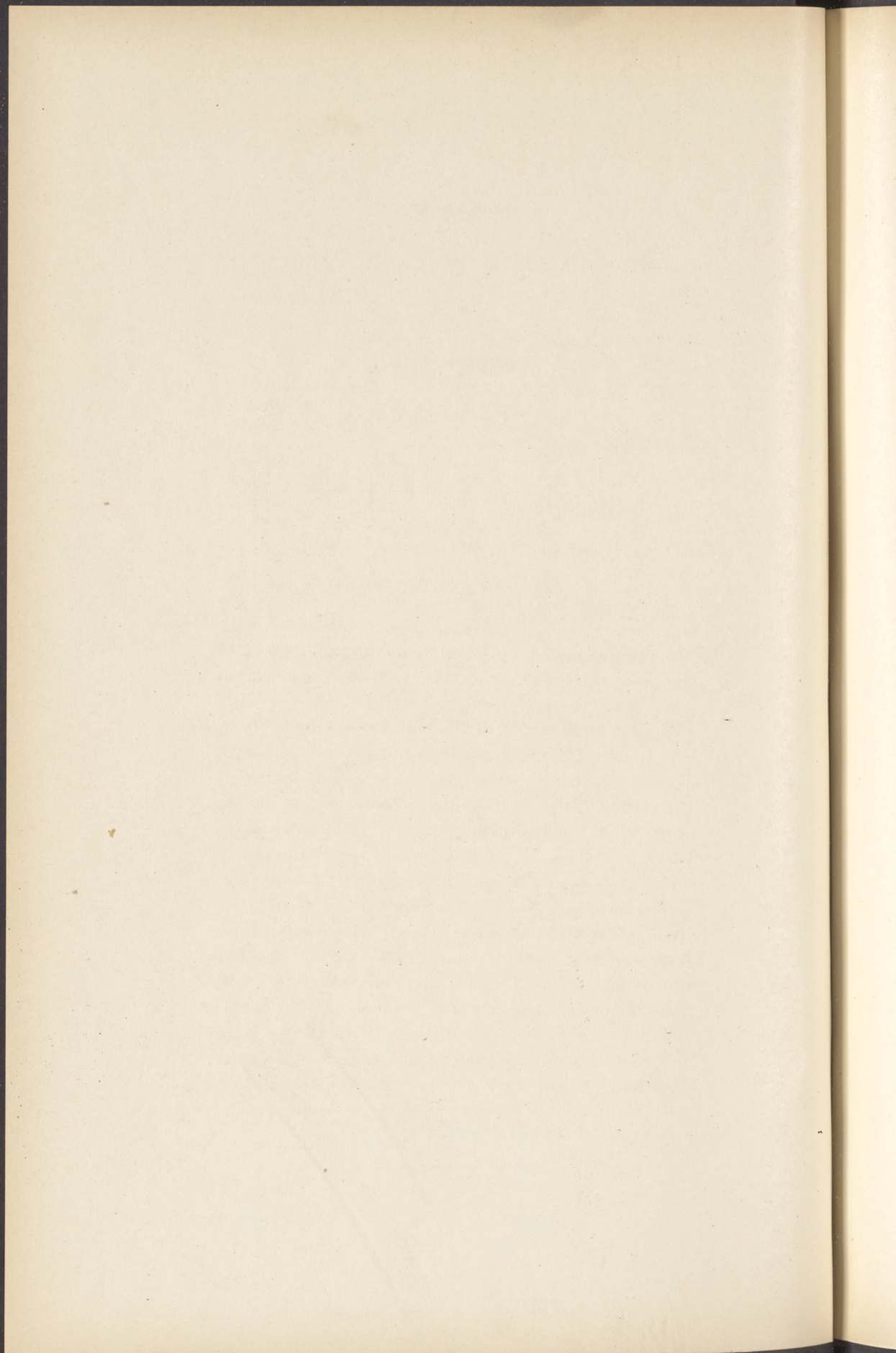


INDEX

| | Page |
|---|------|
| Final Decree | 1 |
| Notice of Motion | 10 |
| Petition of Complainants | 11 |
| Affidavit of Gaetano M. Belfatto | 14 |
| Costs of Cook & Genung Co. and Morreale-Man- tione Const. Co. | 16 |
| Order | 17 |
| Notice of Appeal | 19 |
| Petition of Defendants-Appellants | 20 |



Final Decree.

In Chancery of New Jersey.

| | | | |
|---|---|-------------------------------|----|
| Between | } | On Bill, &c. Final Decree. | 10 |
| JULIUS SHARFF and LOUIS KOP- LOWITZ, | | | |
| Complainants, | | | |
| and | | | |
| ROBERT TOSTI, <i>et als.</i> , | | | |
| Defendants. | | | |

This cause being opened to the Court by Benjamin Newman, Solicitor for and of Counsel with the complainants, and the complainants' bill having been heretofore taken as confessed against the defendants Robert Tosti and Jennie Tosti, his wife, Kernerator Incinerator Co., a corporation, Thien Equipment Co., a corporation, and Morreale-Mantione Construction Co. Inc., a corporation, and it appearing that the defendants New Jersey Terra Cotta Co., a corporation, and Federal Seaboard Terra Cotta Co., a corporation filed an answer in which they do not dispute the priority of complainants' mortgages over their judgment, and filed an answer disputing the amounts due to the complainants on their several mortgages; and it further appearing to the Court that the defendant Morreale-Mantione Construction Co. Inc., filed a notice to report its claim in accordance with the rules of this Court; and it further appearing to the Court that Harry Minowitz trading as Builders Hardware Supply Co., filed an answer in which he dis-

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Final Decree.

puted the priority of complainants' mortgages and alleged that his interest in certain chattels, referred to in the bill of complaint and in his answer, on which said defendant held a conditional bill of sale, was superior to the mortgages of the complainant; and it further appearing to the Court
10 that Cook & Genung Co., a corporation filed an answer and counterclaim to the Bill of Complaint in which it alleged priority of its right of mechanics lien to the lien of complainants' mortgages, and that a certain postponement or postponements of lien executed by it to and on behalf of the complainants, whereby said defendant postponed its right of mechanics lien to the lien of complainants' mortgages, was obtained under an agreement whereby complainants' agreed to pay said defendant the amount due it under its lien claim; and
20 it further appearing to the Court that this matter was referred for a final hearing to the Honorable Alonzo Church, Vice Chancellor of said Court; and it further appearing that the said Honorable Alonzo Church, Vice Chancellor of said Court set the matters in dispute herein down for trial on final hearing on January 29th, 1930; and it further appearing to the Court that the said Court was
30 attended by Benjamin Newman, the Solicitor for and of Counsel with complainants, Messrs. Gabrielson, Conover & Stasse, Solicitors for the defendants, Federal Seaboard Terra Cotto Co., a corporation and New Jersey Terra Cotta Co., a corporation, Messrs. Solomon & Miller, Solicitors for the defendant, Morreale-Mantione Construction Co. Inc., a corporation, Joseph Susskind, Esq., Solicitor for the defendant, Harry Minowitz, trading as Builders Hardware Supply Co., and G. M. Bel-
40 fatto, Esq., Solicitor for the defendant Cook &

Final Decree.

Genung Co., a corporation, and the Court having heard the testimony on behalf of all of said complainants and defendants, and the Court being satisfied that there is due to the complainants the sum of \$29,055.00 and interest from August 15th, 1928, on a certain mortgage held by complainants, dated August 15th, 1928, covering the first tract described in the Bill of Complaint, and that said mortgage is first in point of priority of payment, and that there is due to the complainants the sum of \$29,055.00 and interest from August 15th, 1928, on another certain mortgage held by complainants, dated August 15th, 1928 covering the second tract described in the Bill of Complaint, and that last mentioned mortgage is first in point of priority of payment; that said complainants also hold two advance money mortgages each in the principal sum of \$96,000.00 both dated August 15th, 1928, covering respectively the first and second tracts described in the Bill of Complaint; that said complainants have advanced on said advance money mortgages a total sum of \$192,000.00 and that there is due on said mortgages said amount of \$192,000.00, besides interest from August 15th, 1928, and that said mortgages are second in point of priority of payment to the first mortgages of \$29,055.00 each held by complainants; that all of said mortgages are liens on said lands and premises prior to the claims of all of the defendants in this cause, except Harry Minowitz, trading as Builders Hardware Supply Co.; and it further appearing to the Court that the defendant, Harry Minowitz, trading as Builders Hardware Supply Co. has a conditional bill of sale on certain chattels or fixtures referred to in said defendant's answer, and that the right to said fixtures on the part

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Final Decree.

of said defendant is paramount and superior to the lien of complainants' mortgages; and it further appearing to the Court that there is due to the defendants, Federal Seaboard Terra Cotta Co., a corporation, and New Jersey Terra Cotta Co., a corporation, the sum of \$2626.87 on their judgment, and
10 interest from May 15, 1929, to be made specially of the lands and premises referred to in the Bill of Complaint, and that there is due to the defendants Cook & Genung Co., a corporation, the sum of \$9314.28 and interest from June 25, 1929 on its mechanics lien to be made specially of the said lands and premises, and that there is due to the defendant, Morreale-Mantione Construction Co. Inc., on a mechanics lien the sum of \$9688.81 and interest from October 10, 1929 to be made specially
20 of the said lands and premises; and it further appearing to the Court that the premises comprised and described in the complainants mortgages are the same premises comprised and described in the lien claims of the defendants, Federal Seaboard Terra Cotta Co., a corporation, and New Jersey Terra Cotta Co., a corporation, Cook & Genung Co., a corporation, and Morreale-Mantione Construction Co. Inc., a corporation, and that the complainants' mortgages are entitled to priority of payment
30 prior to the claims and liens of all other defendants in this cause, except Harry Minowitz, trading as Builders Hardware Supply Co., and that the premises described in the Bill of Complaint should be sold separately, and that the order of payment out of the sale of each of said tracts of land and premises should be as follows:

*Final Decree.**First Tract:*

First: The principal and interest due complainants on their mortgages in the sum of \$29,055.00 with interest from August 15, 1928.

Second: The principal and interest and insurance due on advance money mortgage of that date to complainants in the sum of \$96,000.00 with interest from August 15, 1928. 10

Third: One-half of the judgments of the defendants, Federal Seaboard Terra Cotta Co., a corporation, and New Jersey Terra Cotta Co., a corporation, or the sum of \$1313.43, and interest from May 15, 1929, one-half of the claim of Cook & Genung Co., a corporation, amounting to \$4657.14, with interest from June 25, 1929, and one-half of the judgment of Morreale-Mantione Construction Co. Inc., a corporation, amounting to the sum of \$4844.40 and interest from October 10, 1929, and if there should not be a sufficient surplus above the amounts due the complainants to pay said judgments in full, then they should share pro rata in said surplus. 20

Second Tract:

First: The principal and interest due complainants on their mortgage in the sum of \$29,055.00 with interest from August 15, 1928. 30

Second: The principal and interest and insurance due on advance money mortgage of that date to complainants in the sum of \$96,000.00 with interest from August 15, 1928.

Third: One-half of the judgments of the defendants, Federal Seaboard Terra Cotta Co., a corporation, and New Jersey Terra Cotta Co., a corporation, or the sum of \$1313.43, and interest from May 15, 1929, one-half of the claim of Cook & 40

Final Decree.

Genung Co., a corporation, amounting to \$4657.14, with interest from June 25, 1929, and one-half of the judgment of Morreale-Mantione Construction Co. Inc., a corporation, amounting to the sum of \$4844.40 and interest from October 10, 1929, and if there should not be a sufficient surplus about the amounts due the complainants to pay said judgments in full, then they should share pro rata in said surplus.

That the said lands and premises be sold separately to raise and pay the complainants and defendants their several claims, and that for that purpose sale should be made of all those tracts or parcels 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.

First Tract:

Beginning on the westerly side of South Arlington Avenue one hundred feet and fifteen hundredths feet northerly from the northerly line of Elmwood Avenue; thence north sixty degrees west one hundred thirty-six feet and twenty hundredths feet to the rear line of land conveyed by Harry Adams to William Langley; thence northerly parallel with Oak Street one hundred feet to the northerly line of land of Harry Adams; thence south sixty degrees east one hundred thirty feet and seventy-one hundredths feet to the westerly line of South Arlington Avenue; thence running southerly along said line of South Arlington Avenue one hundred feet and more to the point and place of Beginning.

*Final Decree.**Second Tract:*

Beginning at a point in the easterly line of Oak Street therein distant two hundred fifty-six and twenty-two one-hundredths of a foot northerly from the northerly line of Elmwood Avenue; thence running along said line of Oak Street north thirty degrees east eight feet; thence south sixty degrees east one hundred feet; thence north thirty degrees east thirty-five feet and seventy-eight one-hundredths feet; thence south sixty degrees east one hundred twenty-five feet and twenty-two one-hundredths of a foot to the westerly line of South Arlington Avenue; thence running southerly along said westerly line of South Arlington Avenue one hundred feet and fifteen one-hundredths of a foot; thence north sixty degrees west one hundred thirty feet and seventy-one one-hundredths feet; thence north thirty degrees east fifty-six and twenty-two one-hundredths feet; thence north sixty degrees west one hundred feet to said easterly line of Oak Street and the said point of Beginning; reserving, however, a right of way over that part of said lands that may be described as follows: Beginning at a point in the easterly line of Oak Street therein distant two hundred fifty-six feet and twenty-two hundredth feet northerly from the northerly line of Elmwood Avenue; thence running along said line of Oak Street north thirty degrees east eight feet; thence south sixty degrees east one hundred feet; thence south thirty degrees west eight feet; thence north sixty degrees west one hundred feet to said easterly line of Oak Street and the place and point of Beginning.

And no cause appearing or being shown to the contrary; and it appearing to the Court that due notice of the entry of this Final Decree has been

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Final Decree.

given and application having been made to this Court for Counsel Fees and taxed costs on behalf of the complainants and the several defendants appearing in this cause;

10 It is on this 7th day of July, 1930, Ordered, Ad-
judged and Decreed that the said Bill of Complaint
be dismissed as against the defendant Harry Mino-
witz, trading as Builders Hardware Supply Co.
with their taxed costs, that a counsel fee of \$100.00
be and hereby is allowed to the solicitor of Harry
Minowitz, trading as Builders Hardware Supply
Co. defendant; that the mortgaged premises here-
inabove described be sold as aforesaid to raise
and satisfy the moneys due the complainants and
the said defendants, Federal Seaboard Terra Cotta
Co., a corporation and New Jersey Terra Cotta Co.,
20 a corporation, Cook & Genung Co., a corporation,
and Morreale-Mantione Construction Co. Inc., a
corporation, in the manner and time of priority as
aforesaid, with the complainants' costs to be taxed,
together with a Counsel fee of \$2000 to the com-
plainants, together with a Counsel fee of \$300 to
the defendants, Federal Seaboard Terra Cotta Co.,
a corporation, and New Jersey Terra Cotta Co., a
corporation, together with a Counsel fee of \$750 to
30 the defendant, Cook & Genung Co., a corporation,
and together with a Counsel fee of \$250 to the de-
fendant, Morreale-Mantione Construction Co. Inc.,
a corporation, together with the respective taxed
costs of said defendants, and that a Writ of Fiera
Facias in the form herein decreed issue for that
purpose out of this Court, directed to the Sheriff
of the County of Essex to make sale according to
law of the said mortgaged premises hereinabove
described, and that out of the money arising from
40 said sale he pay first to the complainants or their

Final Decree.

solicitor their debts, interest and costs, secondly to pay to the defendants, Federal Seaboard Terra Cotta Co., a corporation, and New Jersey Terra Cotta Co., a corporation, Cook & Genung Co., a corporation, and Morreale-Mantione Construction Co. Inc., a corporation, or their respective solicitors, their respective debts, interest and costs.

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And it is further Ordered, Adjudged and Decreed, if there be not a sufficient amount realized to pay the defendant, Federal Seaboard Terra Cotta Co., a corporation, and New Jersey Terra Cotta Co., a corporation, Cook & Genung Co., a corporation, and Morreale-Mantione Construction Co. Inc., a corporation in full, the same should be divided between said several defendants on a pro rata basis, and that in case more money shall be realized by said sale then shall be sufficient to answer such several payments, that such surplus be brought into this Court, to abide the further order of this Court, unless otherwise previously disposed of by this Court, and that the Sheriff make return, without delay, of his proceedings by virtue of said writ.

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And it is further Ordered, Adjudged and Decreed that the defendants stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises, when sold as aforesaid by virtue of this decree.

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Respectfully advised,

ALONZO CHURCH,

V. C.

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Petition.

IN CHANCERY OF NEW JERSEY.

Between

JULIUS SHARFF and LOUIS KOP-
LOWITZ,

Complainants,

and

ROBERT TOSTI and JENNIE TOSTI,
his wife, COOK & GENUNG Co.
and MORREALE-MANTIONE CON-
STRUCTION Co., *et als.*,

Defendants.

On Bill, &c.

Petition.

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

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The petition of Julius Sharff and Louis Koplo-
witz, of the City of Newark, County of Essex and
State of New Jersey, respectfully shows that:

1. Your petitioners are the complainants in the
above entitled cause, wherein a bill was filed to
foreclose four mortgages, totaling \$308,220.00.

2. On July 7, 1930 a decree was entered and
filed in the above cause, ordering, adjudging and
decreeing that the lien of the complainants' mort-
gages was superior and paramount to the lien
claims of the defendants, Cook & Genung Co. and
Morreale-Mantione Construction Co.

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3. On July 12, 1930 the defendants, Cook &
Genung Co. and Morreale-Mantione Construction
Co., filed a notice and petition of appeal from said
decree.

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Petition.

4. The petitioners subsequently were served with copies of the State of Case for the appeal.

5. Because of omissions of seven exhibits in said State of Case the petitioners served on the appellants a notice of objection to State of Case, a petition to correct the State of Case and a notice of motion to change the State of Case.

6. On October 11, 1930 the petitioners were served with a notice of objection to petitioner's use of certain postponements.

7. Petitioners filed a brief in the above appeal at which their counsel spent fifteen hours in preparation.

8. Petitioner's counsel spent four days at Trenton in awaiting the argument in the appeal and argued the appeal and the motions in the appeal.

9. The Court of Errors and Appeals granted the motion of the petitioners for amending the State of Case and in pursuance thereof petitioner's counsel prepared a supplemental State of Case.

10. On May 18, 1931 the Court of Errors and Appeals affirmed the decree of the Court of Chancery and petitioners have filed a remittitur, remanding this cause to this Court.

Petitioners therefore pray that this Court may by its order direct said defendants, Cook & Genung Co. and Morreale-Mantione Construction Co., to pay to petitioners a reasonable counsel fee for the services rendered by their counsel on the appeal, as well as their taxed costs.

BENJAMIN NEWMAN,
Counsel for Complainants.

Petition.

State of New York, }
 County of Essex, } ss.:

Benjamin Newman, being duly sworn according to law upon his oath deposes and says that:

1. I am the Solicitor for and of Counsel with Complainants in the above entitled cause. 10
2. I have read the said petition and the matters and things therein contained are true.
3. I have performed all the services set forth in the petition necessary on the appeal.

BENJAMIN NEWMAN.

Subscribed and Sworn to before me
 this 5th day of June, 1931.

LEO L. BERMAN,
 An Attorney at Law 20
 of New Jersey.

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Affidavit of Gaetano M. Belfatto.

tor the day before the argument of said appeal to the affect that said argument would take place on the following day. Deponent therefor denies that complainants' solicitor spent four days in Trenton in awaiting for said argument.

Deponent further says that it took 15 minutes for each solicitor to argue the appeal and that complainants' solicitor did not apply to the Court of Errors for a counsel fee. And that about two weeks ago, the bill of costs amounting to about \$84.00 was paid to complainants by the Clerk of said Court of Errors and Appeals. 10

Deponent further says that the complainants have not paid to deponent the sum of \$750.00 as a counsel fee allowed by the Hon. Alonzo Church Vice Chancellor before whom the hearing of said suit took place, and also the sum of \$250.00 as a counsel fee allowed by said Vice Chancellor to the solicitors for the defendants Morreale-Mantione Construction Co. for whom this deponent has been substituted as solicitor. 20

Deponent denies every other allegation in the complainants' petition inconsistent with the facts herein stated.

GAETANO M. BELFATTO.

Sworn to and subscribed before me
this 16th day of June, 1931. 30

FRANCIS F. WEBB,
An Attorney at Law
of New Jersey.

Costs of Cook & Genung Co. and Morreale-Man-
tione Const. Co.

Between
 JULIUS SHARFF and LOUIS KOP-
 LOWITZ,
 Complainants,
 10 and
 ROBERT TOSTI, *et als.*,
 Defendants.

In Chancery
 of N. J.

Costs taxed at One thousand twenty- two dollars
and fifty-two cents (\$1022.52).
June 26, 1931.

20 FERD GARRETSON,
Clerk.

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Order.

IN CHANCERY OF NEW JERSEY.

| | | | |
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| Between JULIUS SHARFF and LOUIS KOP- LOWITZ, Complainants, and ROBERT TOSTI and JENNIE TOSTI, his wife, <i>et als.</i> , Defendants. | } | On Bill, &c. Order. | 10 |
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This matter coming on to be heard in the pres-
 ence of Benjamin Newman, Solicitor for the com- 20
 plainants, and it appearing to the Court that the
 defendants, Cook & Genung Co., a corporation, and
 Morreale-Mantione Construction Co., a corpora-
 tion, took an appeal to the Court of Errors and
 Appeals from the Decree of this Court dated July
 7, 1930, and that said Appeal was duly argued be-
 fore said Court of Errors and Appeals, and that a
 Decree was entered in said cause on May 18, 1931
 by the said Court of Errors and Appeals affirming
 the Decree of this Court, and it further appearing 30
 that a Remittitur has been entered and filed in the
 Court of Chancery remanding this case back to
 this Court, and counsel for the complainants hav-
 ing given notice of the application for counsel fee
 and costs for his work, costs and services on be-
 half of said complainants in the said Court of Er-
 rors and Appeals, and the Court having heard
 argument thereon, it is on this 16th day of June,
 1931

ORDERED that there be allowed to the complain- 40

Order.

ants the sum of \$500—, as a counsel fee for services rendered in such appeal, the same to be paid by the defendants, Cook & Genung Co., a corporation, and Morreale-Mantione Construction Co., a corporation, besides their taxed costs in both courts, to be made of the lands and premises being foreclosed hereinafter the claim of the complainants have been paid and satisfied in accordance with the Decree affirmed by the said Court of Errors and Appeals and out of the monies, if any, realized on the sale of said premises being foreclosed, in the first place, for the defendants, Cook & Genung Co. and Morreale-Mantione Construction Co., and if on the sale of said foreclosed premises there is not enough left to pay the complainants their said counsel fee and costs, or any part thereof, that an execution do issue out of this Court for the payment thereof, or any balance, in accordance with the rules of this Court in such case made and provided.

E. R. WALKER,
C.

Respectfully advised.

ALONZO CHURCH,
V. C.

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Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

| | | | |
|---|---|---|----|
| Between JULIUS SHARFF and LOUIS KOP- LOWITZ, Complainants, and ROBERT TOSTI and JENNIE TOSTI, his wife, <i>et als.</i> , Defendants. | } | On order allowing costs and counsel fee. | 10 |
| | } | Notice of Appeal. | |

The defendants Cook & Genung Co. and Mor-
 reale-Mantione Construction Co., hereby appeal
 from the order made in the above cause on the
 16th day of June, 1931, by the Chancellor upon
 the advise of the Hon. Alonzo Church Vice Chanc-
 cellor allowing the sum of \$500. as a counsel fee
 for services rendered by complainant's solicitors
 in the Court of Errors and Appeals besides com-
 plainants' taxed costs in the Court of Chancery
 and Court of Errors and Appeals to be made of
 the lands and premises being foreclosed and that
 if the sale should not bring money enough to pay
 the same, that said counsel fee and costs be paid
 by the appellants, in accordance with the rules of
 the Court of Chancery, to the Court of Errors and
 Appeals in the last resort in all causes.

Dated, July 1, 1931.

G. M. BELFATTO,
 Solicitor for Defendants-Appellants.

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

G. M. BELFATTO,
 Of Counsel. 40

Petition of Cook & Genung Co. and Morreale-Mantione Construction Co., defendants-appellants.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10 On Appeal from the Order by the Court of Chancery allowing counsel fee of \$500. to complainants-respondents.

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|----|--|
| 20 | <p>Between JULIUS SHARFF and LOUIS KOP- LOWITZ, Complainants-Respondents, and ROBERT TOSTI and JENNIE TOSTI, his wife, <i>et als.</i>, Defendants-Appellants.</p> |
|----|--|

To the Honorable Court of Errors and Appeals in the last resort in all causes.

30 The petition of the defendants Cook & Genung Co. and Morreale-Mantione Construction Co. appellants in the above stated cause respectfully show that the petitioners find themselves aggrieved by an order made in the Court of Chancery of New Jersey by his Honor Edwin R. Walker Chancellor bearing dates June 16th, 1931, wherein said Julius Sharff and Louis Koplowitz are complainants and Robert Tosti and the petitioners are defendants in this respect to wit:

40 "Ordered that there be allowed to the complainants the sum of \$500. as a counsel fee for services rendered in the appeal, to the Court of Errors and Appeals the same to be paid by the defendants

Petition.

Cook & Genung Co. a corporation, and Morreale-Mantione Construction Co. a corporation, besides their taxed costs in both courts, to be made of the lands and premises being foreclosed herein after the claim of the complainants have been paid and satisfied in accordance with the decree affirmed by said Court of Errors and Appeals and out of the monies, if any, realized on the sale of said premises being foreclosed, in the first place, for the defendants, Cook & Genung Co. and Morreale-Mantione Construction Co. and if on the sale of said foreclosed premises there is not enough left to pay the complainants their said counsel fee and costs or any part thereof, that an execution do issue out of this Court for the payment thereof, or any balance in accordance with the rules of this Court in such case made and provided." 10 20

And your petitioners humbly appeal from said order of the Court of Chancery upon the ground that the same is erroneous for the said order should not have been made for the following reasons:

1. No application for counsel fee was made to the Court of Errors and Appeals and no reason shown why it was not made. 30

2. There was no proof before the Court of Chancery of the services rendered by the plaintiff before the Court of Errors and Appeals.

3. There was no proof before the Court of Chancery that the Court of Errors and Appeals ordered an amendment of the State of the case.

4. The complainants amended their brief by annexing thereto a postponement of lien which was not introduced in evidence at the hearing of said cause. 40

Petition.

5. There was no proof before the Court of Chancery that four days were spent by complainant's solicitor at Trenton, awaiting the argument of said appeal.

10 6. Said order is contrary to the final decree made in said cause wherein and whereby it was adjudged that the costs of said foreclosure suit shall be paid out of the money realized from the sale of said premises and not by the petitioners.

7. Complainants have failed and refused to pay to the petitioners a counsel fee of \$750 and \$250 respectively and their taxed costs aggregating \$1022.52 allowed to petitioners by said final decree.

20 8. On May 18th, 1931 the remittitur was signed and returned to the Court of Chancery on May 29th, of said year and the costs of appeal paid long before the application for counsel fee was made to the Court of Chancery.

30 Your petitioners therefore pray that said order of the Chancellor may be reversed set aside, and for nothing holden and that your petitioners may have such relief in the premises as this Honorable Court shall seem meet.

G. M. BELFATTO,
Solicitor for Appellants.

New Jersey Court of Errors and Appeals

Between

JULIUS SHARFF and LOUIS KOP-
LOWITZ,

Complainants-Respondents,

and

ROBERT TOSTI and JENNIE TOSTI,
his wife, *et als.*,
Defendants-Appellants.

On Bill, &c.

On Appeal
from Court
of Chancery.

APPELLANTS' BRIEF.

This is an appeal from an order of the Court of Chancery dated ~~January~~ 16, 1931 allowing a counsel fee of \$500 to the complainants for services rendered in the appeal to this Court of the above entitled suit.

Said appeal was argued at the May Term 1931 and the decree of the Court of Chancery was affirmed.

No application for counsel fee was made to this court by complainants.

On September 25, 1931, the complainants' solicitor applied to Vice Chancellor Church for a counsel fee for services rendered in this Court in said appeal. An allowance of \$500 was made. (State of the Case, page 11).

There was no proof before the Vice Chancellor of the services rendered by complainants in said

appeal, nor that the state of the case was amended nor the time spent by them therein.

Complainants have refused to pay these appellants \$750 and \$250 respectively allowed by the Court of Chancery for services rendered by them in said suit as per final decree (State of the Case, page 8, line 20-30) and costs taxed therein (page 16).

Law.

It is respectfully submitted that the failure by the complainants to first apply to this Honorable Court for the allowance of counsel fee precludes them from afterwards applying to the Court of Chancery for the same. In the case of Williams vs. Lister, 59 Eq. 813, and Sobel vs. Sobel, 100 Eq. 532, this Court held:

“The application for counsel fees should first be made in this court. If the court then passes on it, the decision is final, but, if the court does not pass on it, or if through inadvertence the application for counsel fees is not made while the case is before this court, then after the remittitur, the Court of Chancery has jurisdiction to grant counsel fees and printing in the Court of Errors and Appeals upon a proper case being presented in these respects.”

These appellants contend that the Court of Chancery was without jurisdiction to make said order and that the same should be reversed and set aside and also pray that the complainants be decreed to pay to these defendants the counsel fees allowed by the Court of Chancery besides costs as aforesaid.

Respectfully submitted,

G. M. BELFATTO,
Solicitor for and Counsel
with Appellants.

New Jersey Court of Errors and Appeals

Between

JULIUS SHARFF and LOUIS
KOPLOWITZ,
Complainants-Respondents,

and

ROBERT TOSTI and JENNIE
TOSTI, his wife, *et als.*,
Defendants-Appellants.

BRIEF OF JULIUS SHARFF AND LOUIS KOPLOWITZ, COMPLAINANTS-APPELLEES.

Facts.

This cause has been before this Court and its opinion is reported in 108 Equity, page 270. This Appeal arises therefrom. The above opinion is dated May 18, 1931. After the Remittitur from this Court had been filed in the Court of Chancery, counsel for complainants-respondents filed a Petition in the Court of Chancery asking for an allowance of a counsel fee for the services rendered by complainants-respondents' counsel in the Appeal before this Court decided in the above-reported case. The Notice of this Motion and Petition for allowances are printed on pages 10 and 11 of the State of the Case. The motion was returnable on June 16, 1931. The matter was argued on that date before Vice-Chancellor Church, who signed the Order from which this Appeal is taken and which Order allows to the complainants-respondents herein the sum of \$500.00, as a counsel fee for the services rendered

by counsel on behalf of the two complainants in this Court of Errors and Appeals.

GROUND OF APPEAL.

1. No application for counsel fee was made to the Court of Errors and Appeals and no reason shown why it was not made.

It is admitted by counsel herein that no application was made to this Court and that the same was done inadvertently. After the Remittitur was filed, the application was made to the Court of Chancery. The law on the subject of allowance of counsel fees for services rendered in the Court of Errors and Appeals is set forth in opinions of this Court in the following cases:

Weeks v. Lister, 62 Equity, page 813.

“The application for counsel fees should first be made in this court. If the court then passes on it, the decision is final, but if the court does not pass on it, or if through mere inadvertence the application for counsel fees is not made while the case is before this court, then after the remittitur, the court of chancery has jurisdiction to grant counsel fees and printing in the courts of errors and appeals upon a proper case being presented in these respects.”

And in the case of *Sobel v. Sobel*, 100 Equity, page 532, this Court states:

“The contention that the court of chancery was without jurisdiction to make the order appealed from is directly in the face of our decision in the case of *Weeks v. Lister*, 62 N. J. Eq. 813. In that case, after the remittitur went down from this court, an application was made to us by counsel for the respondent, who had succeeded in this court, to direct an amendment by inserting therein an allowance for counsel fees. We

declined to recall the remittitur from the court of chancery for the purpose indicated, and in doing so we stated that the application for counsel fees for service rendered in this court should first be made in this court; that if the court passes upon it, our decision is final, but if the court does not pass upon it, then, after the remittitur has gone down, the court of chancery has jurisdiction to grant counsel fees for services rendered in this court, and also costs of printing the case for use in this court, when proper grounds are shown for the making of such an order."

See also *Simpson v. Klipstein*, 90 N. J. Equity 197; *Hart v. Central Railroad of N. J.*, 9 Misc. 125.

It is respectfully submitted that the law established by the first above two cases is a complete answer for this ground of appeal.

2. There was no proof before the Court of Chancery of the services rendered by the plaintiff before the Court of Errors and Appeals.

This ground of appeal is answered by the Petition for counsel fee printed on page 11 of the State of the Case, which itemizes in detail counsel's labor, and services before this Court.

3. There was no proof before the Court of Chancery that the Court of Errors and Appeals ordered an amendment of the State of the Case.

This ground for appeal is covered by ground 2, and in addition to the above answer to ground 2, an examination of the files of this Court will show that a Supplemental State of the Case was filed by counsel herein, on the cover of which are printed the following words:

"The within additions to appellants' State of the Case are furnished by complainants-

appellees on objections to the printed State of the Case and by the direction of this Court.”

In addition thereto I hold counsel's acknowledgment of service of three copies of the Supplemental State of the Case under date of October 31, 1930.

4. The complainants amended their brief by annexing thereto a postponement of lien which was not introduced in evidence at the hearing of said cause.

This ground of appeal is not argued in appellants' brief and therefore is regarded as abandoned.

5. There was no proof before the Court of Chancery that four days were spent by complainant's solicitor at Trenton, awaiting the argument of said appeal.

This ground is answered by referring to the Petition on page 11 of the State of the Case.

6. Said order is contrary to the final decree made in said cause wherein and whereby it was adjudged that the costs of said foreclosure suit shall be paid out of the money realized from the sale of said premises and not by the petitioners.

This ground of appeal is not argued in appellants' brief and therefore is regarded as abandoned.

7. Complainants have failed and refused to pay to the petitioners a counsel fee of \$750 and \$250 respectively and their taxed costs aggregating \$1,022.52 allowed to petitioners by said final decree.

It is difficult to understand counsel for appellants as to just how this is a ground for appeal,

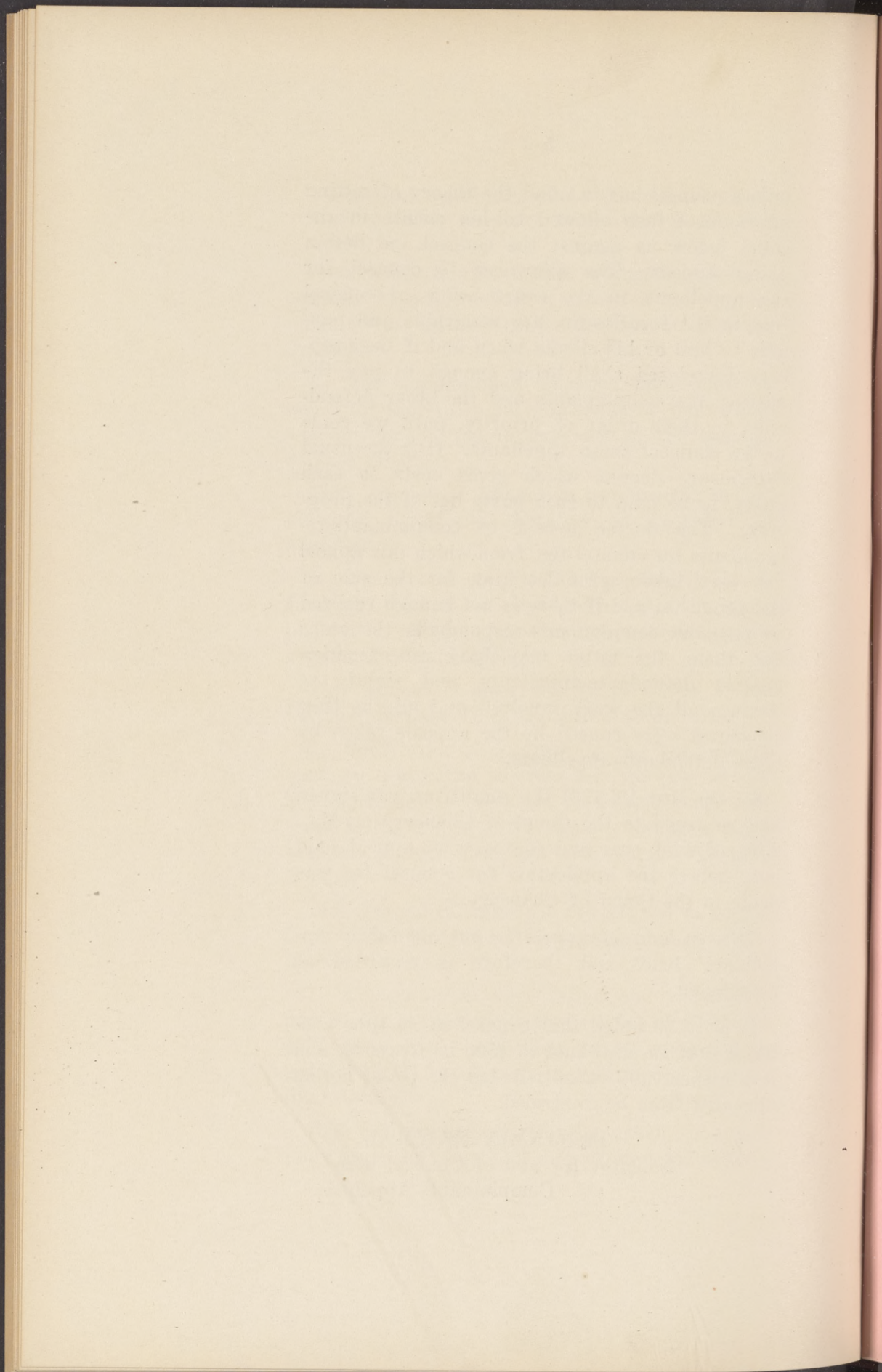
unless counsel has in mind the theory of setting off counsel fees allowed to his clients in the court below as against the counsel fee herein under appeal. The allowance to counsel for the appellants in the court below of counsel fees in the foreclosure, are receivable and payable to him or his clients when and if the property foreclosed shall bring enough to pay the monies due complainants and the other defendants, in their order of priority, until we come to the claim of these appellants. It is the usual foreclosure decree, which gives costs to each party, to be paid to such party out of the property. The decree herein to complainants-respondents for counsel fee, from which this appeal has been taken, provides first, for the sale of the premises, and if there is not enough realized to pay the complainants-respondents the sums due them, the latter may have an execution against defendants-appellants, and rightly so because all the work involved and all the time consumed were caused by the appeals taken by these defendants-appellants.

8. On May 18, 1931 the remittitur was signed and returned to the Court of Chancery on May 29th, of said year and the costs of appeal paid long before the application for counsel fee was made to the Court of Chancery.

This ground of appeal is not argued in appellants' brief and therefore is regarded as abandoned.

It is to be noted that counsel at no time contends that an allowance of \$500 is excessive, and it is respectfully submitted that the Order herein appealed from be confirmed.

BENJAMIN NEWMAN,
Solicitor for and of Counsel with
Complainants-Appellees.



I N D E X

| | PAGE |
|---|--------|
| Bill of Complaint | 1 |
| Summons | 20 |
| Complaint | 30 |
| Order to Show Cause | 43 |
| Notice of Motion to Strike Out Bill | 49 |
| Confessions | 61, 62 |
| Decree | 57 |
| Writ of Appeal | 13 |
| Petition of Appeal | 63 |

