Exhibit P. 3.

EXHIBIT P. 1.

THE "WHITE" DOOR BED COMPANY
Chicago

Sales Contract

To Acropolis Realty Company, #192 Market Street, Newark, N. J. (hereinafter referred to as the buyer)

The "White" Door Bed Company (herein called the seller) hereby proposes to sell and to deliver F. O. B. the sidewalk at Harrison and William Street, East Orange, New Jersey, the merchandise described in the attached specification, at the price of $22,612.50. (Subject to the itemization given therein and to such minor adjustments as may take place from time to time at the unit prices set forth.

Delivery Date: September 1, 1926.
Buyer is to give two weeks notice to the Seller before merchandise is to be delivered.

Terms: Twelve Thousand Six Hundred and twelve dollars and fifty cents ($12,612.50) is to be paid upon delivery of cabinets and ranges to building and the installation of beds on doors, provided by the Buyer. Seller shall not be obligated to deliver until Buyer shall furnish to the Seller a letter from the Mortgagee (U. S. Mortgage & Title Guarantee Co.), that the Mortgagee will pay to the Buyer the said sum of $12,612.50 upon delivery of cabinets and ranges and the installation of the beds as above.

In the event that the Buyer shall be unable to furnish such a letter this agreement shall be null and void without obligation on either the Buyer or the Seller.

The balance of Ten Thousand Dollars shall be evidenced by eighteen notes in the form adopted

Exhibit P. 1.

and used by the Seller, of the Buyer bearing date of three months after the delivery of cabinets and ranges and the installation of the beds payable monthly; the first note to mature one month after date, and the following notes one month apart thereafter; all bearing interest at the rate of 7% per annum, until paid; which notes shall be secured by a chattel mortgage or at the option of the Seller, by a conditional sales contract, upon said merchandise in the form or forms now used by the Seller. The Buyer agrees to execute, acknowledge and deliver such chattel mortgage or conditional sales contract and the notes to be secured thereby at the time of delivery to the Buyer of the bill of lading covering the first shipment.

If the Buyer shall not, within fifteen (15) days after arrival at destination of such first shipment, execute and deliver said notes, the said chattel mortgage or conditional sales contract, or shall fail to pay any installment of said purchase price, or fail to comply with any provision of this agreement, the Seller may, without notice to the Buyer, rescind this agreement, take possession of said merchandise, and retain any monies paid hereunder as agreed and liquidated damages, and not as a penalty.

The Buyer agrees to pay all charges which may accrue on or with respect to said merchandise, and keep the same free from liens and encumbrances, so that the lien of the Seller shall be superior to any and all liens on said merchandise. The Buyer agrees to keep said merchandise insured in good and responsible companies against loss or damage by fire, to an amount equal to the total purchase price thereof, and to deliver the policies for such insurance to the Seller. All

Exhibit P. 1.

such policies shall be made payable, in case of loss, to the Seller, as its interest may appear.

The title to said merchandise shall remain in the Seller until the making of said cash payments and the execution and deliver to the Seller of said notes, and of the chattel mortgage or conditional sales contract securing the same, and the delivery to the Seller of said policies of insurance and release of lien, where necessary.

It is further agreed that said merchandise shall be considered as personal property, and at no time as a fixture, or as a part of or as an appurtenance to any building or real estate, even tho attached thereto, and the Seller may remove such merchandise either before or after installation, if the Buyer shall fail to carry out any of the provisions of this agreement.

The Seller shall not be liable for delay in delivering, or for failure to deliver any such merchandise, occasioned in whole or in part by strikes, fires, accidents, delays in transportation, delays in procuring or inability to procure material or supplies, or for any cause whatever beyond the Seller's control; nor shall the Seller be liable for consequential damages. It is mutually agreed that the receipt of the merchandise by the Buyer when delivered shall constitute a complete waiver of any and all claims for delay.

When the merchandise or any part thereof is ready for shipment, and the Seller gives proper notice to the Buyer either in person or by mail that such merchandise is ready for shipment, and the Buyer fails to give definite instructions for shipment in reply to such notice, it is hereby agreed that the Buyer shall pay to the Seller a sum equal to 1 1/4% of the entire amount of this contract, for each and every month or part of a

Exhibit P. 1.

month that elapses between the time of such notice, and the time the merchandise is actually shipped in accordance with the instructions of the Buyer, as compensation for storage, handling and insurance charges; this amount shall be added to the total amount of the notes to be given and pro-rated over the entire series.

All previous communications, whether verbal or written, with reference to the subject matter of this proposal, are hereby abrogated, and this proposal, as accepted and approved, shall constitute the entire agreement between the Buyer and the Seller, and no change in or modicication of this agreement shall be binding upon the Seller, unless such change or modicication shall be in writing and approved by an executive of the Seller, either attached to or endorsed on this agreement. When this agreement shall have been executed by the selling representative of the Seller and approved in writing by an executive of the Seller, and accepted by the Buyer, it shall then become binding upon the parties thereto.

Dated this 25th day of May, 1926

THE "WHITE" DOOR BED COMPANY.

By CHARLES C. WHITE,
Selling Representative

Accepted:

ACROPOLIS REALTY COMPANY

By MORRIS MELTZ
Approved Manager

Exhibit P. 1.

SPECIFICATIONS
FOR
ACROPOLIS REALTY COMPANY

Nine Story Apartment House Located at
Harrison and William Streets,
East Orange, N. J.

Date: 5/25/26

Dictated by F. W. Bancroft

To EE
Applying to Blue Print
Plans of Nathan Harris, Architect. No. 24 Branford Place, Newark, New Jersey.

No. 76E208 "White" China Cabinet
Equipped with three adjustable shelves and one tray at the top. Over all width 2′ 4¼″— height 4′ 6″— depth 1′ 2½″. D. S. glass doors. Made of white wood. Finished with one coat of primer. Door opening to right when facing cabinet.
72 only. Price each $26.25 Total $1890.00

No. 76E209 "White" China Cabinet
Like 76E208 but with door opening to left when facing cabinet.
72 only. Price each $26.25 Total $1890.00

No. 76E175 "White" Dressing Cabinet
With two chests of trays, enclosed with two sliding doors operating on ball bearing rollers, Made of white wood—finished with one coat of primer. Shipped K. D. Over all length 9′, height 5′ 6″, depth 2′ 0″, hanging space 5′ 6″, no backing.

Exhibit P. 1.

No. 76E206 "White" Dressing Cabinet
Like 76E175 but with only one chest of trays at right side when facing cabinet. Over all length 7'—hanging space 5' 3"
26 only Price each $60.00
Total $1560.00
130.00 extra for special
$1690.00

No. 76E207 "White" Dressing Cabinet
Like 76E175 but with only one chest of trays at left side when facing cabinet. Over all length 7'—hanging space 5' 3".
(Illustration and Floor Plans on Back of Sheet)

"White" Buffet Cabinet
Including refrigerator but and with range no sink opening. Made of white wood; finished with one coat of lacquer primer. No backing Laminated doors equipped with offset hinges and latches. Work top of maple, 6" 9' long and 2' deep. Cabinet 5' 9" long, 7' 3" high, with base section 1' 9" deep, and top section 12" deep. Refrigerator at right side when facing and to be iced from front. Food compartment has three drawers with wire bottoms. Base board, scribing boards and cap moulding furnished. Cabinet shipped K. D. in sections.
72 only Price each $195.00 Total $14,040.00

No. 76E165 "White" Door Bed
Rosemont design, 4' 6" wide, finished in American walnut. Made of 1½" square steel tubing —continuous head and foot posts. Equipped with a 20-year guaranteed spring. Pivot hardware for bed door and plates for attaching bed to door included
73 only Price each $42.50 Total $3,102.50

Exhibit P. 1.

Date: May 25, 1926

All prices are for immediate acceptance and subject to change without notice.
Terms: See special contract.

RECAPITULATION PRICE SHEET FOR "WHITE" EQUIPMENT SHOWN IN THE ACCOMPANYING SPECIFICATIONS

Beds	$3,102.50
Canopy Rods	
Box Springs	
Mattresses	
Dressing Cabinets	1,560.00
Dressing Tables	
Medicine Cabinets	
Kitchen Cabinet (Buffet)	14,040.00
China Cabinets	3,780.00
Extra for spec. Dres. Cabinets	130.00
	$22,612.50

Bed prices include delivery at building site and hanging of beds provided openings have been prepared by the buyer to receive them.
Price does not include distribution of cabinets in building but delivery at building site only.
Prices on beds F. O. B. Sidewalk at Building
Prices on other items F. O. B. Sidewalk at Building.
To be made ready for delivery September 1st, 1926, but two weeks notice in advance must be given in writing by the buyer before delivery is made.
The title of said merchandise shall remain in the Seller until the same shall be fully paid for. It is further agreed that said merchandise shall be considered as personal property and at no time as a fixture, or as part of or as an appur-

Exhibit P. 1.

tenance to any building or real estate, even though attached thereto.

The Seller shall not be liable for delay in delivering, or for failure to deliver any such merchandise, occasioned in whole or in part by strikes, fires, accidents, delays in transportation, delays in procuring or inability to procure material or supplies, or for any cause whatever beyond the Seller's control; nor shall the Seller be liable for consequential damages. It is mutually agreed that the receipt of the merchandise by the Buyer when delivered shall constitute a complete waiver of any and all claims for delay.

Respectfully submitted,

THE "WHITE" DOOR BED COMPANY,

Charles C. White,
Agent.

Accepted:

ACROPOLIS REALTY CO.

By Morris Meltz
Manager.

No order valid unless accepted in writing by an executive of the "White" Door Bed Co. at the home office.

EXHIBIT P. 2.

COPY

WE, ACROPOLIS REALTY CO., a corporation duly organized under the Laws of the State of New Jersey, do hereby, on this 21st day of September, 1926, assign, transfer and set-over unto the "White" Door Bed Company, 130 North Wells Street, Chicago, Illinois, a sum equal to $12,612.50, out of the moneys due us and to become due to us from the United States Mortgage & Title Guaranty Company of New Jersey, under its mortgage loan in the amount of $375,000.00, granted to us upon our apartment building at the Southwest corner of North Harrison and William Streets, East Orange, N. J. and we hereby authorize and direct the said United States Mortgage & Title Guaranty Company of New Jersey to pay unto the said "White" Door Bed Company, the said sum of $12,612.50, out of said mortgage money, on our behalf, upon the delivery of cabinets and ranges to our aforesaid apartment building and upon the installation of beds and doors in accordance with a contract entered into between us and the "White" Door Bed Company, dated the 25th day of May, 1926.

IN WITNESS WHEREOF, we have executed this assignment the day and year first above written.

ACROPOLIS REALTY CO.

By DAVID ROTHBARD
President.

Attest:
Gertrude Aronstein
Assistant Secretary.

EXHIBIT P. 3.

COPY

UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY

September 21, 1926

Title No. 280
The "White" Door Bed Co.,
#130 North Wells Street,
Chicago, Illinois.

Gentlemen:—

This is to acknowledge receipt of an order issued by the Acropolis Realty Company on us, in your favor, for $12,612.50, to be paid to you direct out of the mortgage monies we have in our possession on a $375,000.00 loan extended by us to the Acropolis Realty Company.

We wish to advise that we will make payments direct to you, as requested in this order, but only when the money is forthcoming to the Acropolis Realty Company.

Very truly yours,

UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY OF NEW JERSEY

By Arthur Perselay

AP:EP

EXHIBIT P. 4.

COPY

UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY.

December 2nd, 1926.

The White Door Bed Company,
#130 North Wells Street,
Chicago, Illinois.

Gentlemen:

Replying to your letter of November 30th, would say that we expended during the progress of the construction of the building owned by the Acropolis Realty Company, the entire amount of our loan. We understand that the owners are arranging to procure an additional loan and we would suggest that you procure from them an appropriate order for these funds.

Very truly yours,

UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY OF NEW JERSEY.

By Saul Cohn

SC/F

EXHIBIT P. 5.

COPY

Nov. 30th, 1926.

United States Mortgage and Title Guaranty Co.
#972 Broad St., Newark, N. J.

Re: Your file No. 280

Gentlemen:

In a loan of $375,000.00 made by your company to the Acropolis Realty there is an item in our favor of $12,612.50. Inasmuch as shipment of the equipment was made quite some time ago will appreciate remittance without further delay.

Yours very truly,

THE "WHITE" DOOR BED CO.,

MDYE:LON
EW

EXHIBIT P. 6.

(COPY)

UNITED STATES MORTGAGE AND TITLE GUARANTY CO.

December 13, 1926

The "White" Door Bed Co.,
#130 North Wells St.
Chicago, Illinois.

Gentlemen:—

Replying to your favor of the 6th inst., would say, this Company did not assume any obligation to you to pay the amount of your account.

We made a mortgage loan of $375,000. which we were assured by the borrower was ample to complete the structure. We also required a National Surety Company bond which was agreeable to the borrower.

We advised you that these funds would be paid when forthcoming to the borrower. During the process of the work we have expended the amount of our loan. On orders received from time to time the funds representing our loan have gone into the structure.

We are advised by the borrower that it is raising additional mortgage funds to take care of claims. As soon as this has been accomplished we will take up the matter with you.

Yours very truly,

UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY OF NEW JERSEY

SAUL COHN,
Vice-President.

SC/S

EXHIBIT P. 7.

(COPY)

December 6th, 1926

United States Mortgage & Title Co.
#972 Broad Street,
Newark, N. J.

Gentlemen:—

We were surprised to receive your letter of December 2nd advising that the loan of said $375,000. made to the Acropolis Realty Company had been exhausted and that you are therefore unable to take care of our claim, until an additional loan was secured.

We are surprised at this state of affairs. Your letter of Sept. 21st gave us to understand that you were holding $12,612.50 out of the loan to pay the obligation due this company. Shipment was made on your representation that the funds were in your possession, therefore must look to you for immediate settlement of the $12,-612.50 still due.

Yours very truly,

"WHITE" DOOR COMPANY,

Legal Department.

MD.YELLON
EW

EXHIBIT P. 9.

BOND

ACROPOLIS REALTY CO.,
a corporation,
DAVID ROTHBARD,

TO

UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY OF NEW JERSEY,
a corporation.

DATED: MAY 21, A. D. 1926.

(Stamp) For identification only. National Surety Company. By J. N. McAndrew, resident vice-president.

KNOW ALL MEN BY THESE PRESENTS, that WE, ACROPOLIS REALTY CO., 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, and DAVID ROTHBARD, of the City, County and State aforesaid, are held and firmly bound unto the UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY OF NEW JERSEY, a corporation organized under the laws of the State of New Jersey, Mortgagee, in the penal sum of SEVEN HUNDRED AND FIFTY THOUSAND ($750,000.00) DOLLARS, lawful money of the United States of America, to be paid to the said UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY OF NEW JERSEY, its successors and assigns:

FOR WHICH PAYMENT, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents. Sealed

Exhibit P. 9.

with the corporate seal of the afore ACROPOLIS REALTY CO. and by the said DAVID ROTHBARD, individually, by their own seal and dated the 21st day of May, One Thousand Nine Hundred and Twenty six.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the above bounden ACROPOLIS REALTY CO. and DAVID ROTHBARD, individually, their heirs, executors, administrators, successors and assigns, shall well and truly pay or cause to be paid unto the above named UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY OF NEW JERSEY, or to its certain attorney, successors or assigns, the just and full sum of THREE HUNDRED AND SEVENTY FIVE THOUSAND DOLLARS ($375,000.00) and the interest upon the unpaid principal hereof to be computed from June 1st, Nineteen Hundred and Twenty six, at and after the rate of six per cent per annum, the first payment of interest to be made on September 1st, 1926 and quarter-annually thereafter on the first day of March, June, September and December in each year; said principal sum to be paid as follows:—

Five Thousand Dollars on June 1st, 1927,
Five Thousand Dollars on September 1st, 1927,
Five Thousand Dollars on December 1st, 1927,
Five Thousand Dollars on March 1st, 1928,
Five Thousand Dollars on June 1st, 1928,
Five Thousand Dollars on September 1st, 1928,
Five Thousand Dollars on December 1st, 1928,
Five Thousand Dollars on March 1st, 1929,
Five Thousand Dollars on June 1st, 1929
Five Thousand Dollars on September 1st, 1929,
Five Thousand Dollars on December 1st, 1929,
Five Thousand Dollars on March 1st, 1930,

Exhibit P. 9.

Five Thousand Dollars on June 1st, 1930,
Five Thousand Dollars on September 1st, 1930,
Five Thousand Dollars on December 1st, 1930,
Five Thousand Dollars on March 1st, 1931,
and the balance of the principal sum, viz: TWO HUNDRED AND NINETY FIVE THOUSAND ($295,000.00) on June 1st, Nineteen Hundred and Thirty-one,

without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force and virtue.

The Owner agrees to erect, construct and complete the said building on the premises particularly described in said mortgage, a nine story apartment house according to plans and specifications drawn by Nathan Harris, Architect, free and clear of and from any and all liens or claim for liens for work or labor performed, or materials, machinery or equipment furnished in connection with the construction of said building in accordance with said plans and specifications and any modification thereof approved by said Mortgagee, and the Owner further covenants and agrees that it will pay or cause to be paid any and all sums of money required for the erection, construction and completion of said building as aforesaid, in excess of the net proceeds of said loan available from time to time for the purpose of payment toward the cost of erecting, constructing and completing said building under the terms hereof, and further agrees that any and all installments of principal and interest and all insurance premiums, water rents and taxes falling due in connection with said mortgage, prior to the completion of and payment in full for said mortgage will be promptly paid by said Owner, or, at the option of said

Exhibit P. 9.

Mortgagee, may be paid out of the net proceeds of said loan available at such time (said option to be exercised if the Owner fails to comply with the covenants contained herein); and in the event of the failure of the Owner of the Mortgaged premises to repay the amount of such advances in excess of the proceeds of said loan of $375,000.00 together with interest on such advances, at the rate of 6% per annum, the amount so advanced shall be added to the principal due hereunder and constitute a lien in the same manner and form as though it were a part of the mortgage debt upon the said mortgaged premises.

AND IT IS HEREBY EXPRESSLY AGREED that if said party of the first part shall:—

(1) Make default in the payment of said interest or of any installment of principal, if said principal is payable in installments or any part of either, on any day whereon the same is made payable as above expressed, and said default continues for the space of thirty days.

(2) Fail to pay any tax, assessment, water rent or governmental rate, charge, imposition or lien hereafter imposed or levied upon the above described premises, or any part or installment thereof, on or before the last day upon which the same is payable, without interest and such default continues for a period of sixty days.

(3) Fail within sixty days after notice or demand by the Mortgagee to fully liquidate all or any part of any assessment for local improvements heretofore or hereafter imposed or assessed, which is or may become payable in installments, and which has affected, now affects

Exhibit P. 9.

or hereafter may affect said mortgaged premises, notwithstanding that the same be not due and *payab,e* at the time of such notice or demand.

(4) Fail to exhibit to said Mortgagee, at its Home Office in the City of Newark, within sixty days after any tax, assessment or rate affecting said mortgaged premises has become due and payable, a receipt in full for such tax, assessment or rate, or fail, within ten days after the same may become severally due, to exhibit evidence of the payment of all charges and expenses herein agreed to be paid by the Company.

(5) Fail to comply in the manner above mentioned with any requirement of any department or officers of the State of New Jersey, or of the municipality wherein said mortgaged premises are situate, having jurisdiction over said mortgaged premises, within one month after an order making such requirement has been issued by such department or officer.

(6) Fail to maintain the buildings on said mortgaged premises in reasonably good repair.

(7) Remove or demolish any building erected or which may hereafter be erected on said mortgaged premises or permit the same to be removed or demolished.

(8) Fail to furnish a statement of the amount due and owing for principal and interest upon said mortgage within ten days after request or demand by said Mortgagee therefor, in such form as may be required by the Mortgagee.

(9) Fail to keep the building erected upon said mortgaged premises insured against loss by fire and such other hazard as is specified in the mortgage accompanying this bond or as may be specified by the Mortgagee, for the benefit of the

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Mortgagee, through such broker or brokers as may be selected or approved by the Mortgagee from time to time, and in an amount and in insurers satisfactory to it, or to assign such policies to it.

(10) Fail to procure and assign policy or policies of insurance covering the rent and occupation of the building or buildings on the said mortgaged premises and assign the same to said Mortgagee, if required by said Mortgagee.

(11) Use or permit the use of said mortgaged premises or any building erected thereon, or any part thereof, for any purpose forbidden by law,

In the event that the said party of the first part while the owner of the premises herein mortgaged (a) shall be dissolved or shall go into liquidation; or (b) in the event that a receiver of the Company or any of the property shall be appointed; or (c) in the event that the said party of the first part shall be adjudicated a bankrupt or insolvent, or shall make an assignment for the benefit of its creditors, or shall voluntarily begin any proceedings or take any steps for the purpose of having itself declared or adjudicated a bankrupt or insolvent, THEN, upon the happening of any of said events or upon the occurrence of any breach or breaches in the performance of the terms, covenants and conditions in said mortgage on the part of the party of the first part, the aforesaid principal sum of THREE HUNDRED AND SEVENTY FIVE THOUSAND ($375,000.00) DOLLARS or the balance due thereon, with all arrearage of interest, shall, at the option of said Mortgagee, its successors or assigns, become and be due immediately thereafter, although the period first

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above limited for the payment thereof may not then have expired, anything hereinabove contained to the contrary thereof in anywise notwithstanding.

Upon the occurrence of any of the aforesaid or any of the following events, all obligations on the part of the Mortgagee to make advancements on account of the loan of $375,000.00 represented by the mortgage accompanying this bond shall, if the Mortgagee so elects, cease and terminate, but the Mortgagee may make advances without becoming liable to make any other advances, and in either of the said events the said mortgage debt shall become due and payable at the option of the Mortgagee or of the holder of said mortgage, anything in said bond and mortgage contained to the contrary notwithstanding.

(a) If the mortgage offered by the Owner shall not give to the Mortgagee a lien for the indebtedness to be secured thereby on the premises above set forth, satisfactory to the attorney of the Mortgagee.

(b) If the loan is to be advanced in more than one payment and any payment be called for, and the attorney of the Mortgagee shall not approve of the payment called for because of some act, encumbrance or question arising after the making of the preceding payment.

(c) If the Owner assigns this contract or said advances or any interest therein, or if said premises be conveyed or encumbered in any way without the consent of the Mortgagee.

(d) If the improvements on said premises or any building which may be erected upon said premises shall encroach upon the street or upon adjoining property.

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(e) If the Owner does not take the amount of the loan or portion thereof within thirty days after they are made payable or if the building is not erected with reasonable speed as relates to the date of completion herein fixed.

(f) If the improvements on said premises be materially injured or destroyed by fire or otherwise.

(g) If the Owner shall fail to comply with the terms, covenants and conditions contained in the mortgage accompanying this bond and shall fail to pay, during the construction of the said building, the principal and interest when due and the fire insurance premiums, taxes and water rents and all other charges provided for therein to be made by the Owner of the mortgaged premises.

(h) If any materials, fixtures or articles used in the construction of the said building or appurtenant thereto, be not purchased by the Owner of the land so that the ownership thereof will vest in said Owner free from encumbrances on delivery at the premises.

(i) If the Owner does not erect said building *is* substantial accordance with the plans and specifications which are satisfactory to the Mortgagee and which have been approved by the Building Department of the City of East Orange, and the New Jersey Tenement House Commission.

(j) If the Owner of the said premises does not permit the Mortgagee or a representative of the Mortgagee, to enter upon the said premises and inspect the building thereon at all reasonable times.

(k) If the Owner fails to comply with all the reasonable requirements of the Mortgagee.

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(l) Upon failure to present to the Mortgagee or successors or assigns, postponements of mechanics' lien from all materialmen 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 materials have been paid in full.

(m) 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.

(n) 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.

It is agreed that upon the default of the Owner of said premises in the performance of the terms and covenants herein contained or their failure to complete with dispatch construction of the said building in the manner above set forth, or upon the abandonment of the work for ten days or upon the absconding of said Owner 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 Owner, without any further consent or authorization to

Exhibit P. 9.

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 owner or to create independent contracts for such completion.

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 Owner does, for itself, its successors and assigns, hereby constitute and appoint the Mortgagee irrevocably, as its 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 and on behalf of the said Owner, 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 and to others, and for taxes, insurance, water rents, etc. and to apply any surplus to the amount due for principal on the within mortgage.

It is further agreed that if the Mortgagee is obliged to expend for the purposes aforesaid,

Exhibit P. 9.

sums of money which will exceed the amount of the principal agreed to be advanced hereunder, such excess, with interest at 6% per annum from the time of such 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.

AND IT IS STILL FURTHER EXPRESSLY AGREED that:

1. In case of any default in the performance of any of the covenants of this bond persisted in thirty days after notice in writing from said Mortgagee to said party of the first part, said Mortgagee may enter upon and take possession of said mortgaged premises, collect the rents, let the said premises or any part thereof, in its own name or otherwise, and receive the rents, issues and profits from said mortgaged premises and apply the same, after the payment of all necessary charges and expenses, on account of the amount hereby secured and interest thereon, and said rents and profits, in the event of such default as aforesaid, are hereby assigned to said Mortgagee.

2. Said Owner shall not be entitled to any credit on the interest payable on the principal sum mentioned in the condition of this bond or any addition thereto under the terms hereof, for the taxes which may be levied on the premises covered by said mortgage, or for any part of said taxes or because of the payment thereof.

3. In the event of the passage after the date of this bond of any act of the Legislature of the State of New Jersey, deducting or permitting the deduction from the value of the land, for the

Exhibit P. 9.

purpose of taxation, any lien thereon or providing for the taxation of mortgages or debts secured by mortgage for state or legal purposes so as to affect this bond or the mortgage accompanying this bond, the Mortgagee shall have the right to give thirty days' written notice to the party of the first part, requiring payment of the mortgage, and if such notice is given, said debt shall become due and payable at the expiration of thirty days.

All of the covenants herein contained shall apply to and bind and enure to the benefit of the heirs, executors, administrators, successors and assigns of the Company and the successors and assigns of the Mortgagee.

All of the covenants in the mortgage accompanying this bond shall be deemed to be a part hereof, with the same force and effect as though fully incorporated herein.

ACROPOLIS REALTY CO. (SEAL)

By DAVID L. ROTHBARD,
President.

Attest:

CHARLES ROTHBARD,
Secretary.

DAVID L. ROTHBARD (L. S.)

Signed, sealed and delivered
in the presence of:

SAUL COHN.

EXHIBIT D. 1.

MORTGAGE

ACROPOLIS REALTY CO.,
a corporation,
Mortgagor,

and

UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY OF NEW JERSEY,
a corporation,
Mortgagee.

Dated: May 21, A. D. 1926.

(Stamp) For identification only. National Surety Company by J. N. McAndrew, Resident Vice President.

THIS INDENTURE made this twenty-first day of May, in the year of our Lord One Thousand Nine Hundred and Twenty-six, by and between

ACROPOLIS REALTY CO., 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, (hereinafter called the "Company"), party of the first part, and

UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY OF NEW JERSEY, a corporation organized and existing under the Laws of the State of New Jersey, having its principal office in the City of Newark, County of Essex and State of New Jersey, (hereinafter called the "Mortgagee"), party of the second part.

WITNESSETH:

WHEREAS the Company has full power and authority to borrow money and to make and issue

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its bond and to secure the same by mortgage, pledge or deed of trust and to convey by such mortgage, pledge or deed of trust any or all of its property and has full power to execute and deliver this mortgage and bond secured hereby; and

WHEREAS the said Company desires to borrow from the said Mortgagee, the sum of THREE HUNDRED SEVENTY-FIVE THOUSAND DOLLARS ($375,000.00) and secure the repayment thereof by this mortgage and the bond accompanying the same; and the making, execution and delivery of the said mortgage has been duly authorized by the consent in writing of all of the stockholders and directors of the said Company at a meeting thereunto held for the said purpose,

NOW, THEREFORE, THIS INDENTURE WITNESSETH:

ARTICLE I

The said party of the first part, for and in consideration of the sum of THREE HUNDRED SEVENTY-FIVE THOUSAND DOLLARS ($375,000.00) lawful money of the United States of America, to it in hand paid by the Mortgagee, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said Company therewith fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, enfeoffed, conveyed and confirmed, and by these presents does give, grant, bargain, sell, alien, enfeoff, convey and confirm to the said Mortgagee and to its successors and assigns, ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of East Orange, in the County of Essex and State of New Jersey:

Exhibit D. 1.

BEGINNING at the Southwesterly corner of William Street and North Harrison Street, as the line of said North Harrison Street has been recently changed by the City of East Orange, thence (1) running along said line of William Street North fifty-three degrees twenty minutes West seventy-six feet to a fence post; thence (2) along the line of an iron wire fence South thirty-six degrees twenty-nine minutes West one hundred nine feet and fifty-three hundredths of a foot to a fence post; thence (3) along the line of another iron wire fence South fifty-three degrees seven minutes East eighty-nine feet and eighty-eight hundredths of a foot to a stake in the line of North Harrison Street; thence (4) along the line of North Harrison Street on a curve to the left having a radius of four hundred forty-three feet and sixteen hundredths of a foot, one hundred eleven feet and sixty-eight hundredths of a foot to a mark in the top of a wall at the aforesaid corner of North Harrison and William Streets and the place of BEGINNING.

Being the same lands and premises conveyed to the Acropolis Realty Co. by the Mo-Ray Realty Co. by deed of warranty dated January 13, 1926, and recorded in Book Y 73 of Deeds for Essex County on pages 15-16.

TOGETHER with any and all buildings, improvements and appurtenances now standing, or at any time hereafter constructed or placed upon said land or any part thereof, including all partitions, screens, awnings, window shades, dynamos, motors, engines, boilers, furnaces, curtain fixtures, ice boxes, kitchen cabinets and ranges, and all furniture, carpets, rugs and furnishings in the lobby, hallways and public spaces, vacuum cleaning systems, fire prevention and extinguish-

Exhibit D. 1.

ing apparatus, heating, plumbing, ventilating, gas and electric light fixtures, apparatus and machinery, appliances, fittings and fixtures of every kind in any building now or hereafter standing on said premises, or any part thereof, and the reversion or reversions, remainder or remainders, in and to said premises and each and every part thereof, and together with all the singular the tenements, hereditaments, rights of way, easements, appendages and appurtenances to said estate and property belonging to or in anywise appertaining and all right, title and interest of the party of the first part in and to any streets, ways, alleys, gores or strips of land adjoining said lands or any part thereof, and all the estate, hight, title, interest, claim or demand whatsoever of the said party of the first part, either in law or in equity, in possession or expectancy, of, in and to, the above described land, estate and property, together with all rents, issues and profits arising or accruing out of the occupancy of the said mortgaged premises which are hereby assigned as additional collateral security for the payment of the mortgage debt.

TOGETHER with all and singular the profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining. ALSO all the right, estate, title, interest, property, claim and demand whatsoever of the party of the first part of, in and to the same and of, in and to every part and parcel thereof.

ARTICLE II.

TO HAVE AND TO HOLD all and singular the above described tract or parcel of land and premises with the appurtenances unto the said Mortgagee, its successors and assigns, to the only

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proper use, benefit and behoof of the said Mortgagee, its successors and assigns forever. PROVIDED ALWAYS and it is agreed by and between the parties to these presents that if the said Company, or its successors and assigns, does and shall well and truly pay or cause to be paid to the said Mortgagee, its successors and assigns, the sum of THREE HUNDRED SEVENTY-FIVE THOUSAND DOLLARS ($375,000.00) together with interest on unpaid principal sum to be computed from the first day of June, Nineteen Hundred and Twenty-six, at the rate of six per-cent per annum, the first payment of interest to be made on September 1, Nineteen Hundred and Twenty-six and quarter annually thereafter on the first day of March, June, September and December in each year, said principal sum to be paid as follows:

Five Thousand Dollars on June 1st, 1927.
Five Thousand Dollars on September 1st, 1927.
Five Thousand Dollars on December 1st, 1927.
Five Thousand Dollars on March 1st, 1928.
Five Thousand Dollars on June 1st, 1928.
Five Thousand Dollars on September 1st, 1928.
Five Thousand Dollars on December 1st, 1928.
Five Thousand Dollars on March 1st, 1929.
Five Thousand Dollars on June 1st, 1929.
Five Thousand Dollars on September 1st, 1929.
Five Thousand Dollars on December 1st, 1929.
Five Thousand Dollars on March 1st, 1930.
Five Thousand Dollars on June 1st, 1930.
Five Thousand Dollars on September 1st, 1930.
Five Thousand Dollars on December 1st, 1930.
Five Thousand Dollars on March 1st, 1931,

and the balance of the principal sum, viz: TWO HUNDRED AND NINETY FIVE THOUSAND DOLLARS ($295,000.00) on June 1st, Nineteen Hundred and Thirty-one,

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according to the conditions of a certain bond bearing even date herewith, in the penal sum of SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($750,000.00) made by said ACROPOLIS REALTY CO., a corporation of New Jersey, and DAVID ROTHBARD, individually, to the said Mortgagee, without any deduction or defalcation for taxes, assessments or any other imposition whatsoever, thence and from thenceforth these presents and said obligation shall cease and be void, anything herein and therein contained to the contrary in anywise notwithstanding.

Section 2. Any part or the whole of this mortgage may be prepaid on any of the quarterly dates fixed hereunder for the payment of principal and interest. Said prepayment shall be in amounts of Five Thousand Dollars ($5,000.00) or multiples thereof and interest shall be paid on the amount of principal so prepaid up to the quarterly date hereinbefore mentioned. Said redemption shall be accompanied by a premium of two percent for such redemption on the principal amount redeemed, and shall be made as follows: thirty days prior to the date fixed for redemption, the Company shall deliver to the Mortgagee a written notice of its intention so to redeem and deposit with the depositary designated by the Mortgagee to authenticate the mortgage bonds or participations which will be issued on the basis of this mortgage as an underlying security, an amount of money sufficient to pay the full amount of the principal of the certificates or bonds so to be redeemed and all interest which will accrue thereon to the date fixed for redemption together with the premium on the certificates or bonds so to be redeemed computed as above provided. The Mortgagee will have sole authori-

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ty to determine as to the application of the amount constituting the prepayment and its discretion as to which certificates or bonds shall be redeemed will be regarded as binding and conclusive. The Company shall not have the right to make prepayment or prior redemption in the manner herein mentioned if it should be in default under the terms of this Indenture.

ARTICLE III.

Section 1. The said party of the first part convenants that it has good and indefeasible title in fee simple to all the mortgaged premises and property, free and clear of all liens and encumbrances, and will warrant and defend the same to the Mortgagee against the claims of all persons whomsoever; that this Indenture is and will be kept a first lien upon the said premises and property and the said party of the first part will not at any time create or allow to accrue or exist any debt, lien or charge which would be prior to the lien of this Indenture, upon any part of the mortgaged premises, and that neither the value of the mortgaged premises and property, nor the lien of this Indenture, will be diminished or impaired in any way by any act of the said party of the first part; that the Company will forthwith cause this Indenture to be recorded and re-recorded and filed and re-filed, if at any time required by law in order to preserve the lien of the same as a mortgage or real and personal property, in the County of Essex and State of New Jersey, and will at any future time and as often as it may be necessary, do and cause to be done all such things as may be required by law to protect the security of the Company or any holder of participation certificates in said mort-

gage which may be issued and sold to the public by said Mortgagee on the basis of this mortgage as an underlying security, and, upon demand of the Mortgagee, will institute and prosecute to conclusion such proceedings, and execute and cause to be recorded all such other and further assurances, deeds, mortgages or other instruments in writing in due form and effect, as may be necessary to preserve the lien of this Indenture and carry out the intent and meaning thereof.

Section 2. The Company further covenants that it will not at any time suffer any mechanic's lien against said premises or any part thereof to be established by any judgment which shall not be satisfied within fifteen days after the entry thereof; that it will pay all taxes and assessments, extraordinary as well as ordinary, water rates, municipal, governmental and other rates, charges and impositions which shall at any time be or have been assessed, levied or imposed upon the said party of the first part, or upon said premises and property or any part thereof, and will make such payment respectively from time to time within sixty days after the same shall become respectively due and payable or become a lien on the mortgaged premises and property, and in due time to prevent any delinquency thereon or any forfeiture or sale thereof and will produce to the Mortgagee receipts therefore or other satisfactory evidence of each of such payments upon demand.

Section 3. The Company covenants to maintain said premises in first class repair, working order and condition and to make all necessary replacements and substitutions, to the satisfaction and approval of the Mortgagee, and of all build-

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ing, fire and other similar departments of the City of East Orange, or the County of Essex or State of New Jersey and of the Federal Government and all Insurance Companies, the Board of Underwriters and the Fire Insurance Exchange, if any, and all other similar organizations or authorities having any legal interest in or jurisdiction over the same, and agree to permit the Mortgagee or its representatives to have access to said building so long as any part of the principal secured hereby, remains unpaid, for the purpose of making such inspection as in its opinion is justified hereunder.

Section 4. The Company covenants that it will comply with all restrictions, laws, ordinances, acts, rules, regulations and orders of any national, state, municipal, legislative, executive, administrative, or judicial body, commission or officer exercising any power of regulation or supervision over the said party of the first part or any part of said mortgaged premises, whether the same be directed to the erection of buildings, conduct of the business of the Company, repairs, manner of use, structural alterations or otherwise; provided, however, that the Company may contest any such law, ordinance, act, rule, regulations or order in any reasonable manner which will not affect the title of the Mortgagee to any part of the mortgaged premises.

Section 5. The Company further agrees that as long as it is the owner of any of the mortgaged property, it will, at all times, maintain its corporate organization and that it will not permit or suffer any use or non-use of its corporate authority and franchises whereby said corporate authority and franchises may become in anywise forfeitable or forfeited. Any mortgage

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placed thereon shall be made expressley subject to the lien of this Indenture to the full amount advanced or to be advanced hereunder.

ARTICLE IV.

Section 1. The Company agrees that the said mortgaged premises shall be insured at all times against loss or damage by fire and lightning for the full insurable value thereof and at all times in the sum of at least THREE HUNDRED SEVENTY-FIVE THOUSAND DOLLARS ($375,000.00) for the building on the said mortgaged premises and insurance for the personal property for the full insurable value thereof and to provide policies of insurance in an amount to be denominated by the Mortgagee for the insurance of the said premises and the personal property therein contained against loss or damage to persons or property by explosion of any steam boiler or fly wheel on the premises and to carry plate glass insurance for the full insurable value thereof and elevator insurance in limits of ten to fifty thousand dollars and workmen's compensation insurance in an adequate amount and agrees further to maintain all of the said insurance until the debt secured hereby shall be paid by the Company. The policies of fire insurance shall be placed by the Mortgagee in such companies and through such brokers as it may deem advisable. The other policies may be placed by the Company in such insurance companies as will be approved by the Mortgagee, provided that the renewal of such policies shall be in possession of the Mortgagee five (5) days before the same shall respectively become due, upon failure of which, said policies may be procured by the Mortgagee at the expense of the Company. The Company cove-

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nants to pay all premiums on said insurance policies upon presentation to it of the bill therefor. In case of the Company's failure to pay any premiums, the Mortgagee may do so and any moneys so paid by the Mortgagee, with interest at the rate of six percent per annum from the time of such advancements, shall become so much additional indebtedness secured hereby and be at once due and payable, which payments when and as they may be made, shall be a lien upon said premises. Any and all policies shall at any time hereafter be subject to the reasonable approval of the Mortgagee, and, if it shall deem the Company issuing same unsatisfactory, new policies shall be substituted.

Section 2. If any of the mortgaged property shall be destroyed or damaged by fire or any cause whatsoever, the Company covenants to forthwith repair, rebuild, restore, renew and replace the same and to pay therefor.

The Mortgagee may collect and receipt for all claims under said policy or policies, and any moneys due thereunder are hereby assigned to and shall be paid to the Mortgagee or to its depositary. When the estimated cost of such repairing, rebuilding, restoring, renewing or replacing has been established by a sworn statement of an architect or general contractor to be selected by the Mortgagee, the Company hereby expressly agrees to deposit with the Mortgagee the difference, if any, between the cost of such repairing, rebuilding, restoring, renewing or replacing as thus shown and the net amount of the insurance available for the same. In the event that the Company in the case of damage to or destruction of any of the mortgaged premises or property, shall with reasonable dispatch repair,

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rebuild, restore, renew or replace the same or construct a new building or buildings on said premises in place thereof, and the Company having first deposited with the Mortgagee the aforesaid difference, or furnished bond as hereinafter provided, in such case, but not otherwise, all insurance moneys which shall be received by the Mortgagee under policies covering said building or buildings shall, after deducting therefrom the reasonable charges of the Mortgagee in connection with the collection and disbursement of said moneys, be paid out from time to time as the work progresses upon architects' certificates, for the expense of such repairing, rebuilding, renewing or replacing, but a sufficient amount of money shall at all times in the discretion of the Mortgagee, be retained by them to pay for the completion of such repairing, rebuilding, restoring, renewing or replacing free from liens.

In the event that any such loss shall exceed Ten Thousand Dollars ($10,000.00) the Company shall submit to the Mortgagee plans and specifications, to be subject to the approval of the Mortgagee, and shall exhibit to the Mortgagee any contract or contracts for such work or for the supplying of any such materials. In order to determine such cost, the Mortgagee may thereupon obtain from any disinterested architect or contractor an estimate of the cost of such repairing, rebuilding, restoring, renewing or replacing, the cost of which may be deducted from the amount of such insurance.

In the event of the total destruction of any building or buildings or in the event of a loss requiring substantially the reconstruction of an entire building or buildings, the Company shall forthwith proceed to erect and complete a new

building or buildings on the said premises to be substantially similar to the building or buildings so damaged or destroyed and said new building or buildings shall be erected or constructed substantially according to the plans and specifications of the building so destroyed or according to such other plans and specifications as the Mortgagee in its absolute discretion may approve and supplied with new equipment of the same type as destroyed.

If it shall not appear at any time that said insurance moneys are sufficient to pay for the completion of said building or buildings in accordance with the plans and specifications approved by the Mortgagee, the Company shall on demand deposit such shortage and deficit with the Mortgagee, or the Company may deliver to the Mortgagee a good and sufficient bond in form and amount and with sureties satisfactory to the Mortgagee, and conditioned that the Company shall and will within eight months after the happening of such damage or destruction of such building or buildings, erect and complete such new building or buildings, in accordance with said plans and specifications in a manner satisfactory to the Mortgagee, free from all claims for mechanics' or other liens. Upon being furnished with said bond or such shortage or deficit being deposited with it, the Mortgagee shall disburse said insurance moneys as aforesaid, but not otherwise.

In computing the time for the erection of such new building on said premises or any subsequent new building any delay caused by insurrection, riots, strikes, lockouts, storms, fire, act of God or any unavoidable shortage of materials or labor or causes beyond the control of the Company, shall be added to the time allowed. After the

completion of said building or buildings, as aforesaid, free from all liens, the net preceeds remaining from any and all insurance policies covering the mortgaged premises shall be disbursed by the Mortgagee upon the order of the Company, towards the equipment of said building or buildings with suitable apparatus and fixtures of at least equal quality to those previously in said building and any balance thereof shall be paid to the Company. Said orders shall be subject to the approval of the Mortgagee with respect to the apparatus and fixtures covered thereby and with respect to the amount thereof.

Section 3. In the event that the Company fails to forthwith repair, renew, restore, rebuild, equip or replace the building or buildings as provided in the last section, then the Mortgagee, in its absolute discretion, is hereby authorized (but not required) and without prejudice to any other right or remedy hereunder, in the name of the Company, or otherwise, to do such repairing, rebuilding, restoring, renewing, equipping or replacing, and to have all insurance moneys together with the money representing the difference if any, heretofore provided for in said last section, applied toward the cost thereof, and to do all other needful things so as to preserve the security hereof and in such events and for such purpose the interest of the Company in all insurance moneys shall be, by virtue hereof, assigned and transferred to said Mortgagee.

The Mortgagee may elect to proceed with such work before said difference is deposited with it, and in such event the Company agrees to pay to the Mortgagee on demand the difference between the aggregate of all insurance money collected by the Mortgagee and the total cost of such

repairing, restoring, renewing, equipping or replacing.

Any and all balances remaining in the hands of the Mortgagee after the complete repairing, rebuilding, restoring, renewing, equipping and replacing of said building or buildings as aforesaid, shall, provided the Company is not in default in any of the terms, conditions and provisions of this Indenture be paid over to the Company.

In the event that the Company shall fail to rebuild or repair the said building or buildings so damaged or destroyed by fire within the period aforesaid next after the happening of such damage or destruction in accordance with the terms and conditions in this Indenture contained, then in such events said Mortgagee shall have and it hereby is given the right to apply any and all proceeds of insurance policies which may at such time be in its hands to the repayment of any portions of the principal of the mortgage then remaining unpaid, said application of insurance moneys to be entirely within the discretion of the Mortgagee as to the maturity of the principal payments amortized by such application.

Section 4. In no case shall the receipt by the Mortgagee or its depositary of any moneys for insurance be deemed to be a payment on account of the bond and said certificates secured hereunder (except to the extent that said moneys shall be applied as hereinbefore provided), nor shall the grant, mortgage, pledge and charge hereby created be modified or affected by reason of any such receipt, any law, usage or custom to the contrary notwithstanding.

Any rights created hereunder for the benefit of the Mortgagee shall inure to the benefit of

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the depositary designated by the Mortgagee to hold this Indenture and the bond accompanying the same as an underlying security for the issuance of mortgage bonds or participation certificates in the manner herein referred to.

ARTICLE V.

It is hereby expressly agreed that if said Company shall:

(a) Make default in the payment of said interest, or of any installment of principal, or any part of either, on any day whereon the same is made payable as above expressed, and said default continues for the space of thirty days.

(b) Fail to pay any tax, assessment, water rent or governmental rate, charge, imposition or lien hereafter imposed or levied upon the above described premises, or any part or installment thereof, on or before the last day upon which the same is payable without interest, and such default continues for a period of sixty days.

(c) Fail, within sixty days after notice or demand by the Mortgagee, to fully liquidate all or any part of any assessment for local improvements heretofore or hereafter imposed or assessed, which is or may become payable in installments, and which has affected, now affects or hereafter may affect said mortgaged premises notwithstanding that the same be not due and payable at the time of such notice and demand.

(d) Fail to exhibit to said Mortgagee, at its Home Office in Newark, within sixty days after any tax, assessment or rate affecting said mortgaged premises has become due and payable, a receipt in full for such tax, assessment or rate, or fail, within ten days after the same may become severally due, to exhibit evidence

Exhibit D. 1.

of the payment of all charges and expenses herein agreed to be paid by the said Company.

(e) Fail to comply in the manner above mentioned with any requirement of any department or officers of the State of New Jersey, or of the municipality wherein said mortgaged premises are situate, having jurisdiction over said mortgaged premises, within one month after an order making such requirement has been issued by any such department or officer.

(f) Fail to maintain in the manner above mentioned the building on said mortgaged premises in reasonably good repair.

(g) Remove or demolish any building erected or which may hereafter be erected on said mortgaged premises or permit the same to be removed or demolished.

(h) Fail to furnish a statement of the amount due and owing for principal and interest upon this mortgage within ten days after request or demand by said Mortgagee therefor including a statement by way of estoppal that the said principal is due without any off-set or counterclaim.

(i) Fail to keep the building erected on said mortgaged premises and personal property therein contained insured against loss by fire and such other hazard in the manner and in the amounts above mentioned, for the benefit of the Mortgagee, through such broker or brokers as may be selected or approved by the Mortgagee from time to time, and in an amount and in insurers satisfactory to it, or to assign such policies to it.

(j) Use or permit the use of said mortgaged premises or any building erected thereon, or

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any part thereof, for any purpose forbidden by law, or

(k) In the event that the Company, while the owner of the premises herein mortgaged shall be dissolved or shall go into liquidation; or in the event that a Receiver of the Company of any of its property shall be appointed; or in the event that the Company shall be adjudicated a bankrupt or insolvent, or shall make an assignment for the benefit of its creditors, or shall voluntarily begin any proceedings or take any steps for the purpose of having itself declared or adjudicated a bankrupt or insolvent, THEN, upon the happening of any of said events or upon the occurrence of any breach or breaches in the performance of the terms, covenants and conditions of this mortgage or the bond accompanying the same, on the part of the party of the first part, the aforesaid principal sum of THREE HUNDRED SEVENTY-FIVE THOUSAND DOLLARS ($375,000.00) or the balance due thereon, with all arrearage of interest, shall, at the option of said Mortgagee, its successors or assigns, become and be due immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinabove contained to the contrary thereof in anywise notwithstanding.

Section 2. Upon the occurrence of any of the defaults of the character and in the manner set forth in Section 1 of Article 5 of this Indenture or in the event of a breach by the said Company in the performance of any of the terms, covenants and conditions contained in the bond accompanying this indenture, the Company covenants, at any such time or times, upon the demand of the Mortgagee, forthwith to surrender to it and the

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said Mortgagee shall be entitled to take actual possession of the mortgaged premises as for condition broken and in its discretion may, with or without force and before or after declaring the principal of this mortgage immediately due, enter upon, take and maintain possession of all or any part of said mortgaged property, together with all records, documents, leases, books, papers and accounts of the Company relating thereto, and may, as the attorney-in-fact or agent of the Company, or in its own name as Mortgagee, acting under the assignment of rents hereinabove made, and under the powers herein granted, hold, manage and operate said mortgaged property and collect the rents thereof and lease the same in such parcels and for such times and on such terms as it may see fit, and may cancel any lease or sublease for any cause or on any ground which would entitle the Company to cancel the same, and may sign the name of the Company or its successors or assigns to all papers and documents in connection with such operation, and shall after paying out of the revenue from said mortgaged premises all expenses of management and operation of said mortgaged premises, including rents, insurance premiums and the costs of such repairs, replacements, alterations and useful additions as may seem to it proper and judicious, and all taxes, assessments or charges, or liens upon said mortgaged premises or any part thereof, together with reasonable attorney's fees, and such further sums as may be sufficient to indemnify the Mortgagee against any liability, loss or damage on account of any matter or thing done in good faith in pursuance of the duties of the Mortgagee hereunder, apply the residue to the payment of

Exhibit D. 1.

interest and principal due hereunder or to the payment and liquidation of taxes, interest or other carrying charges as the said Mortgagee may in its discretion determine, and at all times after default shall be made in the performance of the proviso or condition herein contained, peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy all and singular the above granted and bargained premises, with the appurtenances, without the let, suit, trouble, hindrance or denial of the said Company.

Section 3. Upon or at any time after the commencement of any proceeding hereby authorized to be instituted after any one of the aforesaid events of default shall happen, the Court hearing the same as a matter of strict right and without notice to the Company or anyone claiming under it, and without regard to the then value, of said mortgaged premises, may appoint a receiver or receivers of said mortgaged premises, or any part thereof. Any such receivers shall have all of the usual powers and duties of receivers in like or similar cases, and shall continue as such and exercise all said powers until the date of confirmation of sale, and apply the moneys collected to the payment of reasonable compensation for their and their attorney's and counsel's services to be fixed by said Court, to the payment of the expenses and charges of operating and maintaining said mortgaged premises and property, including taxes, insurance premiums, water taxes and repairs, whether accruing before or after such sale, and the balance, if any, toward the payment of the indebtedness hereby secured, and of any deficiency decree that may be entered in such proceedings.

Exhibit D. 1.

ARTICLE VI.

Section 1. The Company agrees to erect, construct and complete on the premises described herein, a nine story apartment house according to plans and specifications drawn by Nathan Harris, Architect, free and clear of and from any and all liens or claims for liens for work or labor performed or materials, machinery or equipment furnished, in connection with the construction of said building in accordance with said plans and specifications and any modification thereof approved by said Mortgagee, and the Company further covenants and agrees that it will pay or cause to be paid any and all sums of money required for the erection, construction and completion of said building as aforesaid, in excess of the net proceeds of said loan available from time to time for the purpose of payment toward the cost or erecting, constructing and completing said building under the terms hereof, and further agrees that any and all installments of principal and interest and all insurance premiums, water rents and taxes falling due in connection with this Indenture, prior to the completion of and payment in full of said Indenture, will be promptly paid by said Company, or, at the option of said Mortgagee, may be paid out of the net proceeds of said loan available at such time (said option to be exercised if the Company fails to comply with the covenants contained herein); and in the event of the failure of the Company to repay the amount of such advances in excess of the proceeds of the said loan of Three Hundred Seventy-five Thousand Dollars ($375,00.00) together with interest on such advances at the rate of six per-cent per annum, the amount so advanced shall be added to the principal due hereunder and con-

stitute a lien, in the same manner and form as though it were a part of the mortgage debt, upon the said mortgaged premises.

ARTICLE VII.

Section 1. In the event of the passage after the date of this mortgage of any act of the Legislature of the State of New Jersey, deducting or permitting the deduction from the value of land, for the purpose of taxation, any lien thereon, or providing for the taxation of mortgages or debts secured by mortgage for state or local purposes, so as to affect this mortgage and the bond accompanying the same, the Mortgagee shall have the right to give thirty days' written notice to the Company requiring the payment of the mortgage, and, if such notice be given, said debt shall become due and payable at the expiration of thirty days.

Section 2. And the said Company, for itself, its successors and assigns does covenant and agree to and with the said Mortgagee, its successors and assigns, that it shall not nor will claim or demand or be entitled to receive any credit or credits on the interest payable thereon, or on the moneys to secure payment of which this mortgage is made, for so much of the taxes assessed against said lands as is equal to the tax rate applied to the amount due on this mortgage or any part thereof.

Section 3. All of the covenants contained in this mortgage shall be deemed to be a part of the bond accompanying this mortgage with the same force and effect as though fully incorporated therein, and all of the provisions of the said bond shall be deemed a part of this mortgage with similar effect.

Exhibit D. 1.

Section 4. It is agreed that all the covenants herein contained shall bind the heirs, executors, administrators, successors and assigns of the parties hereto.

IN WITNESS WHEREOF the said Company has caused these presents to be signed by its President, and to be sealed with its corporate seal, attested by its Secretary, pursuant to authority given by its Board of Directors, and the said Mortgagee has caused these presents to be executed in its corporate name by its President, and its corporate seal to be hereunto affixed, attested by one of its Assistant Secretaries, as of the day and year first above written.

ACROPOLIS REALTY CO.

BY: .....
PRESIDENT.

ATTEST:

SECRETARY.

UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY OF NEW JERSEY.

BY: .....
PRESIDENT.

ATTEST:

ASSISTANT SECRETARY.

Exhibit D. 1.

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

BE IT REMEMBERED that on this day of May, Nineteen Hundred and Twenty-six, before me, the subscriber,

personally appeared CHARLES ROTHBARD, who being by me duly sworn on his oath says that he is the Secretary of the ACROPOLIS REALTY CO., the Company named in the foregoing instrument; that he well knows the 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 DAVID ROTHBARD who was at the date hereof, the President of said corporation, in the presence of this deponent, and said deponent 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 the corporation; and that deponent at the same time, subscribed his name to said instrument as an attesting witness to the execution thereof.

Sworn and subscribed to before
me at Newark, N. J. the day
and year aforesaid.

Exhibit D. 1.

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

WILLIAM E. LEHMAN, of full age, being duly sworn on his oath, according to law, deposes and says that he is the President of UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY OF NEW JERSEY, the Mortgagee in the foregoing mortgage named, and duly authorized by its Directorate to make this proof; that the true consideration of said mortgage is the sum of THREE HUNDRED SEVENTY-FIVE THOUSAND DOLLARS ($375,000.00) less such expenses and premiums as the ACROPOLIS REALTY CO. has agreed to pay to the UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY OF NEW JERSEY, for insuring the title to the said premises and guaranteeing to the public the payment of the principal and interest due and to become due on the said mortgage; that said mortgage is made by the ACROPOLIS REALTY CO. to the UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY OF NEW JERSEY and embraces the premises located at East Orange, New Jersey; that the money is to be advanced from time to time by the said Mortgagee to the said ACROPOLIS REALTY CO. in connection with the erection of a nine story apartment house on the premises more particularly described in said mortgage.

Dependent further says that there will be due on said mortgage, when the advancements are entirely made, the sum of THREE HUNDRED SEVENTY-FIVE THOUSAND DOLLARS ($375,000.00) together with interest from June 1st, 1926.

Exhibit D. 1.

Sworn and subscribed to before me at Newark, N. J. the day and year aforesaid.

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

New Jersey Court of Errors and Appeals

THE "WHITE" DOOR BED COMPANY, a corporation of the State of Illinois,
Plaintiff-Appellee,

vs.

UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY OF NEW JERSEY and ACROPOLIS REALTY COMPANY,
Defendants,

and

UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY OF NEW JERSEY,
Defendant-Appellant.

Action at Law.

BRIEF OF APPELLANT.

Statement.

The Acropolis Realty Company, the then owner of property in East Orange, executed a bond and mortgage covering said property to the United States Mortgage and Title Guaranty Company of New Jersey, appellant, dated May 21, 1926. The bond was admitted in evidence, marked Exhibit P. 9. The mortgage, it would appear from the State of the Case (p. 72, l. 18), was not admitted in evidence, but D. 2 for identification was admitted. As a matter of fact, the mortgage was admitted and marked Exhibit D. 1, as appears from the mortgage itself, and the building agreement, D. 2 for identification, was refused.

At the time of the execution of the mortgage, a building agreement was entered into between the mortgagor and the mortgagee, which was offered in evidence, but on objection was excluded.

The mortgage was what is commonly known as a "construction" mortgage. The money secured by the mortgage was to be advanced as the work of erecting a building on the mortgaged premises progressed, and in accordance with the building agreement between the parties and subject to its conditions. (See Exhibit D. 1, Article 3, State of the Case, p. 166; Article 5, p. 175, etc.; Article 6, p. 180.)

On or about May 25, 1926, the Acropolis Realty Company entered into an agreement with plaintiff to furnish and deliver at said building certain cabinets, beds and other articles described in Exhibit P. 1 at page 134. The beds were to be installed in said building on doors provided by the buyer (p. 134, l. 28). On September 21, 1926, the Acropolis Realty Company gave to plaintiff an order on appellant for $12,-612.50, part of the consideration of the contract between plaintiff and Acropolis Realty Company, payable out of moneys "due us and to become due to us from" appellant under the mortgage loan above recited (Exhibit P. 2, p. 142) payable "upon the delivery of cabinets and ranges to our aforesaid apartment building and upon the installation of beds *and* doors in accordance with" the contract (Exhibit P. 1). The order (Exhibit P. 2) was presented to Mr. Arthur Perselay, who is assistant title officer of the appellant, and who gave to plaintiff's representative

Exhibit P. 3 (p. 143), in which he stated, after acknowledging receipt of the order:

> "We wish to advise that we will make payments direct to you, as requested in this order, but only when the money is forthcoming to the Acropolis Realty Company."

There was some further correspondence between the plaintiff and appellant (Exhibits P. 4 and P. 5, P. 6 and P. 7).

The building was not finished by the Acropolis Realty Company, but by the Chalfonte Realty Company (p. 70, l. 34 and p. 71, l. 10). None of the proceeds of the loan to the Acropolis Realty Company went into its hands, although, for the purpose of record, all checks on account of it were drawn to that company, but before the signature of appellant was added, the check was endorsed on the back, by the Acropolis Realty Company, to the order of the person or corporation who was to receive it (p. 67, l. 20). Even the payroll was paid by appellant (p. 67, l. 32).

No part of the amount mentioned in the order (Exhibit P. 2) was paid by appellant to plaintiff; hence this suit.

Aside from various questions on admission and rejection of evidence and exhibits, there are two main questions involved:

1. The authority of Arthur Perselay to execute the alleged acceptance (Exhibit P. 3).

2. Assuming that such authority existed, was all or any part of the amount of the order (Exhibit P. 2) at any time "forthcoming" to the Acropolis Realty Company.

POINT I.

Arthur Perselay had no authority to execute the alleged acceptance (Exhibit P. 3) on behalf of the appellant.

Mr. Perselay was a closing officer, nominally called assistant title officer (p. 85, l. 12). His duties were to make payments on certification by Mr. Blanchard (p. 85, l. 30), to remove encumbrances (p. 85, l. 35). The by-laws of the appellant do not refer to his duties in any way (p. 36, l. 8). His duties were prescribed by Saul Cohn, vice-president of appellant (p. 86, l. 24). It was his practice to receive a report on the title, negotiate with the holders on encumbrances and liens for liquidation, to investigate intervening liens and to close on a report from the title department, record the history of the loan, attend to insurance and such details (p. 87, l. 15, etc.). Mr. Perselay was not authorized to accept orders or sign them (p. 89, ll. 20 to 30).

There is some mention of the possibility that although Perselay's position gave him no such authority, the fact that plaintiff's representative, Bancroft, was, according to the testimony of that witness, directed to go to Perselay by Mr. Ward, a vice-president, authority to accept this particular order was thus given him. (See Judge's charge, page 124, line 10.) It is to be noted that Mr. Ward denied that he had sent Bancroft to Perselay, but if we assume that he did, notwithstanding his denial, he had no such authority in himself to transmit to Perselay. He is a Vice-President in charge of sales and contact man (p. 76, l. 22); has nothing to do with the payment of money (p. 76, ll. 23 and 24) and in this connection, the witness, Bancroft, who

says he went from Ward to Perselay and there got the letter (Exhibit P. 3) admits that Perselay told Bancroft that his letter (Exhibit P. 3) could not bind the appellant. (See p. 112, l. 12):

> "Q Did he tell you that he didn't have authority to give you a mortgage? A No, sir.
>
> "Q And that his letter could not bind the company, that action could only be by action of the board? A Yes, sir."

It thus appears that after Mr. Bancroft, as he says, had left Mr. Ward and gone to Mr. Perselay, he was told by Mr. Perselay that Mr. Perselay could not bind the company by accepting the order, but that such action could only be by action of the board of directors. Mr. Bancroft's statement in this respect is verified by the testimony of Mr. Perselay (p. 92, l. 30, etc.), who said:

> "No, that is what he told me at first and I told him he would have to see Mr. Blanchard who is handling that job, and I left him in my office and went out to look for Mr. Blanchard in the front office and Mr. Blanchard wasn't there and I went back and told him that I didn't think there was anything that I could do for him, that he would have to wait to see Mr. Blanchard. He then wanted to know why I couldn't do anything for him and I told him I could not legally bind the company on the order or acceptance, that even if I gave it to him it would be useless."

It has not been shown that any such order had ever before been presented to or accepted by appellant, and it does not appear that any officer, from the president down, had authority in the premises.

In *Thomson* v. *Central Passenger Railway Co.*, 80 N. J. L., 328, the president of the defendant

company attempted to agree, on behalf of that company, and to deliver to one, Jordon, certain bonds of the company, if Jordon would cause certain suits against the company to be dismissed. This Court held that the lack of authority in the president to make such an agreement is clear; that the board of directors alone had power to bind the company in that respect.

In *Beach* v. *Palisade Realty & Amusement Co.*, 80 N. J. L., 238-241, the second vice-president of the defendant company agreed to purchase certain shares of its capital stock and bonds. The Court said:

> "Particular officers or agents of the corporation have such authority only as is expressly conferred upon them by the charter, by-laws or resolution of the board of directors, or of the stockholders, and such as is implied, because necessary or proper to enable them to perform the duties of their office,"

and held that the second vice-president had no power to make the contract in suit.

In the case before us, Mr. Ward, a vice-president, in charge of sales of securities, could have no such authority, could not grant such authority to Perselay, whose position, it must be conceded, gave him no such authority.

There was no attempt to prove that Perselay or Ward had ever received authority to accept an order, or had been held out as having such authority. *Interstate Chemical Co.* v. *James Leo Co.*, 94 N. J. L., 513.

In *Hall* v. *Passaic Water Co.*, 83 N. J. L., 771, the superintendent of the water company attempted to make an agreement for supply of water for fire purposes, at the rates usual for

household purposes. The Court held he had no such authority.

Perselay, at best, was a special agent and paintiff's representative, in dealing with him, assumed the risk of his authority or lack of authority, *Fifth Ward Savings Bank* v. *First National Bank,* 48 N. J. L., 513-525, and, as above shown, Bancroft admits that Perselay told him he had no authority to accept the order.

But plaintiff may contend that there was a ratification by Exhibit P. 6 (p. 146, l. 23). P. 6 did not amount to a ratification, for the acceptance of orders was not a duty which Mr. Cohn was in the habit of performing. *Fifth Ward Savings Bank* v. *First National Bank, supra.* Such an act was not, by usage or necessity, incident to his office, nor was it in the usual course of business. *Titus & Scudder* v. *Cairo & Fulton R. R.,* 8 Vroom 98-102. He could not execute a mortgage, *Liggett* v. *N. J. Banking Co.,* Saxt 541, or a bond and warrant of attorney, *Stokes* v. *New Jersey Pottery Co.,* 46 N. J. L. 237.

In order to be a ratification, there must be full knowledge of all facts and circumstances attending the transaction. *Gulick & Holmes* v. *Grober,* 33 N. J. L., 463-471; *Interstate Chemical Co.* v. *James Leo Co.,* 94 N. J. L., 513; *Beach* v. *Palisade Realty & Amusement Co.,* 86 N. J. L., 238-242.

Under this point, we wish to call attention to our ground of appeal No. 1, on page 17, line 35. Our contention is that Exhibit P. 3 should not have been admitted in evidence because it had not been shown, and has not been shown, that Arthur Perselay had authority to execute or to accept the order therein described, nor, as has above been shown, was it ratified. *Aerial League*

of America v. *Aircraft Fire Proofing Corporation,* 97 N. J. L. 530-532.

We further call attention to ground of appeal No. 8 (p. 19, l. 1). Arthur Perselay, the man who signed Exhibit P. 3, was called as witness by the plaintiff and asked if he had disbursed certain money in connection with this loan to persons entitled thereto (p. 62, l. 7). On cross examination, this question was asked:

> "Q Did you ever draw any checks? In fact, did you ever make any order?" (See p. 63, l. 17.)

The question was excluded because the Court held that it was not proper on cross examination. We submit that in view of the question on direct examination, above referred to, the excluded question was proper in order to define the meaning of the words "did you disburse" in the question on the record.

Again, ground of appeal No. 20 (p. 21, l. 1), the trial court would not permit the witness Cohn to be asked what was the established policy of the appellant, with reference to assignments and orders. That was the very question that was involved in the suit and bore directly upon the authority of the officers, or any officer, to accept such a paper (p. 99, l. 11).

Ground of appeal No. 27 (p. 22, l. 35), the Court charged the jury:

> "If the jury find from the evidence that the United States Title & Mortgage Co. voluntarily placed Arthur Perselay in such a situation that the plaintiff company with its knowledge of business usages and the nature of the business in hand, was justified in presuming that Perselay had authority to write the letter of September 21, 1926, accepting the order to pay the plaintiff the sum of $12,-612.50, then the act of Perselay was the act

> of the United States Title & Mortgage Co. and said Company is bound thereby."

(See p. 88, l. 29; p. 89, l. 11; p. 123, l. 8.)

We contend that there was no evidence in the case which could justify the jury in finding that Arthur Perselay was placed in such a situation by the appellant or which would justfy such a presumption, *Aerial League of America* v. *Aircraft Fire Proofing Corporation,* 97 N. J. L. 530-532, and that, therefore, the charge was erroneous in that respect.

Ground of appeal No. 32 (p. 24, l. 15), the Court charged:

> "If we rely upon the authority which Ward gave to Perselay, it is necessary first to find that Mr. Ward had the authority, or apparent authority, to authorize Ward (Perselay) to write this letter."

(See charge of the Court, p. 124, l. 1.) This is objectionable, not only because Ward denied that he gave Perselay any authority (p. 76, ll. 14 to 19), but also because the only thing that has been shown about Ward's authority is that he is the vice-president, in charge of sales of mortgages (p. 77, l. 5). As such, he would have no authority to accept the order (P. 2), and, if he had had such authority, he could not transmit it in this manner for, we submit, in the absence of ratification or usual practice, an officer, whose authority must be specifically to do an act which must be written and over his signature, cannot transmit that authority verbally to a subordinate.

In ground of appeal No. 33 (p. 24, l. 22), objection is made to that part of the charge of the Court in which he said:

> "It may not have been that Mr. Perselay had authority, but, if Mr. Ward had the authority to sign this letter, and you find it

> to be a fact that Mr. Ward sent Mr. Bancroft to Mr. Perselay with the statement that Mr. Bancroft said he did, then that might confer upon Mr. Perselay authority to write a letter, which he otherwise might not have done." (p. 124, l. 9.)

Not only is this charge based on the supposition that evidence had been submitted, which in fact had no existence, but it overlooks the admission by Mr. Bancroft that he was informed by Mr. Perselay that the latter could not bind the appellant by P. 3, and that an acceptance to be binding, must be authorized by the board of directors (p. 112, l. 15).

POINT II.

If Exhibit P. 3 had been the authorized act of appellant, still plaintiff is not entitled to recover because the condition of the alleged acceptance is not fulfilled.

Exhibit P. 3 is payable "only when the money is forthcoming to the Acropolis Realty Co." This can mean only that in accordance with the provisions of the mortgage and those of the building agreement entered into between the Acropolis Realty Company and appellant, money on account of the loan, to be secured by the mortgage, was due and payable by appellant to the Acropolis Realty Company.

The mortgage between the Acropolis Realty Company and appellant, dated May 21, 1926, was actually admitted in evidence and marked Exhibit D. 1, although it would appear from the transcript that it was marked D. 1 for identification; that the building agreement was admitted as D. 2. This is not the fact. The mortgage was marked D. 1. and the building agreement was refused admission. All this appears on page 72, lines 18 to

40. We have printed the mortgage as Exhibit D. 1.

It is plain that it should have been admitted, if it was not, because, if for no other reason, it is referred to in the order or assignment given by the Acropolis Realty Company to plaintiff (Exhibit P. 2) and it was specifically out of the fund to be secured by this mortgage that the amount of the assignment was to be paid. It is inconceivable that admission of this mortgage was refused. The bond was admitted and, for some strange reason, marked Exhibit P. 9. (See p. 72, l. 37.) The mortgage appears in the state of the case on page 160, the bond on page 148. The bond, (Exhibit P. 9) contains some of the conditions under which the money was to be advanced, for instance: Page 154, line 30, page 154, line 38, and following, on pages 155 and 156 are various provisions for the protection of the mortgagee and finally on page 157, is an authorization to the mortgagee, under certain conditions, to complete the building, satisfy liabilities, pay for work done or to continue construction, at its option. In the mortgage (p. 167, l. 15, sec. 2) there is a covenant by the mortgagor against mechanic's liens, taxes and other charges. On page 168, sec. 4, the mortgagor covenants to comply with the regulations of all state and municipal bodies.

These clauses in the bond and mortgage, and those in the building agreement, which was refused admission, bore directly upon the question of whether or not the Acropolis Realty Company was entitled to receive any money from the appellant on account of this loan. That these provisions were pertinent to the question at issue is apparent from reading the decisions of this Court.

In *Bernz* v. *Marcus Sayre Co.*, 52 N. J. E. 275, an order was given by the builder on the owner to a materialman. It was accepted by the materialman, but the Court held its effect was simply to subrogate the assignee to the rights of the assignor under the contract, and would not inure to deprive the owner of the benefit or advantage of the terms and conditions contained in the contract under which the building was being constructed. The condition attached to the acceptance in that case was that the work be approved by the owner and architect. The condition in the case before us is that the money should be forthcoming to the Acropolis Realty Company. The obligation of appellant to plaintiff arose, if at all, under the contract P. 3, and is subject to the conditions which appear therein. No money was forthcoming to the Acropolis Realty Company unless it lived up to the terms of its bond, mortgage and building agreement, entered into as a part of the transaction of making the loan. Since we were not permitted to introduce the building agreement, we cannot discuss its terms, but we insist that the refusal to admit it was error. (Ground 18, p. 20, l. 18, state of the case p. 72, l. 39.)

In *Turner* v. *Wells*, 64 N. J. L. 269, this Court in considering a similar assignment, there held that where the contract between the owner and builder provided that releases from mechanic's liens must be tendered before a payment became due, that the plaintiffs must show that the releases were given, or that there were no mechanic's liens. There, on cross examination, defendant's counsel asked whether any releases had been furnished: the question was excluded. The Court held that it was error and that to establish the obligation of the defendant to pay, the plaintiff must prove as well the furnishing of releases

as compliance with the rest of the contract (p. 272).

It does not seem that it can appear more strongly that the building contract, which defined the rights of the mortgagor and mortgagee, was necessary to the correct determination of the case before us, and that it was the duty of the plaintiff to show that the terms of this agreement had been fulfilled before it can recover.

Titus v. *Gunn,* 69 N. J. L. 410, is to similar effect.

But the trial court not only excluded the building contract, but also frustrated every attempt of the appellant to show that no money had in fact become due or been forthcoming under the mortgage to the Acropolis Realty Company, the maker of the assignment.

As instances in point, there is (p. 18, l. 12) the third ground of appeal (state of the case p. 47, l. 11). The question to the witness, Bancroft, on cross examination as to his knowledge that the Building Department of East Orange would not permit the installation of the cabinets covered by his contract with the Acropolis Realty Company, yet it will be recalled that the bond (Exhibit P. 9) relieved the mortgagee of all obligation to make further advances if the building was not erected in all respects with the approval of the Building Department of the City of East Orange (Exhibit P. 9, p. 152, l. 16; p. 154, l. 8 and p. 155, subdivision 1, l. 20) and in the mortgage (Exhibit D. 1, p. 168, l. 7, sec. 4) the Acropolis Realty Company covenanted to comply with the rules of the Building Department of East Orange. I am not permitted to refer to the provisions of the building agreement, but this simply emphasizes our contention that the building agreement should have been admitted.

Ground 4 (p. 18, l. 18 and p. 55, l. 24) the trial court refused to admit the question as to whether plaintiff had a chattel mortgage on this property it was furnishing to the Acropolis Realty Company, and ground 5 (p. 18, l. 23 and p. 55, l. 32) the trial court refused to permit the witness Bancroft to be asked if plaintiff had filed a lien claim. Yet, under its bond and mortgage, the Acropolis Realty Company was obliged to furnish all fixtures used in the building free from encumbrance (p. 155, l. 21) and no further advancement need be made upon the filing of a mechanic's lien (p. 156, l. 12, Exhibit D. 1, p. 166, l. 20, p. 167, l. 15, sec. 2).

Ground of appeal No 7 (p. 18, l. 33, p. 62, l. 33) was an attempt to show that all payments made by the mortgagee on account of this loan were made to others than the mortgagor, and to bring out the reason for such payment.

Ground of appeal No. 10 (p. 19 and p. 66, l. 25) dealing with the delivery of materials to be supplied under plaintiff's contract and ground of appeal No. 11 (p. 19, l. 20 and p. 68, l. 39), ground of appeal No. 13 (p. 19, l. 28 and p. 69, l. 14), ground of appeal No. 14 (p. 69, l. 25), ground of appeal No. 15 (p. 71, l. 18), ground of appeal No. 16 (p. 71, l 38), were all questions asked in an attempt to bring out the method of payment of the funds secured by the loan; to whom they were paid; the completion or lack of completion of the building; whether there were unpaid claims for material or labor furnished or performed on the building or lien claims on the building; the reason why the building was not being finished by the Acropolis Realty Company and whether, after the completion of the building by someone other than the mortgagor, available funds remained in the loan. All of these inquiries

were excluded by the Court, and we insist that each was improperly excluded; that each was pertinent to the question involved in the case and should have been admited under the cases above cited.

Ground No. 19 (p. 20, l. 24) is directed to the refusal of the Court to permit the testimony of William H. Kessler. (See state of the case p. 80, l. 23.) Mr. Kessler is the building inspector of East Orange and it was desired to prove by him that the installation of the cabinets furnished by plaintiff was not permissible under the Building Code, and it was pertinent, relevant and material evidence, in view of the provisions of the bond (P. 9), the mortgage (D. 1), and the agreement which was excluded. This testimony was re-offered at page 91, line 8, because there had been a change in situation, but was again excluded.

Ground No. 21 (p. 21, l. 12, and p. 103, l. 20), and ground No. 22 (p. 21, l. 19, and p. 104 l. 9) were a repetition of the effort to show lien claims filed against the building and the amount required to satisfy these claims.

Ground No. 24 (p. 21, l. 28, and p. 120, l. 24), the Court attempted to construe the meaning of the term "forthcoming" used in Exhibit P. 3. According to his definition, it means that if the building progressed to a point when, out of the mortgage funds, $12,612.50 should be paid regardless of who was entitled to it; whether the building was finished by the Acropolis Realty Company or someone else, because of the failure or insolvency of the Acropolis Realty Company; whether there were prior liens, orders or assignments of this fund—in other words—if the building progressed to the value of $12,612.50, that sum should be paid to the plaintiffs when it had substantially performed its contract with the

Acropolis Realty Company. The appellant was not permitted to show that this sum never became due to the Acropolis Realty Company.

In Ground No. 25 (p. 21, l. 37, and p. 120, l. 33) the same error is repeated and amplified, for the jury was charged that in the event of such progress in the building, and the failure of the appellant to pay to plaintiff the amount it claimed, it, the appellant, became liable for that amount with interest.

Ground No. 28 (p. 23, and p. 125, l. 34), ground No. 29 (p. 126, l. 4) and ground No. 30 (p. 23, and p. 126, l. 19) the Court charged that the right of plaintiff to recover was not affected by the fact that the Building Department of East Orange excluded part of the fixtures furnished by the plaintiff; that neither the terms of the mortgage between the Acropolis Realty Company and the United States Mortgage & Title Guaranty Company (Exhibit D. 1) with respect to the covenants of the Acropolis Realty Company to conform to the rules of such Building Department, or any of the terms of the mortgage affected the plaintiff's right to recover because it was not a party thereto, and in line with this ruling, the trial court refused to charge the requests of the appellant which are covered by grounds Nos. 35, 36 and 41 (State of the Case, p. 131, l. 16, request 6; p. 131, l. 36, request 8, and p. 133, l. 19, request 13).

We insist that this is direct conflict with the cases of *Bernz* v. *Marcus Sayre Co.*, *Turner* v. *Wells* and *Titus* v. *Gunn,* above cited.

The remaining Grounds of Appeal.

Ground No. 2 (p. 18, and p. 34, l. 23). The Court admitted over objection the question directed to the witness, Bancroft, as to the cost of hanging the beds on the doors. Not only had the plaintiff failed to qualify this witness as having any knowledge of the cost of hanging beds, but it was apparent from the context that the amount given was merely a guess. The question should have been excluded.

Ground No. 26 (p. 22, and p. 124, l. 19). The Court charged that if there was a substantial compliance with the contract between the plaintiff and the Acropolis Realty Company, but that the plaintiff had not hung the beds on the doors, the appellant was obliged to withhold from any sum which might be due to the Acropolis Realty Company the sum of $12,612.50, or such portion as would pay the plaintiff for substantial compliance with the contract. We contend that this charge is erroneous. Exhibit P. 2 was payable only "upon the installation of the beds *and* doors, in accordance with the contract." That was a condition precedent to the payment; that contract must be performed to the letter before the order, or its alleged acceptance (P. 3) would become effective. Since the plaintiff failed to show complete performance, it was not entitled to the sum mentioned in the order, or any part of it. The obligation of the plaintiff to complete arose from the contract between them expressed in the alleged acceptance of the order. *Bernz* v. *Marcus Sayre Co.*, 52 N. J. E. 275, at 282.

Ground No. 31 (p. 24, and p. 119, l. 32). The Court charged the jury that on December 2nd, after notice had been received from the Acropolis Realty Company that the work had been com-

pleted, it was an admitted fact that over $12,-700.00 was in the treasury of the appellant and had never been paid upon the mortgage. I can find no testimony that would justify this statement. The testimony of Mr. Perselay on p. 102, l. 35, is pointed to as justifying this portion of the Judge's charge. The question and answer is as follows:

> "Q I am referring to Exhibit P. 6. In your testimony on your direct examination you stated that on the 2nd day of December you had on hand some $7,000 odd dollars. Kindly figure it up and see if it is not $12,-750.82 that you had on hand? A When it comes down to those figures, I didn't prepare the statement. I can only give it to you assuming that it is correct."

On page 2, at line 13, this witness was asked the question:

> "Q Will you tell me on December 2, 1926, you had any funds on account of the mortgage loan? A I had $7,900.00 roughtly."

We insist that this testimony contradicts the charge of the Court on this point, and that, therefore, the charge was error.

Counsel for appellant asked the Court to charge the jury as follows:

> "If the plaintiff has failed to satisfy the jury that it has in every respect conformed with the terms of its contract with the Acropolis Realty Co., owner, there can be no recovery against this defendant."

(Ground 39, page 26. See page 132, request 11.)

We contend that substantial performance was not sufficient and that plaintiff's failure to hang the beds, whatever the cause, precluded recovery from this defendant.

This same contention is exemplified in ground 40 (p. 26, and p. 132, l. 33), request to charge No. 12.

Finally, the Court refused to non-suit the plaintiff and refused to direct a verdict in favor of appellant.

See grounds No. 9 (pp. 19 and 64) and No. 23 (pp. 21 and 112). We refer to the cases cited above as our authority for stating that at the time that plaintiff rested, and more definitely, at the time when the motion for direction of verdict was made (p. 112, l. 25), the plaintiff had not sustained the burden of proving any liability of appellant to plaintiff. *Turner* v. *Wells,* 64 N. J. L. 269-271.

We respectfully insist that the verdict and judgment in favor of the plaintiff should be set aside and a new trial granted:

First: Because it has not been shown that Perselay had any authority to sign the alleged acceptance (P. 3); that Ward had any authority to give Perselay authority to sign; that there was any ratification by anyone in authority, who had knowledge of the circumstances.

Second: That even had the alleged acceptance been made with the authority of the appellant, the plaintiff is not entitled to payment because it did not finish the work provided for in its contract with the Acropolis Realty Company, in that it did not hang the beds, and the material it furnished was contrary to law and could not be installed, because the approval of the Building Department was withheld. Further, it has not been shown that a single dollar became due or payable to the Acropolis Realty Company on or after September 21, 1928.

Third: Because the Court erred in its rulings as to the admission and rejection of evidence and its charge to the jury.

Respectfully submitted,

REED & REYNOLDS,
Of Counsel with Appellant.

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

New Jersey Court of Errors and Appeals

THE "WHITE" DOOR BED COMPANY, a corporation of the State of Illinois, *Plaintiff-Appellee,* *vs.* UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY OF NEW JERSEY and ACROPOLIS REALTY COMPANY, *Defendants,* *and* UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY OF NEW JERSEY, *Defendant-Appellant.*	*Action at Law.*

BRIEF OF PLAINTIFF-APPELLEE.

This is an appeal from the Essex County Circuit Court, by one of the defendants, United States Mortgage and Title Guaranty Company of New Jersey, from a judgment rendered upon a verdict of the jury in favor of the plaintiff against the defendant in the sum of $13,459.56 together with costs of suit, before Nelson Y. Dungan, Esq., Judge of the Essex County Circuit Court.

Facts.

(Italics ours unless otherwise noted.)

The action is based on a contract (Exhibit P. 1) entered into between the plaintiff and the Acropolis Realty Company for the sale and pur-

chase of certain cabinets, ranges and door beds, therein specified, and by this contract it was provided that "seller shall not be obligated to deliver until buyer shall furnish to the seller a letter from the Mortgagee (U. S. Mortgage & Title Guaranty Co.), that the Mortgagee will pay to the buyer the said sum of $12,612.50 upon delivery of cabinets and ranges and the installation of the beds as above." In pursuance of this provision, Mr. Bancroft, an agent of the plaintiff obtained from the Acropolis Realty Company the assignment and order (Exhibit P. 2) transferring to the plaintiff $12,612.50 out of the money due or to become due from the United States Mortgage and Title Guaranty Company of New Jersey under its mortgage of $375,000.00 granted upon the building for which these articles were ordered and directing said company to pay that sum to the plaintiff upon the delivery of cabinets and ranges and installation of the beds.

With this assignment and order in his possession, the plaintiff's agent went to the office of the defendant, United States Mortgage and Title Guaranty Company of New Jersey. Mr. Bancroft, the plaintiff's agent, states, as appears on page 30 of the state of the case, that he went to the defendant's office with this assignment and order of the Acropolis Realty Co., and a copy of the contract (Exhibit P. 1) and asked for Mr. Saul Cohn, the Vice-President and General Manager of the defendant company (p. 35, l. 38) and was informed that he was in Europe; that he was then referred to Mr. Ward, another Vice-President of the defendant company who in his testimony (p. 78, l. 12) stated that in the absence of Mr. Cohn and Mr. Blanchard, he was in charge of the affairs of the defendant company; that he showed the contract and the order to Mr. Ward

who looked them over and said that Mr. Perselay would give him the order required. Mr. Ward on direct examination (pp. 75 and 76) stated that he didn't recall anything about the transaction, but on cross examination stated that he was not sure that the conversation related by Mr. Bancroft did not occur, and on re-direct examination in response to the question whether he sent Mr. Bancroft to Mr. Perselay and that Mr. Perselay would give him such an order, he stated that it might have occurred, but that he had no recollection of that fact (p. 80, l. 10, etc.). Mr. Bancroft then went to Mr. Perseley and showed him the contract for the cabinets, ranges and beds, and assignment of the portion of the mortgage funds, and told him that Mr. Ward said that he would give him a letter accepting the assignment (p. 31). Mr. Perselay read the order, said he had a copy of the contract in his files, left the office for a short time, and then came back and dictated the letter of acceptance (Exhibit P. 3) (p. 43, l. 40) which reads as follows:

UNITED STATES MORTGAGE & TITLE GUARANTY COMPANY OF NEW JERSEY.

William E. Lehman, President	Charles C. Lossee, Assistant Title Officer
Saul Cohn, Vice-Pres. and General Counsel	Arthur Perselay, Assistant Title Officer
Henry H. Dawson, Title Officer	Otto J. Strasser, Assistant Title Officer
Hugh B. Reed, Solicitor	

Title No. 280

The "White" Door Bed Co.,
#130 North Wells Street,
Chicago, Illinois.

Gentlemen:—

This is to acknowledge receipt of an order issued by the Acropolis Realty Company on

us, in your favor, for $12,612.50, to be paid to you direct out of the mortgage monies we have in our possession on a $375,000.00 loan extended by us to the Acropolis Realty Company.

We wish to advise that we will make payments direct to you, as requested in this order, but only when the money is forthcoming to the Acropolis Realty Company.

Very truly yours,
UNITED STATES MORTGAGE AND TITLE GUARANTY COMPANY OF NEW JERSEY.
AP:EP By Arthur Perselay

This letter was delivered to plaintiff's agent written on the letter-head of the defendant company on which is set out in detail, the name of Mr. Ward as Vice-President and Mr. Perselay as Assistant Title Officer, the exhibit not having been printed in full in the state of the case.

Thereafter the plaintiff company proceeded to perform its contract and did perform it with the exception of installing the door beds for the reasons hereinafter explained (p. 33, l. 8, etc.; p. 67, l. 7, etc.; p. 83, l. 5, etc.) which the plaintiff was to hang on openings provided by the buyer (p. 140, l. 22). The Acropolis Realty Co., did not have the openings nor were the doors provided (p. 33, l. 30) in accordance with the terms of the contract. The actual hanging of the beds would have cost between fifty cents (50c) to seventy-five cents (75c) apiece (p. 34, l. 32), a total of Thirty-six ($36.00) Dollars to Forty-eight ($48.-00) Dollars for all the beds, thus indicating that this was a minor, unimportant and insignificant part of the contract, and the contract had been fully and substantially performed in accordance with its terms.

Thereafter under date of November 30, 1926, plaintiff wrote (Exhibit P. 5) to the defendant asking for payment of the $12,612.50, and in the ensuing correspondence, the defendant, over the signature of Saul Cohn, Vice-President and General Manager, on December 2, 1926, stated (Exhibit P. 4) that the entire amount of the mortgage loan had been expended, although at the time of writing this letter there was still over Seven Thousand Nine Hundred ($7,900.00) Dollars unexpended (p. 62, l. 15, p. 102, l. 38), and again later (Exhibit P. 6) that although they had advised that the funds would be paid when forthcoming to the borrower (p. 146, l. 23) the amount of the loan had been expended on orders. There is nothing in this correspondence repudiating Mr. Perselay's authority, but rather an acknowledgment of it and acquiescence of his implied authority. It is an admitted fact that at the time Mr. Perselay gave Mr. Bancroft the letter guaranteeing to pay $12,612.50 there was still a sum over $100,000.00 unexpended on the mortgage loan (p. 61, l. 26).

The case was one of fact purely and simply whether the act of Perselay was the act of the company, and if at the time of the so-called order and agreement on part of the United States Mortgage and Title Guaranty Company of New Jersey to pay the plaintiff sufficient funds were forthcoming to meet the obligation. Both of said questions were resolved by the jury in favor of the plaintiff and there was plenary evidence substantiating both questions of fact.

It is, therefore, respectfully urged that the judgment rendered in the court below in favor of the plaintiff should be affirmed and the appeal dismissed.

POINT I.

There was plenary and complete evidence of the authority of Arthur Perselay, the agent, to execute the acceptance. (Exhibit P. 3.)

There was direct and positive evidence of his agency and also evidence which indicated the apparent authority of the agent to bind the principal. The law is clearly settled in this State by a long line of authorities that:

> "a principal is bound by the acts of his agent within the authority actually given him which includes not only the precise act which he expressly authorized him to do, but also whatever belongs to the doing of it, or is necessary to its performance. *Beyond that, he is liable for the acts of the agent within the appearance of authority which the principal himself knowingly permits the agent to assume or which he holds the agent out to the public as possessing.*" *Law* v. *Stokes,* 32 N. J. L. 251.

A recent case in which the subject is treated is the case of *J. Wiss & Sons Co.* v. *H. G. Vogel Co.,* 86 N. J. L. 618, Court of Errors and Appeals, lays down the true rule as follows:

> "As between the principal and third persons, the true limit of the agent's power to bind the principal is the apparent authority with which the agent is invested. The principal is bound by the acts of the agent within the apparent authority which he knowingly permits the agent to assume or which he holds the agent out to the public as possessing. And the reason is, that to permit the principal to dispute the authority of the agent in such cases would be to enable him to commit a fraud upon innocent persons.
>
> The question in every such case is whether the principal has by his voluntary act placed the agent in such a situation that a person of ordinary prudence, conversant with business usages, and the nature of the particular

> business, is justified in presuming that such agent has authority to perform the particular act in question and when the party relying upon such apparent authority presents evidence which would justify a finding in his favor he is entitled to have the question submitted to the jury.''

It is strongly contended that the language of the foregoing case is clearly applicable to the case at bar. Mr. Bancroft, the agent of The ''White'' Door Bed Company, entered the office of United States Mortgage and Title Guaranty Company of New Jersey for the purpose of obtaining an agreement from them to pay the first installment upon the contract (Exhibit P. 1). He there inquired for Mr. Saul Cohn, Vice-President and General Manager of the corporation, and was informed that he was out of town and referred to a Mr. Ward, whom he was informed was the Vice-President of the company, to whom he stated the nature of his errand. Mr. Ward informed Mr. Bancroft, after he had talked it over with him, that the matter was in charge of Mr. Perselay and that Mr. Perselay would give him whatever was required in the way of an order or agreement. Acting upon this instruction, he saw Mr. Perselay, and Mr. Perselay gave him the order which is the subject of the suit (Exhibit P. 3).

So much for apparent authority, but in addition to this, we have the direct testimony of Mr. Bancroft that Mr. Ward, after conferring with him as to what we wished in the way of an order or agreement, said that Mr. Perselay was authorized to act and subsequent to the conversation with Mr. Ward did in fact give the order that is now before the Court on the letter-head of the defendant company, and the testimony

bearing upon that point is here set down in detail.

State of Case, page 30, line 14, to page 31, lines 1 to 18.

A I went to the office of the United States Mortgage and Title Guaranty Company with that order and my contract and a copy of it, and I asked Mr. Saul Cohn, who they told me was in Europe. Another man standing there was a Mr. Ward.

Q What in his office? A I believe he is Vice-President. Mr. Ward read my contract and order and said it was nothing that he could attend to.

Q Just repeat that? A I believe he is Vice-President. Mr. Ward read the contract through and the order against the loan and he said Mr. Perselay would give me the order.

Q He said that Mr. Perselay would give you the order that you required? A Yes, sir.

Q Did he introduce you then to Mr. Perselay? A No, he directed me a way to get there. It was out in the back of the offices there.

Q And he made this statement to you after you had shown him your order and he had read the contract? A Yes, sir.

Q (Showing witness paper.) Do you know whether this is a copy of the contract that you left there at that time?

Objected to.

Q Is that the contract that you had with you, would you say? A I won't say that is the contract. I will say it is a copy, or one like it.

Q After you had this conversation with Mr. Ward, did you see Mr. Perselay? A I showed it to Mr. Perselay and told him that Mr. Ward had told me that he would give me a letter and order explaining that order.

Q (Showing witness paper.) I show you a letter dated September 21, 1926, and ask

you whether Mr. Perselay gave you that order? A He did.

The case of *Smith* v. *Delaware & Atlantic Telegraph & Telephone Co.*, 64 N. J. Equity 770, is somewhat similar to the case at bar. In this case, the attorney for the complainant in order to ascertain who had erected certain wires on the complainant's property entered the office of the Delaware & Atlantic Telegraph & Telephone Co., and testified as follows:

> "I was shown to the office of the General Manager, Mr. Westbrook, and had a conversation with him. In the conversation, Mr. Westbrook told me he was the General Manager of the company, and authorized to speak for the company; that it was the Delaware & Atlantic Telegraph & Telephone Co., who had erected wires on the property of Mr. Smith on Main street in Elmer, and that he received a letter from Mr. Smith forbidding the placing of the wires there and asked me whether money consideration would settle the matter."

The Court, in that case stated the rule governing the situation to be that:

> "a person may by permission and recognition occasion a reasonable inference that another is his agent. Did the evidence in this case tend to support that Mr. Westbrook was the agent of the defendant and that his declarations would bind it? Mr. Early called at the office of the company in Philadelphia and was shown, no doubt, in answer to some inquiry, to an office purporting to be that of the General Manager. There he found Mr. Westbrook installed, assuming to act as General Manager and already informed about the letter that the complainant had written to the defendant. What is the more natural supposition, that Mr. Westbrook was an intruder or usurper, and had possessed himself in some unauthorized way of the contents of the complainant's letter, or was he acting

> with the knowledge and by the direction of the defendant? The mind readily accepts the latter alternative. Mr. Westbrook's averment that he was agent, and this evidence made his declarations competent, for they were admissions of the defendant by the mouth of one who appeared by uncontradicted proof to be its agent, made in the conduct of the business entrusted to him."

This case is strong authority for the position here taken, namely, that Mr. Perselay was acting with authority, permission, recognition and acquiescence. He accepted the order or assignment made by the Acropolis Realty Company directed to United States Mortgage and Title Guaranty Company of New Jersey. He was familiar with the terms of the contract (Exhibit P. 1); that the same was to have no validity unless and until United States Mortgage and Title Guaranty Company of New Jersey recognized the validity of the assignment, and agreed to pay $12,612.50 on account of the contract in accordance with its terms.

With this information at hand in the office of the company, Mr. Perselay dictated and had typewritten upon the company's letter-head, an agreement signed by the company, by him as its agent, to the effect that the United States Mortgage and Title Guaranty Company of New Jersey would pay the installment pursuant to the terms of the contract, and there has been no repudiation of his authority from the time the letter was given until suit was instituted. There is evidence that subsequently Mr. Saul Cohn, the Vice-President and General Manager of the company, wrote a letter which, if by its terms was not a recognition and confirmation of the authority of Mr. Perselay to act for the company was by implication a strong

bit of evidence that such authority was ratified and confirmed by the defendant company. The letter (Exhibit P. 6) in which he said—

> "We made a mortgage loan of $375,000.00 which we were assured by the borrower was ample to complete the structure. We also required a National Surety Company bond which was agreeable to the borrower. *We advised you that these funds would be paid when forthcoming to the borrower.* During the process of the work we have expended the amount of our loan. On orders received from time to time the funds representing our loan have gone into the structure—"

It would seem from this communication that the agreement to pay was ratified. It also appears that orders received from time to time were recognized by the company and why this order of the plaintiff was not so recognized, does not appear. In reply to this letter, The "White" Door Bed Company wrote the letter (Exhibit P. 7) which is here set out in full:

> December 6th, 1926
>
> United States Mortgage & Title Co.
> #972 Broad Street,
> Newark, New Jersey.
>
> Gentlemen:—
>
> We were surprised to receive your letter of December 2nd advising that the loan of said $375,000. made to the Acropolis Realty Company had been exhausted and that you are therefore unable to take care of our claim, until an additional loan was secured.
>
> We are surprised at this state of affairs. Your letter of September 21st gave us to understand that you were holding $12,612.50 out of the loan to pay the obligation due this company. Shipment was made on your representation that the funds were in your pos-

session, therefore must look to you for immediate settlement of the $12,612.50 still due.

Yours very truly,
"WHITE" DOOR COMPANY
MD. YELLON Legal Department
EW

It therefore appears that the evidence as to whether Mr. Perselay was acting with authority and could bind the company was a question of fact and the plaintiff by overwhelming evidence convinced the jury that he was acting both by direct authority and had been clothed by apparent authority by the defendant company, and this question having been resolved in favor of the plaintiff there is no basis for this appeal.

There is some intimation in the brief on the part of the appellant that because the acts of Mr. Perselay were not authorized by a particular by-law of the company or he had no such authority by reason of the fact that it was not conferred upon him by Mr. Saul Cohn, Vice-President and General Manager of the appellant, that therefore his act could not bind the company. This is an erroneous statement of the law applicable to the case because the answer to such a situation is found both in the fact that there is evidence that he was directly authorized by the Vice-President and secondly, that all that Mr. Perselay did in signing the order was within the apparent scope of his authority, which the defendant knowingly permitted him to assume by reason of the circumstances surrounding the transaction, the nature of his employment, and the acts done and performed by him in the furtherance thereof, and he was held out to the public as an agent possessing the authority to perform the very act under consideration in this cause.

The Court's attention is directly called to the fact that in the appellant's brief it is stated that the money was payable upon delivery of cabinets and ranges to our aforesaid apartment building and upon the installation of beds and doors in accordance with the contract. This language is the language of the order (Exhibit P. 2) from the Acropolis Realty Company to The "White" Door Bed Company, but is not the language of the contract (Exhibit P. 1) which is the real basis of the suit. The contract providing "$12,612.50 is to be paid upon delivery of the cabinets and ranges to building and the installation of beds *on doors provided by the buyer.*"

The appellant's brief in some instances has not stated the facts clearly and in accordance with the evidence. On page 4 it is stated that Mr. Ward denied that he had sent Mr. Bancroft to Mr. Perselay. The fact is that Mr. Ward did not deny that he had sent Mr. Bancroft to Mr. Perselay, but stated that he had no recollection of the fact and that it might have occurred.

State of Case, page 75, lines 30 to 40 and page 76, lines 1 to 10.

> Q He said he came to your office in September 21, 1926, and he had an order, Exhibits P. 1 and P. 2, and a contract between the Acropolis and the White Door Bed Company, and he says he showed this to you and that you read that. Can you tell me whether or not that occurred? A I don't recollect them; I don't recognize them.
>
> Q Don't recognize those two exhibits? A No.
>
> Q You said that after you had read the order and inspected the contract that he asked you for a letter directed to the White Door Bed Company agreeing to pay the sum of twelve thousand and odd dollars mentioned in the order—what do you say as to

that—as part of the proceeds from a mortgage loan of the U. S. Title & Guaranty Company. What have you to say about that? A I don't know anything about it.

Q I understand you to say that you are not sure of whether you sent Mr. Bancroft to Mr. Perselay and Mr. Perselay would give him an order? A I said it might have occurred; I have no recollection of the fact. In fact, I don't see how I could have sent Mr. Bancroft—

Q I want to know if you would remember if you had sent him to Mr. Perselay and got an order? A I don't remember that.

Q That could have happened? A I don't think it possibly could have happened.

The appellant's brief also asserts that Mr. Ward had no authority himself to transmit to Mr. Perselay. This is not borne out by the evidence. The evidence indicates that Mr. Ward had the same authority as Mr. Saul Cohn who had general control of the affairs of the company, and was its General Manager.

State of Case, page 108, lines 30 to 37, page 109, lines 30 to 34 and page 78, lines 11 to 14.

Q Who is the Vice-President of the bank to take the place of the President? A We have not delineated a Vice-President to act for the President. If anything happens to—

Q You mean Mr. Ward has the same authority that you have? A Yes, sir, we have three vice-presidents who act for the president. We have no delineation of vice-president at all.

Testimony of Mr. Ward:

Q I want to know in the absence of yourself, for example, and Mr. Lehman, does the vice-president do whatever is necessary in the regular business of the company? A I would say yes to that.

Q And the company is wholly under the charge of Mr. Cohn and yourself, isn't that so? A And Mr. Blanchard.

Q Is he an active man? A Yes, sir.

The appellant contends that Mr. Bancroft admitted that Mr. Perselay told him that his letter could not bind the company. This is not borne out by the evidence.

State of Case, page 44, lines 1 to 10.

Q Did he tell you when you asked him for the guarantee that he couldn't give you one? A He didn't.

Q Didn't you ask him when he told you that he couldn't give you one you could refer him to an officer who could? A I didn't.

They have, however, taken an excerpt from part of the testimony on page 112, line 12, and that answer as appears upon the record at that point was either erroneously taken down by the stenographer, or Mr. Bancroft must have misunderstood the question, as appears from Mr. Bancroft's entire rebuttal which is set out in full.

State of Case, page 111, lines 30 to 34 and page 112, lines 1 to 21.

Q Mr. Perselay testifies that when you saw him in September, 1926, you asked him for a guarantee; is that so? A It is.

Q You did ask him for a guarantee? A Yes, sir.

Q He says also that you told him to see Mr. Blanchard and personally left the office to find Blanchard and also told you that he could not give you such a guarantee. Did he say that?

The Court: He says that he told Mr. Perselay to see Mr. Blanchard.

A He didn't.

Q Did he tell you that he didn't have authority to give you a mortgage? A No, sir.

Q And that his letter could not bind the company, that action could only be by action of the board? A Yes, sir.

> Q The only object of giving you this letter direct was so you wouldn't have to get the endorsement of the Acropolis Realty Company? A No, sir.

There are a number of cases cited in Point I by the appellant with reference to agency. An examination of these cases will indicate that they are not applicable to the case at bar.

The case of *Thomson* v. *Central Passenger Railway Co.,* 80 N. J. L. 328, has no bearing upon the case under discussion and merely holds that "a corporation is not bound by an unauthorized agreement made by its President *outside the scope of his express or implied authority and not in the course of its ordinary business,* which it, through its directors, has neither ratified, acquiesced in, or knowingly profited by."

In the case of *Beach* v. *Palisades Realty & Amusement Co.,* 86 N. J. L. 238-241, the Court states "Of course, if a corporation holds an officer out, or allows him to appear as having authority not usual to such an office, it will be bound by the act done by him within the scope of his apparent authority." The question here raised, is not applicable to the case under consideration, the facts in the case cited being that the Vice-President of the company attempted to purchase its corporate stock without any authority of any kind or character having been vested in the officer by any act of the company.

Interstate Chemical Co. v. *James Leo Co.,* 94 N. J. L. 513. This case has no application to the situation here under discussion for in that case, according to the syllabus, "there was no attempt to prove that the agent had authority to change the terms of the original contract or that the agent had been held out by his principal as hav-

ing authority to do so, or that the principal had any knowledge of an alteration in the original contract until an attempt was made to deliver the goods made in accordance with such alleged change." Of course in such a situation there was no basis that a ratification had been made, but in the case under discussion, the contention is that the agent had authority and also that the agent had been held out as having authority to do the acts which he did and that his acts were ratified with full knowledge of the facts and thus raised question of fact which is entirely absent in the case hereinabove cited.

Hall v. *Passaic Water Co.*, 83 N. J. L. 771. In this case the Court held that a corporation is not bound by the unauthorized agreement of a superintendent where it is not shown that the agreement made by him was within the scope of his express or implied authority, and which is not in the course of the ordinary business of the company and which the corporation has not ratified, acquiesced in or knowingly profited by. This case has no application to the situation presented under the facts in the case under discussion.

Fifth Ward Savings Bank v. *First National Bank,* 48 N. J. L. 513-525, holds that the duties of a Treasurer of a savings bank more nearly resembles those of paying and receiving tellers of banks. He cannot by virtue of his office borrow money and give the company's notes and make a pledge of its securities for payment thereof, nor is such power invested in him as Treasurer *virtute officii,* and has no application to the case at bar.

Aerial League of America v. *Aircraft Fire Proofing Corporation,* 97 N. J. L. 530-532, holds that a corporation is bound where the power—

"can be implied from the powers expressly conferred or which are incidental thereto, or where the act is within the apparent power which the corporation has caused those with whom its officers or agents have dealt to believe it has conferred upon them." This is a direct authority for the position here taken by the appellee.

The appellant complains in its brief because on page 63, line 17, on cross examination this question was asked "Did you ever draw any checks, in fact did you ever make any order?" This question was properly excluded, first, because it was not material to the issue, secondly, it was not proper cross examination, and even if it were material to the issue, the question had been answered by other witnesses who gave the information required (p. 63, l. 24 to p. 64, l. 10).

In ground of appeal No. 20, page 21, line 1, wherein the prior court would not permit the witness, Mr. Cohn, to be asked what was the established policy of the appellant, with reference to assignments and orders, this of course is immaterial. What the policy of the company was with reference to assignments and orders would not in anywise bind the plaintiff in this case and therefore was properly excluded.

POINT II.

The question of fact as to whether Mr. Perselay had authority to write the letter of acceptance (Exhibit P. 3) binding the Company to pay $12,612.50 to plaintiff-appellee, having been decided in the affirmative by the jury, the "White" Door Bed Company is clearly entitled to receive that amount from the United States Mortgage and Title Guaranty Company of New Jersey as it has fully performed its contract with the Acropolis Realty Company (Exhibit P. 1).

Exhibit P. 3 acknowledges receipt of the order issued by the Acropolis Realty Company for the sum of $12,612.50 and advises that payment will be made to The "White" Door Bed Company as requested by the order, but only when the money is forthcoming to the Acropolis Realty Company.

The Judge in his charge to the jury on page 120, lines 20 to 38, enunciated the proper construction of these words, ruling "that if, after the time this letter was written, funds from the mortgage loan became available because of the progress of the building, to be applied to that building, out of these funds this $12,612.50 should be paid, after and when the contract of the plaintiff had been fully or substantially performed, etc.—."

In support of the legality of this charge we quote the decision of the Court in *Kempler* v. *Reeve*, 79 N. J. Equity, pages 484 and 485.

> "Complainants also deduct from the amount of the last contract installment $53.00, which was paid by complainants, December 23, 1910, to the Raney-White Company by virtue of a guarantee made by complainants to that company May 21, 1910, wherein complainants guaranteed the pay-

ment of an order issued to that company by the contractor on that date against complainants for money due that company under that contract. With such an accepted or guaranteed order outstanding at the time the last installment fell due, the order clearly at this time became fully operative in favor of the person holding the order as an equitable assignment of the fund to the amount of the order, as against all persons who at that time had no prior rights. It therefore becomes immaterial as to such subsequent claims whether that order was paid by complainant on the day the installment fell due or at a subsequent day, for the holder of the order was entitled to the money on that day."

The Judge went on to say that if a different construction had been given these words by the parties, that construction would be binding on the Court and jury and left that question of fact for the jury to decide, and the jury in finding for the plaintiff-appellee found as a matter of fact from the evidence that no other construction had been given these words by the parties hereto.

The order (Exhibit P. 2) assigns the sum of $12,612.50 out of the mortgage loan granted by the United States Mortgage and Title Guaranty Company of New Jersey upon delivery of cabinets and ranges to the premises and upon installation of beds and doors in accordance with the contract between The "White" Door Bed Company and Acropolis Realty Company.

The plaintiff-appellee had fully performed its contract, except for the installation of the beds on the doors, as appears from the testimony of Mr. Bancroft.

State of Case, page 33, line 10, etc.

Q Can you say, of your own knowledge, whether the equipment was installed in ac-

cordance with the terms of the contract? A Yes, sir.

Q You say the equipment was installed according to the terms of the contract? A Yes, sir.

Q The specifications provided, according to this contract, that you were to furnish seventy-two white china closets. Did you furnish them? A Delivered them on the sidewalk, as per contract.

Q It also provided that you were to put in twenty-seven white dressing cabinets? A Those were delivered, according to the contract.

Q And it provided that you were to put in seventy-two buffet cabinets? A Yes, sir.

Q And further provided that you were to deliver seventy-two white door beds? A Yes, sir.

Q Did that include installation? A No, sir; everything was done with the exception of the installation of the beds.

Q Why were the beds not installed? A The doors were completely ready.

Q Did the contract provide the doors should be completely ready? A The contract provided that the doors should be erected.

Q Will you point out in the contract where it so provides? A It says, "Upon delivery of cabinets and ranges to the building and the installation of beds and doors provided by the buyer."

Q And those doors were not provided by the buyer, is that it?

and this is admitted by defendant-appellant's witness, Mr. Blanchard.

State of Case, p. 67, l. 7, etc.

Q Can you say what other materials you did see in October? A I saw the ranges, the beds, cabinets, had to direct men to move them several times so we could complete the building in portions where they were located, where they were stored.

As for the installation of the beds, Mr. Bancroft says that this could not be done because the doors, which were to be furnished by the buyer (p. 134, ll. 27-28) were not ready, so that The "White" Door Bed Company is excused from the performance of this provision. *Byrne* v. *Sisters of Charity,* 45 N. J. L. 213. In any event, the contract was substantially performed as it would cost only 50-75 cents to install each bed, there being 72 in all, making an expenditure of from $36.00 to $54.00 necessary to complete the contract, which certainly is a minor item in a $22,-612.50 contract. *Feeney* v. *Bardsley,* 68 N. J. L. 239.

Answer to Appellant's Brief.

The appellant contends that because the mortgage contains a clause that the mortgagor covenanted to comply with the regulations of all state and municipal bodies, that it was an error on the part of the court to exclude testimony dealing with the question of whether the materials supplied by The "White" Door Bed Company under its contract conformed to such regulations.

It is admitted that the court received the mortgage in evidence, the stenographer's notes notwithstanding, this being one of the many inaccuracies in the transcribed testimony. But the court rightfully refused to charge the fifth request of the appellant to the effect that the terms of the mortgage was binding on The "White" Door Bed Company, a matter in which The "White" Door Bed Company was in no way concerned, plaintiff-appellee contracted in writing to do certain things which it did, and the defendant-appellant agreed to pay when the contract was performed in accordance with the terms of said

contract. The said mortgage was in nowise referred to, nor did form part of the contract.

The appellant on page 11 of its brief cites the case of *Bernz* v. *Marcus Sayre Co.* to support its contention but a perusal of this case will show that is not applicable to the case at bar. The acceptance of the owner in the cited case was to pay the assignee only if the work was *approved by himself and the architect;* such approval was not obtained and the condition not performed. In the case at bar, the conditions were that the contract be performed, which was admittedly done, and that money was to be paid to the plaintiff when it was forthcoming to the Acropolis Realty Company. The charge of the court, and the finding of the jury, supports the contention that subsequent to the writing of Exhibit P. 3 money was forthcoming to the Acropolis Realty Company in excess of one hundred thousand ($100,000.00) dollars. If the mortgage was considered a part of the contract (which it is strenuously asserted is not the fact) providing that Acropolis Realty Company must conform to municipal regulations, the defendant-appellant waived any breach of this by actually paying out the major part of the mortgage after the writing of Exhibit P. 3 until every cent of the mortgage money was expended.

The court admitted the mortgage between Acropolis Realty Company and United States Mortgage and Title Guaranty Company of New Jersey in evidence because it was a recorded instrument, but ruled that its terms were not binding on plaintiff-appellee; but the building contract to which plaintiff-appellee was no part and which was not recorded was rightfully rejected by the court.

Defendant-appellant contends on page 13 of its brief that the question of whether plaintiff held a chattel mortgage (p. 55, l. 25) on the material supplied or had filed a mechanics' lien (p. 55, l 32) were improperly excluded because the bond and mortgage provided that all fixtures were to be free from encumbrance, and no further advancements need be made upon filing a mechanics' lien. When these questions were asked, the bond and mortgage had not yet been offered in evidence, and therefore the exclusion was proper. Moreover, even if the defendant-appellant had the option to discontinue payments, it waived that provision by making advances, and also waived the provision covering chattel mortgage by accepting the order with full knowledge of the contents of the contract (Exhibit P. 1). However, the fact concerning an alleged chattel mortgage or liens, it is contended was in nowise material to the issue.

Appellant's ground of appeal No. 10 gives no cause for reversal as the appellant's witness, Mr. Blanchard, himself gave testimony on this point on p. 67, l. 12.

Ground of appeal No. 11, likewise, is covered by the testimony on p. 67, ll. 20-26. The question which is the subject of ground of appeal No. 13 is entirely immaterial to the issue as it is of no consequence whether the building was finished on March 1, 1927, or not. Ground of appeal No. 14 is also immaterial for even if there were liens on the building, the appellant waived this provision of the contract by continuing payments thereafter. Ground of appeal No. 15 raises a question immaterial to the issue as does ground of appeal No. 16. In respect to ground of appeal No. 17, it is admitted that the court did admit the mortgage in evidence, and that anything to the contrary

is a stenographic error. Ground of appeal No. 19 directed to the refusal of the court to permit Mr. William Kessler to answer certain questions and grounds of appeal No. 21 and No. 22 directed to the question of lien claims cannot be sustained as they are immaterial to the issue. Plaintiff-appellee agreed to deliver materials in accordance with its specifications approved by the architect of the Acropolis Realty Company and defendant-appellant agreed to pay $12,612.50 when The "White" Door Bed Company performed its contract, with full knowledge of the contents of said contract. The subject of grounds of appeal Nos. 24, 25, 28, 29 and 30 which are specifically referred to in appellant's brief have been covered in other parts of this brief.

Ground of appeal No. 2 should be denied as no reason is given in the state of the case (p. 34, l. 25) to support its objection, and furthermore, because Mr. Bancroft by his previous testimony has shown himself as fully qualified to answer.

Ground of appeal No. 26 should be denied as the court's charge on the question of substantial performance is the accepted law in the case of such contracts.

Ground of appeal No. 31 should be denied as the testimony therein contained is immaterial under the court's charge. The amount of money on hand on December 2, 1926, when Mr. Saul Cohn wrote that there was none on hand made no difference except to deny that statement of Mr. Saul Cohn.

Grounds of appeal No. 9 and No. 23 concerning denial of motions for non-suit and direction of a verdict should be denied as the record contains sufficient evidence not only to submit the case to the jury but to support the jury's finding.

CONCLUSION.

It is therefore respectfully submitted that the verdict is incomplete in accordance with clear and convincing evidence and the judgment in favor of the plaintiff-appellee should be sustained.

(1) There was plenary and complete evidence of the authority of Mr. Perselay to execute the alleged acceptance, both direct and positive evidence and also evidence which indicated his apparent authority, as well as evidence of ratification.

(2) Both the conditions contained in the letter of acceptance (Exhibit P. 3) namely (a) the performance of the contract between The "White" Door Bed Company and Acropolis Realty Company, and (b) the fact that money was thereafter forthcoming to the Acropolis Realty Company, had occurred, and the sum of $12,612.50 was therefore rightfully due The "White" Door Bed Company.

These were, chiefly if not solely, questions of fact which were fully sustained by the evidence and so found by the jury in favor of the plaintiff, and therefore, the judgment of the court below should be affirmed and the appeal dismissed.

Respectfully submitted,

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