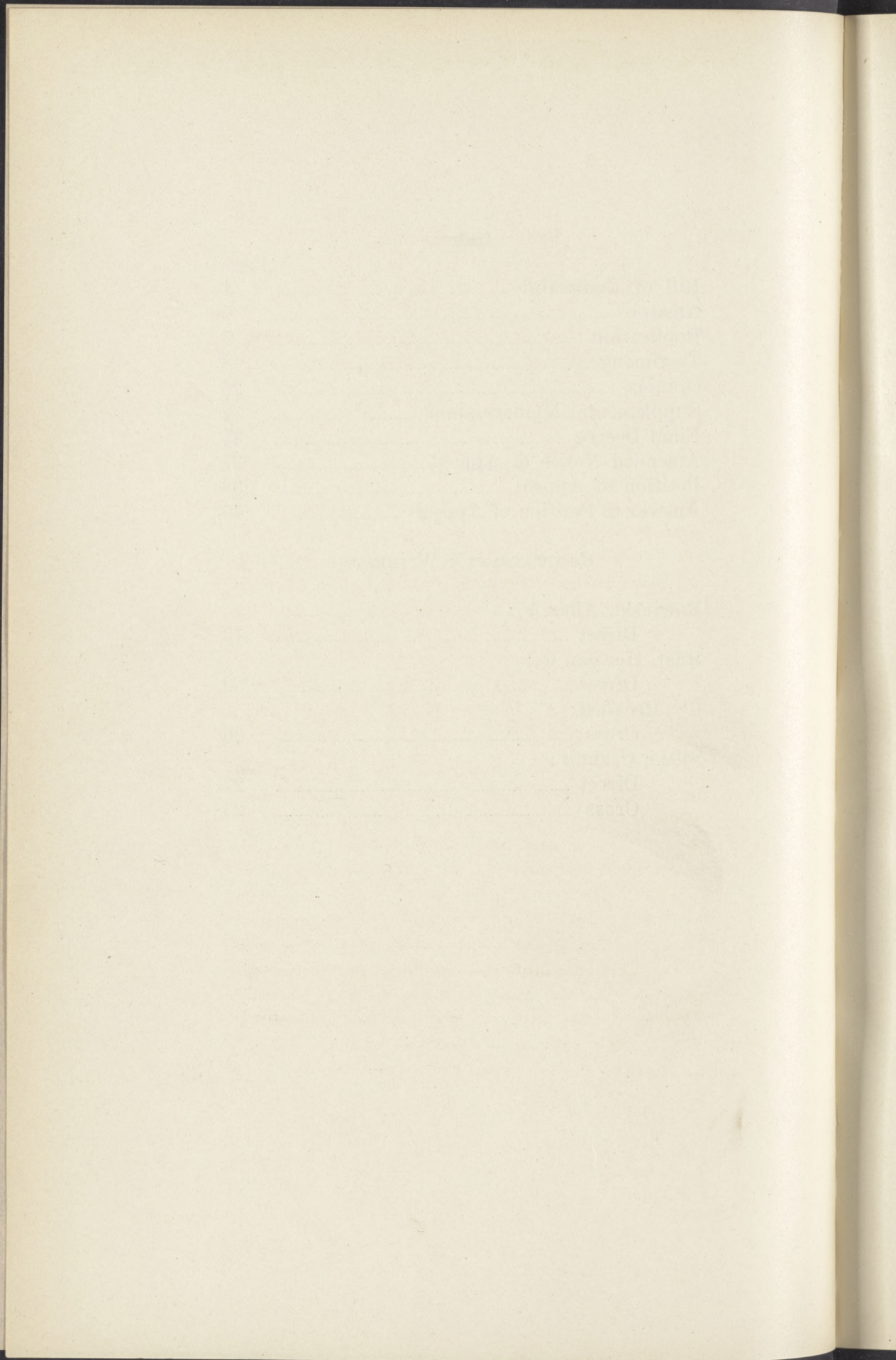


Index.

	Page
Bill of Complaint	1
Answer	5
Replication	7
Testimony	8
Opinion	28
Supplemental Memorandum	32
Final Decree	35
Amended Notice of Appeal	37
Petition of Appeal	38
Answer to Petition of Appeal	40

COMPLAINANT'S WITNESSES:

Rowinski, Albin F.:	
Direct	13
Rust, Herman C.:	
Direct	9
Recalled:	
Cross	26
Silski, Casimir:	
Direct	22
Cross	25



Bill of Complaint.

IN CHANCERY OF NEW JERSEY

TO HIS HONOR EDWIN ROBERT WALKER, CHANCELLOR OF THE STATE OF NEW JERSEY :

The complainant, Joseph Ziembinski of the City of New York, in the County of New York and State of New York, respectfully shows that: 10

1. Stephen Adamski, on the 30th day of March, 1915, became indebted to Joseph Ziembinski in the sum of Six hundred Dollars and executed to him a mortgage of that date to secure that sum, and in accordance with the terms and conditions of said mortgage the aforesaid principal amount of said mortgage was to be paid and satisfied on the 30th day of March in the year 1916, together with interest thereon from the 30th day of March, 1915, at and after the rate of four per cent, payable semi-annually. 20

2. To secure said mortgage the said Stephen Adamski delivered to Joseph Ziembinski his bond of that date in the aforesaid sum, containing similar conditions and did thereby convey, together with said mortgage, in fee the land hereinafter described on the express condition that such conveyance should be void if the payment should be made according to the terms of the bond, which mortgage having been duly acknowledged and a certificate of acknowledgment duly endorsed thereon, was recorded in the Register's office of the County of Passaic in book Y-9 of mortgages for said County on page 489, &c. 30

Bill of Complaint

3. The mortgaged premises are described as follows:

10 ALL that certain lot, tract and parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Acquackanonk, in the County of Passaic and State of New Jersey.

20 BEGINNING at a point in the southerly line of Christie Avenue, distant one hundred feet westerly from the corner formed by the intersection of said southerly line of Christie Avenue with the westerly line of Vernon Avenue and running thence (1) southerly, parallel with Vernon Avenue, one hundred feet; thence (2) westerly, parallel with Christie Avenue, fifty feet; thence (3) northerly parallel with the first course, one hundred feet to said southerly line of Christie Avenue, and thence (4) easterly, along said southerly line of Christie Avenue, fifty feet to the place of beginning. Being known and designated as lots Nos. 12 and 13, Block 4, on Map B of the Hamilton Heights Land Company.

30 Also all that tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the Township of Acquackanonk, in the County of Passaic and State of New Jersey.

40 BEGINNING at a point in the northerly line of Bergen Avenue distant one hundred feet westerly from the corner formed by the intersection of the westerly line of Vernon Avenue with the said northerly line of Bergen Avenue, and running thence (1) Northerly, parallel with Vernon Avenue, one hundred feet; thence (2) westerly

Bill of Complaint

parallel with Bergen Avenue, fifty feet; thence (3) southerly, parallel with the first course, one hundred feet to said northerly line of Bergen Avenue and thence (4) easterly, along said northerly line of Bergen Avenue, fifty feet to the place of beginning. Being known and designated as lots 22 and 23, Block 4 on Map B of the Hamilton Heights Land Company. 10

4. Both bond and mortgage became due and payable on the 30th day of March, 1916, no part thereof having been paid to the complainant herein.

5. On May 1st, 1915, Stephen Adamski, unmarried, conveyed said premises to Albin F. Rowinski and Cora Rowinski, his wife, by deed bearing date May 1st, 1915, and recorded in book A-25, page 179 in the office of the Register of deeds and mortgages of the County of Passaic. 20

6. On May 1st, 1915, the said Albin F. Rowinski and Cora Rowinski, his wife, conveyed the said premises to Kazimiera Adamski by deed bearing date May 1st, 1915 and recorded in book B-25, page 333 in the office of the Register of deeds and mortgages of the County of Passaic. 30

7. On October 27th, 1922, the said Kazimiera Adamski, widow, conveyed said premises to Joseph Wasniewski and Helen Wasniewski, his wife, by deed bearing date October 27th, 1922 and recorded in book E-30, page 32 in the office of the Register of Deeds and mortgages of the County of Passaic.

8. The whole amount of principal of six hun- 40

Bill of Complaint

dred Dollars (\$600.00) together with interest from the 30th day of March, 1915, is due upon complainant's bond and mortgage.

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

10 1. That Stephen Adamski, Albin F. Rowinski, Cora Rowinski, Kazimiera Adamski and Joseph Wasniewski and Helen Wasniewski, his wife, who are the defendants to this suit, may answer this bill of complaint without oath, and each statement made therein.

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

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

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

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

And your complainant will ever pray, &c.

WEINBERGER & WEINBERGER,

Solicitors of Complainant.

40 Weinberger & Weinberger,
Of Counsel.

Answer.

IN CHANCERY OF NEW JERSEY.

 Between:

JOSEPH ZIEMBINSKI,
Complainant,
and

JOSEPH WASNIEWSKI and HELEN
WASNIEWSKI, his wife,
Defendants.

}

On Bill to
Foreclose. 10
Answer.

The defendants Joseph Wasniewski and Helen Wasniewski, his wife, of the City of Clifton, County of Passaic and State of New Jersey, answering complainant's complaint, respectfully shows: 20

1. They neither admit or deny paragraphs 1, 2, 3 & 4 of complainant's Bill but leave complainant to make such proof thereof as they may deem proper. Defendants admit that a mortgage as set forth in paragraph 1, 2, 3, & 4 of Complainant's Bill is recorded in the Register's Office of the County of Passaic. 30

2. Defendants admit paragraph (5) Five.

3. Defendants admit paragraph (6) Six.

4. Defendants admit paragraph (7) Seven.

5. Defendants neither admit or deny paragraph (8) Eight but leave complainant to make such proof as they deem necessary and proper.

6. Further answering complainant's Bill of 40

Answer

complaint, defendants say that at the time they purchased said property from Kazimiera Adamski, widow, they understood that the said property was free and clear of all encumbrances and that they caused a search to be made by their attorney for uncanceled mortgages, judgments, conveyances etc., and that said search did not disclose said mortgage and they had no knowledge of the execution or existence of said mortgage and allege the truth and fact to be that said mortgage was recorded on May 5th, 1915, whereas the deed from Stephen Adamski, unmarried to Albin F. Rowinski, and Cora Rowinski, under whose deed defendants' title is derived was recorded on May 4, 1915 and as defendants' title was derived thru the said deed to Albin F. Rowinski which was prior in recording to the said mortgage of complainant, defendants had no notice of said mortgage.

And these defendants pray to be hence dismissed with their reasonable costs and charges.

HERMAN C. RUST,
Solicitor for Defendants.

Filed,

30 Mar. 27, 1923.

A true copy.

JESSE R. SALMON.

Replication.

IN CHANCERY OF NEW JERSEY.

Between:

JOSEPH ZIEMBINSKI,
Complainant,
and

JOSEPH WASNIEWSKI and HELEN
WASNIEWSKI, his wife,
Defendants.

} On Bill, &c.
} Replication. 10

Complainant, replying to the answer filed in the above entitled cause, says:

AS TO PARAGRAPH SIX. 20

Complainant denies the allegations in said paragraph concerning the fact of knowledge and further alleges that the said defendants acquired title to the said property with express knowledge of the fact that there was such a mortgage lien on said property and in fact agreed to pay the same.

WEINBERGER & WEINBERGER, 30
Solicitors of Complainant.

40

Testimony.

IN CHANCERY OF NEW JERSEY.

Between:

10	JOSEPH ZIEMBINSKI, Complainant, and	}	On Bill, &c. Testimony.
	JOSEPH WASNIEWSKI and HELEN WASNIEWSKI, his wife, Defendants.	}	

20 Transcript of additional testimony taken in accordance with the memorandum filed October third, nineteen hundred and twenty-three, at the Chancery Chambers, Paterson, New Jersey, on the nineteenth day of January, nineteen hundred and twenty-five, before Hon. Vivian M. Lewis, Vice Chancellor.

Appearances:

Weinberger & Weinberger, Esqs., for the complainant.

30 Herman C. Rust, Esq., solicitor, and Andrew Foulds, Jr., counsel for defendants.

MR. HERMAN C. RUST, being duly sworn, testified as follows:

Direct-examination by Mr. Weinberger:

Q. You are a member of the Bar of the State of New Jersey? A. Yes, sir.

40 Q. And licensed to practice as such? A. Yes, sir.

Complainant's Witness, Herman C. Rust, Direct

Q. You filed an answer in behalf of Joseph Wasniewski and Helen Wasniewski in the suit of Joseph Ziembinski, which is the foreclosure of a mortgage? A. I think an answer was filed.

Q. You represented, didn't you, in the capacity of a lawyer, the Rowinski who purchased this property of Adamski? A. No, sir. 10

Q. Sure about that? A. Pretty sure.

Q. Did you represent the Wasniewskis? A. Yes, sir.

Q. Did you make a search? A. Yes, sir.

Q. And your search disclosed a mortgage?

Mr. Foulds: I object to that on the ground that this is not the issue here at all. Your Honor has said very clearly the only matter before the Court is the knowledge of Rowinski on May 1, 1915. Now, what took place subsequently to that can have no bearing here. This is apparently an effort to retry the case. 20

Mr. Weinberger: We will produce here new evidence to show this is not a bona fide transaction, and that they did have knowledge that this mortgage was in existence. 30

Q. (Question read.)

Mr. Foulds: I am willing to concede that at this time Mr. Rust learned of this mortgage, and that Mr. Rust arranged to deduct from the amount that was paid as security. That is not material here. I am willing to put that on the record.

Mr. Weinberger: Mr. Rust took out that 40

Complainant's Witness, Herman C. Rust, Direct

money at the time the deal was closed, and filed an answer in this court.

The Court: Stipulate that.

Mr. Weinberger: I desire to prove that Mr. Rust, when he closed this title—

10 Mr. Foulds: That was when—are you talking about this last title?

Mr. Weinberger: The title of Wasniewski.

Mr. Foulds: That was October 27, 1922, I stipulate that.

Q. Will you admit you have got this money?

A. Yes, sir.

Q. And did you deduct this money at the time the sale took place, and there was a mortgage?

20 A. Yes, sir.

Q. And that Rowinski knew about it? A. Yes, sir.

Q. And that you have the \$600.00 in your possession now? A. I have a thousand dollars.

Q. And that was taken off by you to pay off this mortgage? A. No, sir, you are wrong.

30 Mr. Weinberger: Mr. Foulds and I stipulate that Mr. Rust represented the Wasniewskis, and that at the time of closing the title, whichever date that was—

Mr. Foulds: Title of Adamski to Wasniewski, October 27, 1922.

Mr. Weinberger: And that he made a search on the property, and that the search disclosed the mortgage, and that he advised his clients, Mr. Wasniewski and Mrs. Wasniewski—

40

Complainant's Witness, Herman C. Rust, Direct

Mr. Foulds: I will not stipulate what he advised his clients.

Mr. Weinberger: And he called the attention of the purchasers that there was a mortgage on the premises from Adamski to Ziembinski, which was then in force and effect.

10

Mr. Foulds: We stipulate that there was a mortgage open of record from Ziembinski to Adamski.

Mr. Weinberger: And that the mortgage was made from Stephen Adamski to Joseph Ziembinski, dated March 30, 1915, and recorded on the 5th of May, 1915. And it is further stipulated, that Mr. Rust held these moneys as security, amounting to \$1,000.

20

Q. You say \$1,000? A. I don't know whether it is \$600 or \$1,000 but I always thought it was a thousand dollars.

Mr. Foulds: My objection still holds, that this is incompetent, irrelevant and immaterial on this hearing.

Q. Haven't you the checks, Mr. Rust? A. Not checks.

30

Q. You have not your books? A. I have books that will show whether it is \$600 or \$1,000.

Q. You were subpoenaed to bring your books? A. I have no books referring to that.

Q. Did you file an answer to this cause in behalf of Mr. and Mrs. Wasniewski, in which you alleged, in Paragraph 6, "Further answering complainant's bill of complaint" (reading Paragraph 6 down to "defendants had no notice of said mortgage"). Was that true or false?

40

Complainant's Witness, Herman C. Rust, Direct

Mr. Foulds: Objected to as entirely improper, and it calls for a confidential communication.

Q. Was that true or false? A. I don't know what to say about it—who filed that answer?

10 Q. Herman C. Rust. A. Then I filed it.

Q. Was that true or false? A. No, sir, that is true.

Q. I thought you just said a moment ago, when counsel for the defendants in this suit stipulated on the record that you knew at the time, and that you kept as security moneys which you claimed you thought to be one thousand dollars, and which we claim to be \$600; which is true? That you kept this money and knew there was a mortgage; or the contents of the answer?

20

Mr. Foulds: I submit that cannot be material.

The Court: I will take the testimony and note your objection, because I have to go over it again and look over my memorandum that I filed.

Q. (Question read.) A. Yes, sir; I held the money out because I was not going to decide who was to get this money; I wanted the Court to pass on it.

30

Q. You knew there was an unrecorded mortgage? A. A recorded mortgage.

Q. And at the time of the transaction, you kept out this money to protect yourself? A. Yes, sir.

Q. And you knew that all the time? A. What?

Q. You knew all the time you had this money in your possession? A. Yes, sir.

40

*Complainant's Witness, Albin F. Rowinski,
Direct*

Q. Why did you file this answer then, this untrue answer? A. Let me see the paper.

Q. Here it is. A. I represented this man Wasniewski.

Q. You knew as a member of the bar, didn't you, that this answer when you filed it, then was false? A. Where is it false? Let me explain to the Court the whole thing. It is not false; I kept the money and I want to pay it out if the Court tells me whom to pay it to. 10

Q. Didn't you file an answer denying Paragraphs 1, 2, 3, 4, 5, 6, 7, 8; didn't you deny this? A. I don't know what the paragraphs are.

Q. You still have this money in your possession for the payment of this mortgage, and you are willing to pay it into court? A. I am willing to pay it out on the direction of the Court. 20

Q. Did anybody else, except this mortgagee, Mr. Ziembinski, did anybody else, outside of him, ever claim this money from you? A. No, sir.

Q. So that you are ready, able and willing to pay over this money if the Court directs you to do so? A. Yes, sir.

No cross-examination. 30

ALBIN F. ROWINSKI, being duly sworn, testified as follows:

Direct-examination by Mr. Weinberger:

Q. Your wife's name is Cora? A. Yes, sir.

40

*Complainant's Witness, Albin F. Rowinski,
Direct*

Q. And you were one of the owners of this property? A. Yes, sir.

Q. From whom did you purchase it? A. From Stephen Adamski.

10 Q. For how much money? A. I think it was ten or eleven hundred dollars.

Q. Don't you want to remember? A. I say I don't remember.

Q. Did you pay cash or check? A. I don't remember whether I paid by check or cash.

Q. Don't you know you were just a dummy in this transaction? A. I was not.

Q. You paid for it? A. Yes, sir.

20 Q. You don't know how much? A. I know about how much.

Q. You don't know how much? A. About how much, I did.

Q. You don't know whether by check or cash? A. No, sir, it is ten years ago, and I don't remember.

Q. Did you have a bank account? A. I think I had.

30 Q. What bank? A. Either the Hobart or the National.

Q. What kind of a house was it? A. Some Rush lots.

Q. You answer the question. A. There was no house there.

Q. Well, now, did you buy it for speculation? A. I bought it because I thought it was nice property to keep; it was on the hill on Lakeview Heights on Bergen Avenue or Bergen Street.

40 Q. How many lots were there? A. Four.

*Complainant's Witness, Albin F. Rowinski,
Direct*

Q. Did you get a receipt when you paid your money? A. I got a deed.

Q. (Question read.) A. I received a deed.

Q. Answer my question? A. I did not; I received a deed.

Q. You never got a receipt for your money? 10
A. No, sir; I got a deed.

Q. Did you have a search made? A. Yes, sir.

Q. By whom? A. By a man who worked in the Register's office; I telephoned to him; I do not just recall his name; it is so long ago that I have really forgotten the transaction.

Q. Did you pay for the search? A. I think I gave him some money, I don't remember.

Q. Do you know how much money you gave 20
him? A. No, sir.

Q. Was there a contract made? A. No, sir.

Q. Who was the Adamskis' lawyer? A. McGuire was my lawyer, and I think it was he; it was a quick transaction.

Q. How long did you keep it? A. I bought it in the morning, I think, and in the afternoon I sold it.

Q. I thought you said it was nice property to 30
keep for building purposes? A. His mother wanted that property; his mother came to my mother, and I think his mother said, "I bought the property from Stephen," and that she wanted that for herself; I told her she could have it if she paid me for my expenditures.

Q. What expenditures did you have? A. The lawyer's fees.

Q. How much were they? A. I don't know. 40

*Complainant's Witness, Albin F. Rowinski,
Direct*

Q. You are sure Meyer McGuire was your lawyer? A. Yes, sir.

Q. And you paid him? A. Yes, sir.

10 Q. And you are sure a search was made? A. I paid him for his trouble for looking up the record; it was Dick Cogan; now I recall; he worked in the Register's office at the time; he was an old acquaintance; I knew he worked in the Register's office.

Q. Didn't you say you had Meyer McGuire as your lawyer? A. He made the deed for me.

Q. Did you get cash from Mrs. Adamski? A. Yes, sir; I did.

Q. How much? A. I don't remember.

20 Q. Did you put it in the bank? A. I don't remember.

Q. Don't you remember anything about this transaction? A. No, sir, it is ten years ago.

Q. How old are you now? A. 34.

Q. Had you ever bought a piece of property before you were 24 years of age? A. No, sir.

Q. Where did you get the money from to buy the property? A. My hard-earned money.

30 Q. Where did you keep your hard-earned money; you never bought any property before? A. No, sir.

Q. You never sold any property before? A. No, sir.

Q. You never got a receipt of any kind when you gave this hard-earned money? A. I did not, any receipt from him, no, sir.

40 Q. Did you ever have \$11,000 when you were 24 years old? A. No, sir.

*Complainant's Witness, Albin F. Rowinski,
Direct*

- Q. Did you have \$10,000? A. No, sir.
- Q. Did you have \$9,000? A. No, sir.
- Q. Did you have \$8,000? A. No, sir.
- Q. Did you have \$7,000? A. No, sir.
- Q. Did you have \$5,000? A. No, sir.
- Q. Did you have \$4,000? A. No, sir. 10
- Q. Did you have \$3,000? A. I think I had earned two or three thousand dollars.
- Q. Where did you get it? A. Earned it in business, in the undertaking business.
- Q. And you kept the money at home? A. Yes, sir, as well as in bank.
- Q. You don't remember what bank it was? A. It was two banks.
- Q. Are you related to any of these people in this transaction—to the Adamskis? A. No, sir. 20
- Q. Is your wife? A. No, sir.
- Q. Are you sure about that? A. Yes, sir.
- Q. By blood or any other relationship? A. No, sir.
- Q. Is your mother or father? A. No, sir.
- Q. Or anyone in your family? A. Not of my family.
- Q. Not of your wife's family? A. No, sir. 30
- Q. Who took the paper to be recorded, the deed that you got? A. That was done at the lawyer's office.
- Q. Who drew the deed for you when you sold the property? A. The stenographer at the lawyer's office.
- Q. In whose office? A. McGuire's office.
- Q. Both deeds were drawn there? A. Yes, sir.
- Q. You knew Mr. Adamski, the son of Mr. 40

*Complainant's Witness, Albin F. Rowinski,
Direct*

Adamski and the lady whom you sold the property to, were in business together? A. No, sir; they were not.

Q. Do you know how she knew where you lived?

A. Certainly, she knew where I lived.

10 Q. How did she know? A. I don't know.

Q. Do you want the Court to believe the mother could not have purchased this property from her own son without going to you and giving you a profit on the same day? A. I don't believe they were on very good terms.

Q. Did you ever speak to them? A. To the family?

Q. Yes. A. To the Adamski family?

20 Q. Yes. A. Yes, sir, I knew them well.

Q. Did you have a tax search made? A. No, sir.

Q. Nothing at all? A. No, sir.

Q. You came there in the morning and you gave them the money without having a search made? A. I had a telephone search.

Q. No Supreme Court search, and no tax search and no United States Court search? A. No, sir.

30 Q. You want the Court to believe that story? A. Yes, sir.

Q. And on the strength of that, you gave your hard-earned money? A. Yes, sir.

Q. And on the strength of that you took back in the afternoon, how much more for the money that you invested? A. I don't remember.

Q. Was it a nickel? A. No, sir; you would not work for a nickel, would you?

*Complainant's Witness, Albin F. Rowinski,
Direct*

Q. How much did you invest? A. I don't remember.

Q. Don't you know that you were nothing more than a dummy? A. Not to my knowledge.

Recess to 2 P. M.

10

After recess.

ALBIN F. ROWINSKI resumes the witness stand.

Direct-examination (continued) by Mr. Weinberger:

20

Q. Who was present when you closed that title in Meyer McGuire's office? A. I think it was Meyer McGuire.

Q. Who else? A. His stenographer.

Q. Is that all? A. Which title do you mean?

Q. The one you are talking about. A. If you are speaking of the title of the transfer of the property—

Q. Who was present when you purchased the property? A. I believe it was Meyer McGuire and his stenographer and Stephen Adamski.

30

Q. You knew Stephen Adamski very well? A. I knew him.

Q. Did you have any business relations with him? A. No, sir.

Q. You knew he was in business with Ziembinski? A. No, sir.

40

*Complainant's Witness, Albin F. Rowinski,
Direct*

- Q. You never told Mr. Silski, a lawyer in Passaic— A. No, sir.
- Q. He talked to you about this mortgage years ago? A. Yes, sir; but not when I bought the property.
- 10 Q. You took this deed and you went to record it? A. No, sir; the lawyer recorded it; I gave it to the lawyer.
- Q. Did you pay him any money? A. I suppose I had to pay him for drawing up the papers.
- Q. How much? A. I don't know.
- Q. Was it cash or check? A. I don't know.
- Q. Did you ask Meyer McGuire to represent you at the closing of title and guarantee it for you? A. No, sir.
- 20 Q. How about the taxes and interest; was that apportioned? A. What do you mean?
- Q. Back taxes and interest? A. There were no back taxes, because he had his tax receipt right there for 1914 or 1915, whichever year the taxes were due for that year.
- Q. How about the interest on the mortgage? A. I did not know anything about any mortgage.
- 30 Q. What day of the week was title closed on? A. I don't remember.
- Q. These four lots that you say you bought were on Bergen Street? A. They run from Bergen into the other street.
- Q. Were they corner lots? A. I don't believe they were.
- Q. Don't you know? A. I don't remember.
- 40 Q. You don't remember what you bought at that time? A. I don't remember today.

*Complainant's Witness, Albin F. Rowinski,
Direct*

Q. You did tell Lawyer Silski when he spoke to you, that Meyer McGuire had made the search for you? A. I did not.

Q. You never told him that? A. No, sir.

Q. Whom did Meyer McGuire represent? A. Me.

10

Q. You mean to say Meyer McGuire represented you, but that, nevertheless, you called up a man named Cogan, who worked in the Register's office, who you think worked in the Register's office, and you knew that, to make a search for you? A. Yes, sir.

Q. You know that Cogan never worked in the Register's office, don't you? A. He worked in the Register's office; I don't know who he worked for.

20

Q. Who was Adamski's lawyer? A. He did not have any lawyer.

Q. Did you ever hear from Adamski at any time after you sold that property? A. Yes, sir.

Q. When? A. I don't remember.

Q. Your memory is pretty bad? A. It was ten years ago; I have heard two or three times from him.

30

Q. What about? A. Personal letters.

Q. How did he come to write you personal letters; have you personal business with him? A. Yes, sir, family affairs.

Q. What family affairs? A. Our own family affairs, he, as a friend writes letters to me.

Q. He is a friend of yours? A. Yes, sir.

Q. He never wrote you anything about anything concerning the mortgage? A. No, sir.

40

Complainant's Witness, Casimir Silski, Direct

Q. He never asked you for any money? A. No, sir.

Q. Why do you say he was just a casual acquaintance? A. A man who is only a casual acquaintance, you see only once in a great while.

10 Q. I suppose if you saw your brother once in a great while only, you would call him a casual acquaintance. Did you ever get a search? A. No, sir.

Q. You knew that Ziembinski had borrowed money from Adamski because of their restaurant affiliations in New York? A. I never met Mr. Ziembinski and never saw him.

Q. You never told Mr. Silski, the lawyer, that you were a cousin of Adamski? A. No, sir.

20 Q. And the best you can tell the Court is, that you have no paper or writing to show what this deal was about? A. The deed only.

Q. No receipt, no bank book, nothing, and you don't even remember anything about it; is that right? A. Right—outside of the deed.

No cross-examination.

30

MR. CASIMIR SILSKI, being duly sworn, testified as follows:

Direct-examination by Mr. Weinberger:

Q. You are a member of the bar of this state? A. Yes, sir.

Q. Where do you practice? A. Passaic.

40 Q. You know Mr. Rowinski? A. Yes, sir.

Complainant's Witness, Casimir Silski, Direct

Q. Did you know a man named Wasniewski?

A. Yes, sir.

Q. Did you ever speak to Mr. Rowinski about this mortgage? A. I did in 1919; I had a number of interviews with him at his residence.

Q. Did he state whether he was a cousin of Adamski?

10

Mr. Foulds: Objected to as leading.

The Court: Objection sustained.

Q. State to the Court exactly what he said—have you had any conversations with this Mr. Rowinski? A. I did.

Q. Tell the Court what it was about. A. I went to see him about that mortgage that was on this property in question; I spoke to him about it, what he knew about it, and asked him where Adamski lived, and I asked him everything I could with relation to this mortgage, and as much as I remember after so many years, he told me he was a cousin of Adamski, I think; it seems that he had known at that time something about that mortgage.

20

By the Court:

Q. What did he say? A. I don't remember much more outside of that, your Honor; he told me he was a cousin of Adamski, and he told me he did not know anything about the mortgage; but he knew something about the existence of this mortgage when I went there; but he told me he did not know anything of the mortgage at the time he bought the property. He told me he had Meyer McGuire search the property for him and

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Complainant's Witness, Casimir Silski, Direct

that he had found it to be without any encumbrances.

Q. How did he come to you? A. I went to him, because, after making search I saw the title went through him; originally, the complainant came to see me about this, so I knew Rowinski, and I went to see him.

Further Direct:

Q. Whom did you make the search for? A. For your client.

Q. Did you ever represent the Wasniewskis? A. Yes, sir, Wasniewski came to me about this property, this was three or four years, after I had gotten through with Ziembinski; he asked me if I would make a search of this property for him, and I just happened to recall that was the very first case I had had in my life, and I took my file out, and I cautioned him not to buy it unless he would get the seller to deposit some money as security in the event that the present mortgagor would foreclose his lien. I told him, Wasniewski, that, before he purchased the property.

Q. Did you ever speak to Mr. Rust? A. Yes, sir.

Q. What did he say? A. He called me on the telephone once and asked me if I would consent to an acknowledgment, which he intended to cancel the mortgage; and I told him I did not represent Ziembinski, and I told him I was not authorized to accept any service or anything of the kind; that I would have to get specific authority from Mr. Ziembinski to do so. I wrote to Ziembinski, and he did not come to me.

Complainant's Witness, Casimir Silski, Cross

CROSS-EXAMINATION by Mr. Foulds:

Q. Your knowledge of this matter does not go back of 1919? A. No, sir.

Q. And you came into the title four years after the mortgage? A. Yes, sir.

The Court: Have the case written up and submit it to the Court. 10

Mr. Weinberger: I want the testimony written up, but I want to call your Honor's attention to one thing: In taking the case under advisement, I would like to say that now it appears in this case that this man, the defendant in this case, knew there was a mortgage, and that Mr. Rust has got the money, and nobody ever claimed the money except the mortgagee. 20

Mr. Foulds: This case was opened solely for the purpose—you permitted proof to be offered as to the knowledge of Rowinski in 1915 of this mortgage. That has not been shown here. That is all we are here for. There is no reason why we should go any further.

The Court: I will allow Mr. Weinberger to have the testimony written up and file an additional memorandum. 30

Mr. Weinberger: We are in a court of equity, and where counsel comes in and says, "We have the money in our hands," and no one else has claimed it, and there is a mortgage open of record, and an answer is filed by an attorney in this court stating he never had this money and never 40

Complainant's Witness, Herman C. Rust, Cross

saw it; and it now appears he has got this money, equity will certainly make him turn it over to the proper party.

10 The Court: If there is any doubt about what Mr. Rust's testimony is, you had better put him back on the witness stand. I think Mr. Rust should be told now, that he has already sworn that he never had any-one claim this money at any time or any place, with the exception of this suit.

HERMAN C. RUST recalled.

Examined by Mr. Foulds:

20 Q. You said this morning that you were holding this deposit as security on the title? A. Yes, sir.

Q. For whom are you holding that security, Mr. Rust? A. I am holding it for two persons, one for the man in California and one for the man in Clifton that is dead now.

30 Q. Both being claimants for this money? A. Yes, sir, fifty-fifty.

By Mr. Weinberger:

Q. You understood my questions this morning, didn't you? A. I think I did, yes.

40 Q. And you knew when you swore this morning that no one claimed this money with the exception of the party who was suing to foreclose this mortgage? A. What is the man's name who is foreclosing it?

Complainant's Witness, Herman C. Rust, Cross

Q. You know, don't you? A. No, sir.

Q. You remember the defendant in this suit?

A. I do not.

Q. Didn't you file an answer? A. I turned it over to Mr. Foulds.

Q. Did you ever get a letter from anyone in California, relative to this fund; did you ever get a letter from anyone claiming this money? A. Yes, sir, I think I did. 10

Q. Where is the letter? A. That was seven or eight years ago; I don't know where the letter is; the woman was writing for her money.

Q. Was it eight years ago? A. I don't remember when I got the letter; it might have been eight years ago.

Q. Don't you keep letters? A. No, sir. 20

Q. Did you answer the letter? A. Yes, sir.

Q. Where is the copy of the answer? A. I gave it to the girl to answer, and I don't know whether she has a copy of it or not.

Q. You knew you had in your possession certain money, and that two persons were claiming it? A. Yes, sir.

Q. Have you got the address of this supposed woman in California? A. Maybe she does not come from California, I don't know. 30

The Court: Have it written up, Mr. Weinberger.

Mr. Weinberger: I think the money should be deposited in the court.

The Court: It is perfectly safe.

Opinion.

IN CHANCERY OF NEW JERSEY.

 Between:

10	JOSEPH ZIEMBINSKI, Complainant, and JOSEPH WASNIEWSKI and HELEN WASNIEWSKI, his wife, Defendants.	}	Memorandum—Opinion. On Bill and Answer.
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Messrs. Weinberger and Weinberger, for the complainant.

20 Mr. Herman C. Rust, solicitor for defendants, and Mr. Andrew Foulds, Jr., of counsel with defendants.

LEWIS, V. C.:

30 The question involved in this case has been submitted for decision on the pleadings. The bill is to foreclose a mortgage given by Stephen Adamski to the complainant, Joseph Ziembinski, for \$600.00, dated March 30, 1915, recorded May 5, 1915. There is no question but that the consideration named passed between the parties. On May 1st, 1915, Stephen Adamski conveyed the mortgaged premises to Albin F. Rowinski and Cora Rowinski, his wife. That deed was recorded May 4, 1915. On the same date of this conveyance, viz: May 1st, 1915, Rowinski and wife conveyed the premises back to Kazimiera Adamski, the mother of Stephen Adamski, the original owner

40

Opinion

and mortgagor. The Rowinski deed was not recorded by Kazimiera Adamski until June 22, 1915. The mortgage in question, dated March 30, 1915, was not recorded by complainant until May 5, 1915, which is one day after the recording of the deed to Rowinski and wife, but seventeen days prior to the recording of the deed back to Kazimiera Adamski. On October 27, 1922, Kazimiera Adamski conveyed the mortgaged premises to the present defendants, Joseph Wasniewski and Helen Wasniewski. Their deed was recorded November 2, 1922. The present bill filed to foreclose this mortgage against the present owners of the property contains no allegation of fraud nor does it set up actual notice of the existence of the mortgage in Rowinski and wife or Kazimiera Adamski at the time of the conveyance to them, respectively, on May 1st, 1915; nor at the time of the recording of the Rowinski deed on May 4, 1915. The mortgage, which was recorded May 4, 1915, did not become constructive notice of the lien until the date when it was so recorded.

Upon these facts the solicitors for the complainant have submitted their right to foreclose, contending that the present defendants, who purchased the premises in question in 1922, were bound by constructive notice of the mortgage, which had been recorded more than seven years previous to their purchase; and that a proper title search would have disclosed the existence of the recorded mortgage; stating in their brief, however, that if it is deemed necessary to produce proof of actual notice of the existence of the mortgage by the purchasers of the property on May

Opinion

1st, 1915, such proof is available and can be readily submitted to the Court.

The defendants, in their answer, deny complainant's right to foreclose the mortgage as against them and their property, on the ground that Rowinski and wife, who recorded their deed
10 May 4, 1915, one day before the complainant recorded his mortgage, were bona fide purchasers of the mortgaged premises for value, without notice of the unrecorded mortgage; and that even though these defendants had constructive notice of the mortgage at the time they purchased the premises in 1922, they are not bound by it, nor is their property encumbered by it, because they succeeded to the title of the premises free from
20 the lien of the mortgage.

The decisions in this state are clear that one who takes title to real property, even with notice, actual or constructive, of an encumbrance, from one who had no notice thereof, and was a bona fide purchaser when his deed was placed on record, takes the title free and clear of the encumbrance.

30 Rutgers vs. Kingsland, 7 N. J. Eq. 178; affirmed *id.* 658.

Holmes vs. Stout, 10 N. J. Eq. 419.

Capital Circle, &c., vs. Schmidt, 84 N. J. Eq. 95.

40 Applying this rule to the present situation, Rowinski and wife took title to the premises free and clear of the Adamski mortgage, which was unrecorded at the time of the recording of their deed, and of the existence of which mortgage it is not alleged they had actual notice. By their

Opinion

deed they conveyed to their grantee a like unencumbered title, and that grantee in turn conveyed a like unencumbered title, free and clear of the mortgage in suit, to the present defendants.

If the case were to rest in its present posture, therefore, I would be obliged to dismiss the bill. The answer, in my opinion, setting up a complete defense to the complainant's alleged right to foreclose as set forth in his bill. 10

In view of the complainant's statement, however, of his ability and desire to submit proof of the knowledge of the original grantees of Stephen Adamski of the existence of the mortgage in question, which would destroy the bona fide position under which the present defendants claim immunity from foreclosure, I am constrained to re-open the case and afford the complainant the opportunity to present such proof in support of his right to foreclose. 20

Appropriate opportunity will also be afforded the defendant to meet complainant's proofs. A date for the hearing may be designated upon application for that purpose.

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Supplemental Memorandum.

IN CHANCERY OF NEW JERSEY.

Between :

10		JOSEPH ZIEMBINSKI, Complainant, and	}
		JOSEPH WASNIEWSKI and HELEN WASNIEWSKI, his wife, Defendants.	

On Rehearing—on pleadings and proofs.

Messrs. Weinberger and Weinberger, for the
20 complainant.

Mr. Andrew Foulds, Jr., for the defendant.

LEWIS, V. C.:

30 This was a bill to foreclose a mortgage given by Stephen Adamski to the complainant, dated March 30, 1915, recorded May 5, 1915. The foreclosure was resisted by defendants on the ground that the mortgage had not been recorded until after the conveyance of the mortgaged premises to the grantors of defendants, who took the conveyance without notice of the unrecorded mortgage, and that, therefore, defendants, even though they had notice of the unrecorded mortgage when they purchased, were entitled to claim the premises free from the lien of the unrecorded mortgage, as the grantees of those who had previously taken the conveyance without notice. Upon the

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Supplemental Memorandum

original hearing a decree was advised in favor of the position taken by the defendants (see 122 At. Rep. 304), but a further hearing was granted complainant in view of his statement that convincing proof was available to establish the fact that the defendants' grantors had actual notice of the unrecorded mortgage, when they took title from Stephen Adamski. The additional proofs submitted have failed to convince me that I should depart from my previous conclusion. 10

As stated in the former opinion, the rule is clear in this state that a purchaser from a grantor who took bona fide without notice of an unrecorded mortgage is himself protected from the lien of that mortgage, even though he knew of it when he took title from his grantor who had previously taken without notice of it. In other words, the last grantee having knowledge of the unrecorded mortgage is protected by the title of his grantor who took without notice. 20

The complainant, however, asserting that he had positive proof to show that the defendants' grantor had knowledge of the unrecorded mortgage, and was, therefore, not protected, led the Court to grant a further hearing for the purpose of having that proof put in. All that that additional proof shows is that Adamski conveyed to Rowinski, who, on the same day, conveyed to Adamski's mother. A few months later Adamski's mother conveyed to the defendants, who knew, at the time they took title, that the unrecorded mortgage existed. From this transaction the complainant draws the inference that it was simply the usual "man of straw" transaction for 30 40

Supplemental Memorandum

the purpose of avoiding a direct conveyance from Adamski to his mother; Rowinski being the "dummy" for that transaction; and that Rowinski never paid value, nor did the mother pay value for the property; and that, therefore, this transaction was a fraud, devised by those several parties for the purpose of cutting out the complainant's unrecorded mortgage.

The difficulty with these proofs is, that they don't convince me that the grantee of Adamski or Rowinski had the knowledge of the unrecorded mortgage which complainant claims they had; or that the two transactions were without consideration.

I am, therefore, unwilling to alter my former conclusions; and I think that the complainant has not shown a right to foreclose this unrecorded mortgage (now recorded) against the present owners of the property.

I shall, therefore, advise a decree accordingly.

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Final Decree.

IN CHANCERY OF NEW JERSEY.

 Between:

JOSEPH ZIEMBINSKI,
Complainant,
and

JOSEPH WASNIEWSKI, *et al.*,
Defendants.

On Bill to
Foreclose,
etc. Final
Decree. 10

This cause coming on to be heard in the presence of Joseph J. Weinberger, Esq., of counsel with complainant, and Andrew Foulds, Jr., of counsel with the defendants, and the pleadings, proofs, testimony and exhibits having been received and the arguments of the respective counsel having been duly heard and considered, and it appearing that the complainant is not entitled to the relief sought and prayed for by him in his bill of complaint; 20

It is on this 18th day of October, 1926, by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey,

Ordered, Adjudged and Decreed that the complainant's bill be and the same is hereby dismissed with costs, and it is further 30

Ordered, Adjudged and Decreed that the sum of \$19.50 paid by defendants for typewriting the transcript of the testimony be and hereby is allowed to the defendants and included in the taxed costs, and it is further

Ordered, Adjudged and Decreed that the sum 40

Final Decree

of one hundred and fifty Dollars be allowed and paid to the solicitor and counsel of defendants and collected with the other items of said bill and that an execution issue therefor.

Respectfully advised,

E. R. WALKER,

C.

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Vivian M. Lewis,
V. C.

A true copy.

THOMAS BARBER,
Clerk.

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Amended Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

Between:

JOSEPH ZIEMBINSKI,
Complainant,
and
JOSEPH WASNIEWSKI and HELEN
WASNIEWSKI, his wife,
Defendants.

}

Amended
Notice of
Appeal.

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The complainant, Joseph Ziembinski, hereby
appeals from the final decree made by Chancel-
lor Edwin Robert Walker by Vice Chancellor,
Vivian M. Lewis in the above entitled cause on
the 18th day of October, 1926 and from the whole
and every part thereof, to the Court of Errors
and Appeals in the Last Resort in All Causes.

20

Dated, November 22nd, 1926.

WEINBERGER & WEINBERGER,
Solicitors for and of Counsel with
Complainant.

30

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

WEINBERGER & WEINBERGER,
Of Counsel with Complainant.

Nov. 23, 1926.

Service is hereby acknowledged for the defend- 40
ants.

HERMAN C. RUST,
Attorney.

Petition of Appeal

evidence and is against the weight of the evidence.

Petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, wholly reversed, set aside and for nothing holden, and that your petitioner may have such other relief in the premises as to this Court shall seem proper. 10

WEINBERGER & WEINBERGER,
Solicitors for and of Counsel
with Appellant.

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Answer to Petition of Appeal.NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between :

10	JOSEPH ZIEMBINSKI, Complainant-Appellant,	}	On Appeal From Chancery.
	and		
	JOSEPH WASNIEWSKI and HELEN WASNIEWSKI, Defendants-Respondents.		

20 The answer of the above-named defendants-respondents, Joseph Wasniewski and Helen Wasniewski, to the petition of appeal of the above-named complainant-appellant, Joseph Ziembinski.

30 These defendants-respondents, not acknowledging all or any of the matters in the said petition of appeal contained, for answer thereto, nevertheless, say and admit that a decree was on the 18th day of October, 1926, made and entered in the Court of Chancery in the cause and for the purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof these defendants-respondents beg leave to refer thereto when the same shall be produced; and these defendants-respondents are advised and believe that the said decree is agreeable to equity, and they pray that the same may be affirmed with costs to be adjudged to these defendants-respondents.

Dated, November 27th, 1926.

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HERMAN C. RUST,
Solicitor of Respondents.Andrew Foulds, Jr.,
Of Counsel.

61 FEB.T.1927

New Jersey Court of Errors and Appeals

JOSEPH ZIEMBINSKI,
Complainant-Appellant,

vs.

JOSEPH WASNIEWSKI AND
HELEN WASNIEWSKI,
Defendants-Appellees.

On Appeal
From
Chancery.

Brief for Complainant-Appellant.

This is an appeal from a final decree of the Court of Chancery, advised by Vice Chancellor Lewis, dated October 18th, 1926, dismissing the bill of foreclosure brought by the complainant.

The suit was instituted for the foreclosure of a mortgage of six hundred (\$600.00) dollars, covering real estate in the City of Clifton, in the County of Passaic and State of New Jersey, made by Stephen Adamski to the defendant, Joseph Ziembinski, dated March 30th, 1915 and recorded May 5th, 1915. The case was submitted on the pleadings and the facts of record and supplemental proof after the Vice Chancellor permitted the reopening of the case to insert additional testimony.

Stated in chronological order, the facts are as follows:

	<i>Dated</i>	<i>Recorded</i>
Mortgage made by Stephen Adamski to Joseph Ziembinski	Mar. 30, 1915	May 5, 1915
Deed made by Stephen Adamski to Albin F. Rowinski	May 1, 1915	May 4, 1915
Deed made by Albin F. Rowinski to Kazimiera Adamski, widow (mother of Stephen Adamski)	May 1, 1915	June 22, 1915
Kazimiera Adamski conveys to Joseph Wasniewski by deed	Oct. 27, 1922	Nov. 2, 1922

It will be noted that the mortgage made to the complainant, bears date March 30th, 1915 and was recorded May 5th, 1915. By deed dated May 1st, 1915 and recorded on May 4th, 1915, Adamski conveyed to Albin F. Rowinski the property. Thereafter Rowinski conveyed to Adamski's mother the property by deed bearing the same date as the deed, by virtue of which she received title. This deed was recorded June 22nd, 1915.

When Mrs. Adamski conveyed this property to Wasniewski, there was deducted the sum of One thousand (\$1,000.00) Dollars, which was deposited with Herman C. Rust, an attorney-at-law of this State, because of the mortgage which appeared of record, made by Adamski, the son of the seller, to the complainant in this cause.

The mother did not testify in this case, nor did Adamski testify, nor did Wasniewski testify.

The evidence disclosed that this money was paid by the purchaser to Rust, as part of the purchase price and the money would belong, if to anyone, to Mrs. Adamski, the mother of the mortgagor who executed the mortgage in question to the present complainant.

We contend that the Vice Chancellor was not justified in making the decree that was made, under the evidence in this case, and that the said decree should, therefore, be reversed and a decree entered in favor of the complainant and against the defendants for the sum of money now in the hands of the attorney, for the purpose of satisfying this mortgage.

POINT I.

The overwhelming weight of the evidence clearly shows that the Vice-Chancellor was in error.

The bill of complaint sets forth and it is conceded that there was due on this mortgage the sum of Six hundred (\$600.00) dollars, together with interest from the 30th day of March, 1915. There is no question but that the complainant is entitled to this sum of money, as the law and evidence justify a recovery. All of the facts in the bill were admitted. The answer in this case was prepared by Herman C. Rust, as Solicitor for the defendants, Joseph Wasniewski and Helen Wasniewski. In it the solicitor specifically denies the fact that he had any knowledge of the existence of this mortgage. At page 9 of the Record, it will be observed that Mr. Rust, the solicitor, closed this transaction, that he had a

search made, that he sent this mortgage to record and, in fact, deducted from the amount of the purchase price the sum of One thousand (\$1,000) dollars to take care of this very lien. This happened on October 27th, 1922. Admittedly Mr. Rust has been in possession of this money since October 27th, 1922 and the fact of the matter is that the Wasnievskis certainly ^{were} ~~was~~ not entitled to this money, because the money which was deducted represented part of the purchase price due to Mrs. Adamski and which obviously must have been deducted to pay and satisfy this mortgage.

When Mr. Rust prepared this answer, why is it that he did not set forth in this answer the fact that he was in possession of this fund of One thousand (\$1,000.00) dollars, which was deducted at the time of the sale of the property, and tender this money into Court, in order that the claimants, who might have at any time asserted any interest in this fund, might fight out the question in Court. This was not done and we respectfully submit that the reason is very obvious, and a reading of Mr. Rust's testimony makes it very obvious that this is a collusive defense manifestly interposed to prevent this complainant from collecting the money rightfully due him, and if perchance the bill should be dismissed, then would Mr. Rust retain this money himself, or divide it with certain others?

In order to establish this point without any question of doubt, may we specifically refer to Mr. Rust's testimony. At page 11, Mr. Rust is specifically asked with regard to his books: (lines 30 to 40) he fails to produce them, although subpoenaed. He says he has no books, referring to this transaction. At page 12, Mr. Rust seems

to have doubt as to whether he filed the answer in this case (line 10).

At page 12, lines 29 &c.

“Q. (Question read). A. Yes, sir; I held the money out because I was not going to decide who was to get this money; I wanted the Court to pass on it.

“Q. You knew there was an unrecorded mortgage? A. A recorded mortgage.

Q. And at the time of the transaction, you kept out this money to protect yourself? A. Yes, sir.

Q. And you knew that all the time? A. What?

Q. You knew all the time you had this money in your possession? A. Yes, sir.”

And at page 13 (lines 1 to 30):

“Q. Why did you file this answer then, this untrue answer? A. Let me see the paper.

Q. Here it is. A. I represented this man Wasniewski.

Q. You knew as a member of the bar, didn't you, that this answer when you filed it, then was false? A. Where is it false? Let me explain to the Court the whole thing. It is not false; I kept the money and I want to pay it out if the Court tells me whom to pay it to.

Q. Didn't you file an answer denying Paragraphs 1, 2, 3, 4, 5, 6, 7, 8; didn't you deny this? A. I don't know what the paragraphs are.

Q. You still have this money in your possession for the payment of this mortgage, and you are willing to pay it into court? A. I am willing to pay it out on the direction of the Court.

Q. Did anybody else, except this mortgagee, Mr. Ziembinski, did anybody else, out-

side of him, ever claim this money from you? A. *No, sir.*

Q. So that you are ready, able and willing to pay over this money if the Court directs you to do so? A. Yes, sir."

Admittedly no one else ever claimed this money but the complainant, Mr. Ziembinski. Mrs. Adamski, the seller of the property, who was entitled to this money, if the mortgage was not of record, never claimed it because she obviously knew that this money was deducted to pay this mortgage and she likewise must have known of the mortgage because a reading of the record discloses the fact that all of these transactions, which resulted in title being acquired by Mrs. Adamski, were *merely mesne conveyances through dummies, who were related to the Adamskis, so as to have title conveyed from the son to the mother. They bear the same date, were drawn by the same attorney and the consideration recited therein is One dollar.*

The Vice Chancellor apparently made the mistake of assuming that this money belonged to Wasniewski, the purchaser, and that Wasniewski was being forced to pay the same. *This is not so.* Mr. Rust admits that he is in possession of the \$1,000 deducted from the purchase price and which would go to Mrs. Adamski, the mother of the mortgagor, if anyone was entitled to it. She makes no claim therefor. Admittedly no one has claimed this money but Ziembinski.

At page 13, line 22, asked of Mr. Herman C. Rust.

"Q. Did anybody else, except this mortgagee, Mr. Ziembinski, did anybody else, outside of him, ever claim this money from you? A. No, sir.

Q. So that you are ready, able and willing to pay over this money if the Court directs you to do so? A. Yes, sir."

What the Vice Chancellor should have done in this case was to direct that the money be deposited in Court and that this mortgage be paid and satisfied out of the funds so deposited to the complainant to satisfy the mortgage in question.

The Court discusses legal questions that have no application to the facts presented in this cause. If this mortgage were being enforced as against Wasniewski's property and Wasniewski was being called upon to pay and satisfy the same, then we think that the Court's decision would have been correct. But, the learned Vice Chancellor overlooked the fact that Mrs. Adamski, the mother of the mortgagor sold the property; that there was deducted from the purchase price at this time the sum of \$1,000 *to secure the payment of the mortgage*, which was recorded on May 5th and which obviously Mrs. Adamski knew about, because she was vested with the title through conveyances from her son to others related to her and in the family, and the consideration expressed therein, being the sum of One dollar. She would be entitled to this money if it was not her intention to pay the mortgage. She does not appear. She does not contest this suit. She never made a claim for this money. Mr. Rust has been in possession of the funds since 1922. *Who gets this money?*

Admittedly, the learned Vice Chancellor said that the mortgage was supported by a valuable consideration and the money was due him. Admittedly the moneys in the hands of the attorney

are not claimed by anybody but the complainant. Why then did not the Court direct that this mortgage lien attach to the funds which were left with the attorney, that it be paid from this source and cancelled and satisfied of record?

May we also, at this time, suggest to the Court that the conduct of the solicitor in this case is an element which must likewise convince this Honorable Court that the learned Vice Chancellor fell in error. There devolved a duty upon this solicitor to specifically set forth in his answer the fact that he had in his possession this money, and what the object was in leaving the money with him, and that he desired to be relieved from the further duty of retaining this fund, and that a decree might go from the Court of Chancery releasing him from any further obligation with regard to the fund. This he does not do, but on the contrary, as stated above, in his answer denies knowledge of the existence of the mortgage, whereas in truth and fact he deducted the sum from the purchase price (Adamski's money) to protect this very lien.

If the Adamskis had defended this suit and they had denied that this was intended to be a lien, then there might have been justification for the decree which was made by the learned Vice Chancellor. The money belonged to the Adamskis, if anybody, because it was deducted from the purchase price. They don't claim the fund; they don't question the mortgage. Obviously their failure to assert an interest in the fund from 1915 down to the date of the filing of the bill, would indicate that it was their thought, to say the least, that this lien had been paid and discharged and the innocent complainant, Ziem-

binski was long out of the picture having received his money.

Counsel for the defendants very ingeniously attempted to befog the issue by raising a legal question, which had no application to the facts at bar and the Court fell in error by reason of this legal principle, which was urged.

The inevitable conclusion and the only deductible inference that one can possibly have, after reading the record in this case, is that Adamski, who executed the mortgage for \$600 and received the consideration therefor, was anxious to convey the title to the property to his mother. To bring about this result dummies were used. The deed from Adamski to Rowinski and from Rowinski back to Adamski's mother were dated the same day, prepared by the same scrivener, and the consideration expressed therein was One dollar. Mrs. Adamski sells the property to Wasniewski. At the time of the sale the moneys due on the mortgage are deducted. Mrs. Adamski or Stephen Adamski never thereafter called back to demand the money from Mr. Rust. Why not? Why was not Mrs. Adamski produced to deny the fact that she knew that this mortgage was a mortgage lien? The answer is clear. She knew it. *She left the money with the attorney for the purpose of paying the mortgage.* She never came back to the attorney to demand the money thereafter assuming that it was paid.

Mr. Rust, on the stand, says, "I wish to pay the money into Court." We say that this decree should be reversed and this money directed to be paid in Court so that we can proceed as against this fund and not be denied the right to recover what is a just and honest indebtedness, not disputed by any person in the world, who has an interest in the fund.

Wherefore, it is respectfully submitted that the decree of the learned Vice Chancellor be reversed and that this Court direct that a decree be found in favor of the complainant and against the fund now in the hands of the solicitor, out of which moneys the said complainant's lien be paid and satisfied, and the mortgage which he holds and is now foreclosing, be cancelled and satisfied of record, and further that if necessary, the pleadings be amended so as to permit the joining of the said Herman C. Rust as a defendant in said cause so as to conform with the proof and evidence offered in the case.

Respectfully submitted,

WEINBERGER & WEINBERGER,
Solicitors of Complainant-Appellant.

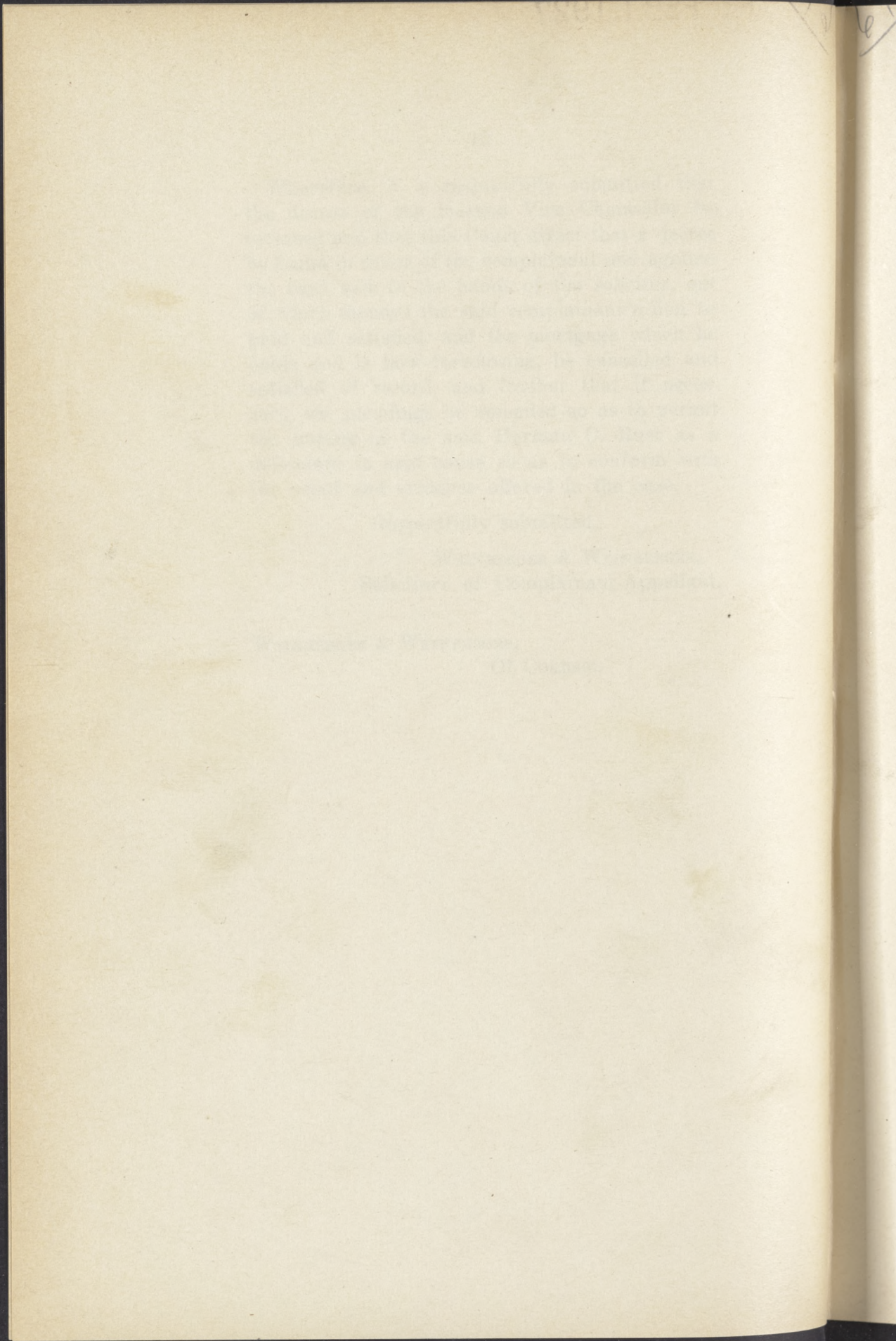
WEINBERGER & WEINBERGER,
Of Counsel.

THE HISTORY OF THE

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CHAPTER I

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New Jersey Court of Errors and Appeals

Between

JOSEPH ZIEMBINSKI,
Complainant-Appellant,

and

JOSEPH WASNIEWSKI and HELEN
WASNIEWSKI,
Defendants-Appellees.

On Appeal
From
Chancery.

BRIEF ON BEHALF OF DEFENDANTS- APPELLEES.

This is an appeal by complainant from a final decree of the Court of Chancery advised by Vice-Chancellor Lewis dismissing the complainant's bill.

The suit was brought to foreclose a real estate mortgage for \$600. given by Stephen Adamski to the complainant, dated March 30, 1915, recorded May 5, 1915.

Prior to the recording of the mortgage in suit the mortgagor conveyed the mortgaged premises to Albin F. Rowinski and Cora Rowinski, his wife, by deed dated May 1, 1915 and recorded May 4, 1915. The mortgagor was thus divested of the record title and the new grantees Rowinski and wife acquired the record title before the mortgage in suit was recorded. On May 1, 1915 the said grantees, Albin F. Rowinski and wife, conveyed the premises to Kasimiera Adamski, the mother of the mortgagor, by deed dated and acknowledged on that day and recorded June 22, 1915. This gran-

tee conveyed the premises to the present defendants, Wasniewski and wife by deed dated October 27, 1922 and recorded November 2, 1922.

The above facts were stipulated before the Court and are recited in the opinion of Vice-Chancellor Lewis (State of Case, pages 28-29, and in the Brief of Complainant-Appellant, pages 1-2).

The case was originally heard and decided on the facts as so stipulated (State of Case, page 29, l. 28).

The Vice Chancellor filed a memorandum opinion (122 Atl. Rep. 304), in which he said:

“The decisions in this state are clear that one who takes title to real property, even with notice, actual or constructive, of an encumbrance, from one who had no notice thereof, and was a bona fide purchaser when his deed was placed on record, takes the title free and clear of the encumbrance. * *

Applying this rule to the present situation, Rowinski and wife took title to the premises free and clear of the Adamski mortgage, which was unrecorded at the time of the recording of their deed, and of the existence of which mortgage it is not alleged they had actual notice. By their deed they conveyed to their grantee a like unencumbered title, and that grantee in turn conveyed a like unencumbered title, free and clear of the mortgage in suit, to the present defendants.”

State of Case, page 30, l. 20.

The complainants on the argument asserted that proof was available which would destroy the bona fide position of the defendants and the case was opened to permit them to produce such proof (State of Case, page 31, line 15).

Additional proofs were accordingly taken which

the Vice-Chancellor said "have failed to convince me that I should depart from my previous conclusion" (State of Case, page 33, line 10).

No proof of knowledge of the existence of the mortgage on the part of Rowinski, the original grantee, was presented and he denied that he knew of the mortgage when he took title (State of Case, page 20, line 29).

It is understood from the Brief of Appellant that it is not claimed that there was presented any proof of knowledge of the mortgage on the part of Rowinski. In fact counsel say at page 7 of their Brief:

"If this mortgage were being enforced as against Wasniewski's property and Wasniewski was being called upon to pay and satisfy the same, then we think that the Court's decision would have been correct."

The Bill is in the usual form for the foreclosure of complainant's mortgage and a sale of the lands therein described but does not recite the date of recording of the mortgage nor of the deeds (Case, pages 1-4).

The only issue raised by the pleadings is as to the ~~lien~~ of the mortgage.

POINT I.

The lands in question are not subject to the lien of complainant's mortgage.

Counsel for appellant concedes this point (Brief, page 7) and does not now ask for a sale of the mortgaged premises but only that a lien be imposed upon a deposit held by one not a party to the suit and not mentioned in the bill (Brief, page 10).

The complainant delayed recording his mortgage for thirty-six days, from March 30, 1915 until May 5, 1915. During this period the mortgagor conveyed the mortgaged premises to Albin F. Rowinski and wife, whose deed was recorded prior to the recording of the mortgage. Rowinski testified that he had no knowledge of the mortgage when he took title (State of Case, page 20, line 28).

Rowinski therefore took title which was conveyed by him free of the lien of the mortgage, under the authorities cited by Lewis, V. Ch. (State of Case, page 30, line 30).

POINT II.

The mortgage in suit should not be decreed to be a lien on the proceeds of the mortgaged premises.

Counsel for appellant presents a new contention on this appeal. Admitting that the mortgage is not a lien on the lands, it is asserted by appellant on this appeal that it should be decreed to be a lien on a deposit for security made at the passing of title to the last grantee.

When the case was reopened to permit complainant to offer proof of actual knowledge by Rowinski, the original grantee, of the existence of the mortgage when he took title, complainant called Herman C. Rust, a member of the bar, who had charge of the passing of title to the last grantee, the defendant, Wasniewski, in 1922. His testimony was received over the objection of defendant's counsel (State of Case, page 9).

Mr. Rust testified that because of the open mortgage of record he required that there be deposited

on the closing of title to the last grantee a sum sufficient to protect the purchaser against the mortgage, as he was unwilling to assume the responsibility (State of Case, page 12, line 30).

Appellant now argues that the Court should on this appeal re-frame the pleadings and impress a lien on this deposit in the hands of Mr. Rust, who is not a party to the suit.

Passing the technical questions involved, the position of counsel for appellant is not logical.

Rowinski, the original grantee without notice, took the title free and clear of the incumbrance and that title was duly transmitted to the defendant grantee against whom appellant admits he cannot foreclose his mortgage (Brief of Complainant-Appellant, page 7).

Counsel for appellant devotes considerable space to a discussion of the form of the answer filed by defendant, and the fact that Mr. Rust did not file a bill of interpleader (Appellant's Brief, pages 4-6).

The deposit is held by Mr. Rust as security and the suggestion at the foot of page 4 of Appellant's Brief that Mr. Rust may wrongfully retain this money is not justified and should be withdrawn. This wholly unfounded charge should not be allowed to stand as a part of the records of this Court.

At the foot of page 9 of their Brief, counsel for appellant quotes Mr. Rust as saying: "I wish to pay the money into Court." There is no reference to the source of this alleged quotation and it is not in the State of the Case. What Mr. Rust wishes to do is to pay the money to the person entitled to it who now appears to be Kasimiera Adamski, (State of Case, p. 13, line 20).

Counsel for appellant says that Mr. Rust "sent

this mortgage to record" (Appellant's Brief, page 4, line 1). To what mortgage counsel here refers is not understood. It is certainly not the mortgage in suit, as Mr. Rust had no part in that transaction and did not send to record any mortgage connected with the property in question.

Counsel for appellant says (Appellant's Brief, foot of page 8) that the failure of Adamski "to assert any interest in the fund from 1915 down to the date of filing of the bill" would indicate that it was their thought that the mortgage had been paid.

The fact is that the fund did not come into existence until October 27, 1922, shortly before the filing of this bill of complaint.

The date of filing the bill does not appear, but the answer was filed March 27, 1923 (State of Case, page 6, line 30). It is therefore apparent that the suit was brought within a short time after the deposit was made with Mr. Rust. Appellant argues that because Kasimiera Adamski, pending the decision of this suit, has not demanded her deposit she should be adjudged to have abandoned her claim to it (Appellant's Brief, page 6).

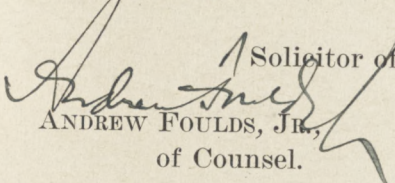
No notice has been given by complainant to Kasimiera Adamski nor to anyone upon which might be based a forfeiture of her right to the money. The bill of complaint gives no intimation of such claim, and no one had any reason to assume that any such contention would be made by complainant.

The mortgage was not a lien against the property held by Kasimiera Adamski, and she is entitled to the money which will be paid to her as soon as this case, which has been pending for over four years, is terminated.

The only defendants who have any interest in the lands sought to be sold, the subject matter of this suit, are the answering defendants, Wasniewski and wife, and their answer sets up the defense which they have consistently urged, that the mortgage in suit is not a lien on their lands.

POINT III.

The decree dismissing the bill should be affirmed with costs.

 HERMAN C. RUST,
Solicitor of Defendants-Appellants.
ANDREW FOULDS, JR.,
of Counsel.

