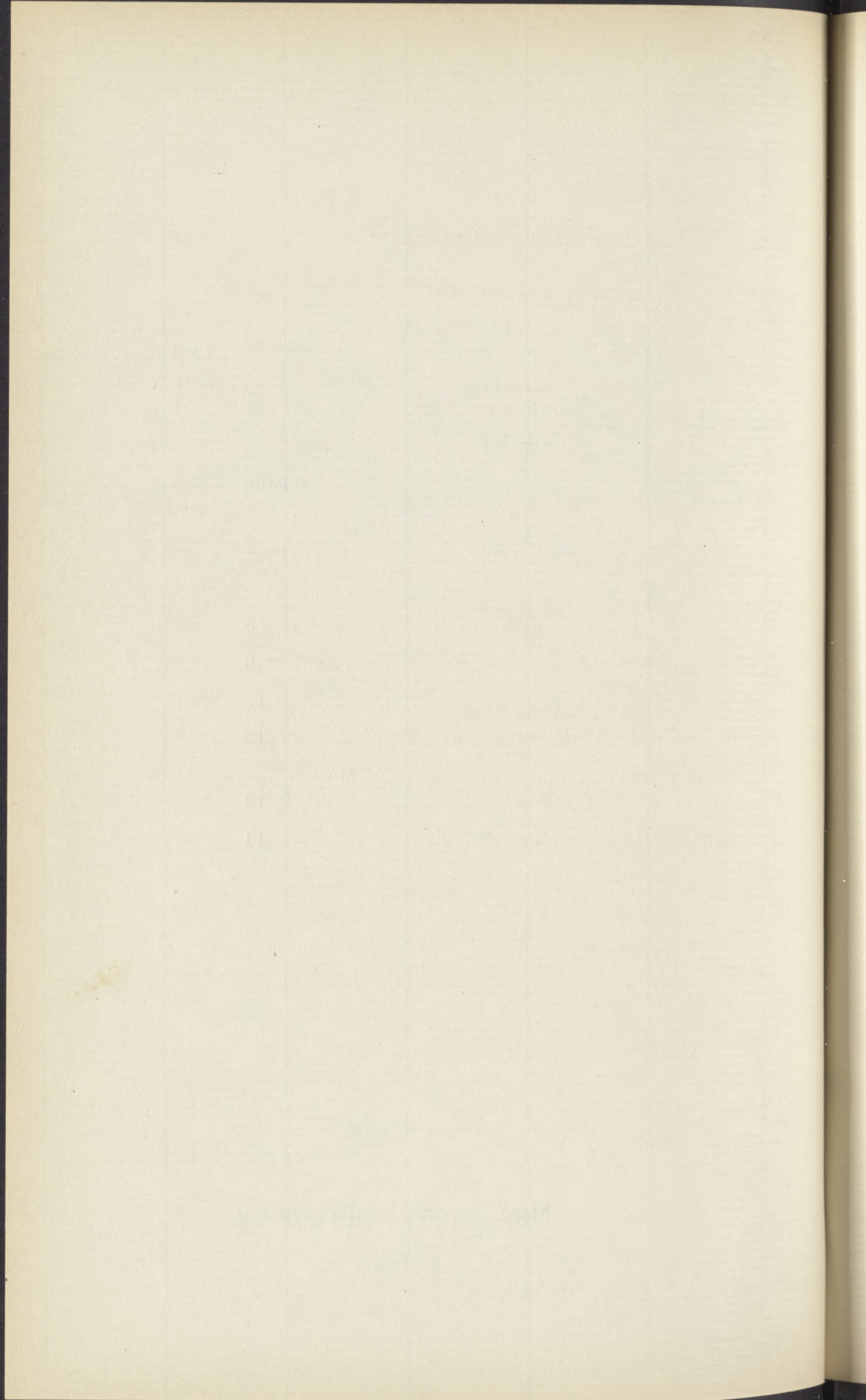


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**Notice of Appeal.**

IN CHANCERY OF NEW JERSEY.

Between EDWIN ENGLER, Complainant,  and  HARRY BUESSER, <i>et ux.</i> , <i>et als.</i> , Defendants.	}	On Bill, &c.    10
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The defendant, Harry Buesser, hereby appeals from the order and every part thereof made on the 17th day of June, Nineteen Hundred and Twenty-nine by the Chancellor on the advice of Vice Chancellor James F. Fielder, striking out the Answer of the defendant, Harry Buesser, filed in the above entitled cause, to the Court of Errors and Appeals in the Last Resort in All Causes. 20

Dated, June           , 1929.

NICHOLAS S. SCHLOEDER,  
Solicitor of the Defendant.

30

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

NICHOLAS S. SCHLOEDER,  
Of Counsel with the Defendant.

40

**Order on Motion to Strike Out Answer.**

IN CHANCERY OF NEW JERSEY.

Between  
 EDWIN ENGLER,  
 Complainant,  
 and  
 HARRY BUESSER, *et ux., et als.*,  
 Defendants.

20 This matter coming on to be heard in the presence of Dippel, Davis and Stewart, Solicitors of the complainant, Edwin Engler, and of Nicholas Schloeder, Solicitor of defendant, Harry Buesser, and the Court having heard the argument of the said solicitors and being in the opinion that the answer filed herein is sham and untrue in fact and does not present a legal defense to the bill of complaint

And it appearing that due notice of the said complainant's motion to strike out the answer of defendant filed herein has been given to said defendant;

30 It is thereupon on this 17th day of June, nineteen hundred and twenty-nine, ORDERED, ADJUDGED and DECREED that the defendant's said answer be and the same is hereby stricken out.

EDWIN ROBERT WALKER,  
 Ch.

Respectfully advised,  
 JAMES F. FIELDER,  
 V. C.

40

**Petition of Appeal.**NEW JERSEY COURT OF ERRORS AND  
APPEALS.

Between EDWIN ENGLER, Complainant-Appellee,  and  HARRY BUESSER, <i>et ux., et als.</i> , Defendant-Appellant.	}	On Bill, &c.  On Appeal from the Court of Chancery.	10
---	---	--	----

To the Honorable COURT OF ERRORS AND APPEALS  
in the Last Resort in All Causes :

The petition of Harry Buesser, the appellant in  
the above entitled cause respectfully shows that: 20

1. The petitioner finds himself aggrieved by an  
order made in the Court of Chancery by his Honor  
Edwin Robert Walker, Chancellor of the State of  
New Jersey, bearing date the 17th day of June,  
1929, in a certain cause in the said Court of  
Chancery, wherein one Edwin Engler is complain-  
ant and Harry Buesser and others are defendants,  
in this respect, to wit: 30

That the said order adjudges and decrees that  
the Answer filed by the defendant, Harry Buesser,  
in said cause be stricken out.

2. The petitioner appeals from the order of the  
Chancellor which decrees as aforesaid, upon the  
ground that the same is erroneous in that:

(a) Because the allegations of the Answer to  
the Bill of Complaint filed in this cause are not 40

*Petition of Appeal.*

shown to be palpably or inherently false or so palpably false and insufficient as to enable the Court to conclude that this defendant was seeking delay or trifling with the process of law.

10 (b) The Court erroneously treated the motion leading to the making of the order complained of as the trial of an issue on motion instead of an inquiry as to whether there is in fact an issue to be tried.

20 (c) The Court erroneously found that the answer of the defendant was insufficient in law entitling the complainant in foreclosure to a forfeiture of the credit although the defendant alleged facts which showed that the default set forth in the bill of complaint was the result of honest mistake and misapprehension into which the defendant was led by the acts and declarations of the complainant.

(d) The said order erroneously declares the answer of the defendant to be both sham and frivolous at the same time.

30 Petitioner therefore prays that the said order of the Court of Chancery may be reversed, set aside and for nothing holden, and that the petitioner may have such other relief in the premises as to this Honorable Court may seem proper.

NICHOLAS S. SCHLOEDER,  
Solicitor for and of Counsel  
with Petitioner-Appellant.

**Answer to Petition of Appeal.**NEW JERSEY COURT OF ERRORS AND  
APPEALS.EDWIN ENGLER,  
Complainant-Appellee,

vs.

HARRY BUESSER, *et ux., et als.*,  
Defendants-Appellants.On Appeal  
From the  
Court of  
Chancery.

10

The answer of Edwin Engler, the above named appellee, to the petition of appeal of Harry Buesser, the above named appellant.

This appellee, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that an order was, on the Seventeenth day of June, 1929, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said order, this appellee begs leave to refer thereto when the same shall be produced.

20

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

30

DIPPEL, DAVIS & STEWART,  
Solicitors for Appellee.JOSEPH DAVIS,  
Of Counsel.

40

**Bill of Complaint.**

(Filed April 9, 1929.)

## IN CHANCERY OF NEW JERSEY.

TO THE HONORABLE EDWIN ROBERT WALKER, CHAN-  
CELLOR OF THE STATE OF NEW JERSEY:

10 The Complainant, Edwin Engler, of the Borough  
of Cliffside Park, in the County of Bergen and State  
of New Jersey, respectfully shows that:

1. On May 1st, 1928, John J. Murphy, being in-  
debted to Edwin Engler, in the sum of Twenty-five  
Hundred (\$2500.00) Dollars executed to him a  
bond of that date to secure that sum, payable on  
May 1st, 1931, with interest at the rate of six per  
centum per annum, payable quarterly from the date  
20 of the bond.

2. To secure payment of the bond, said John J.  
Murphy executed to said Edwin Engler, a mortgage  
of even date with the bond; and thereby conveyed  
to him in fee, the land hereinafter described, on the  
express condition that such conveyance should be  
void if payment should be made according to the  
terms of the bond. Which mortgage, having been  
30 first duly acknowledged and the certificate of ac-  
knowledgment duly indorsed thereon was recorded  
in the Clerk's Office of Bergen County, in Book 1047  
of Mortgages, page 548, etc.

3. The mortgaged premises are described as fol-  
lows: ALL those certain lots, tracts or parcels of  
land and premises hereinafter particularly de-  
scribed, situate, lying and being in the Borough of  
Ridgefield, in the County of Bergen and State of  
New Jersey, shown and designated as lots Four-  
40

*Bill of Complaint.*

teen (14), Fifteen (15) and Sixteen (16), block No. 7 on a certain map entitled "Map No. 3 of property of Cliffside Park Realty Company, Cliffside Park, Bergen Co., N. J." filed in the Bergen County Clerk's Office, August 27, 1915 as Map No. 1565.

4. On August 27th, 1928, John J. Murphy and Katherine F. Murphy, his wife, conveyed said lands by deed of that date to Harry Buesser, in fee, which deed was on August 28th, 1928, recorded in the Clerk's Office of Bergen County in book 1598 of Deeds at page 350. 10

Any interest which the said Harry Buesser has in said lands is subject to the lien of complainant's mortgage.

5. Said Harry Buesser is married and his wife's name is Thelman. 20

Any claim or interest which she may have in said lands by reason of right of dower, or otherwise, is subject to the lien of complainant's mortgage.

6. On August 27th, 1928, Harry Buesser mortgaged said lands to John J. Murphy, for \$1500.00, which mortgage was on August 28th, 1928, recorded in the Clerk's Office of Bergen County, in book 1097 of Mortgages at page 51. 30

Any interest which said John J. Murphy may have in said lands is subject to the lien of complainant's mortgage.

7. On August 27th, 1928, John J. Murphy assigned to Henry Gubler, Jr., and Leonard Metzger, the one-half right, title and interest in the mortgage mentioned in the preceding paragraph, which assignment of mortgage was recorded on August 40

*Bill of Complaint.*

28th, 1928, in book 183 of Assignments at page 141.

Any interest which the said Henry Gubler, Jr. and Leonard Metzger may have in said lands is subject to the lien of complainant's mortgage.

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

20 The mortgage also contained an agreement that the mortgagor, his heirs and assigns, would keep the buildings on the mortgaged premises insured against loss or damage by fire in a sum and by insurers satisfactory to the mortgagee, and would assign the policy of insurance to the mortgagee, his representatives or assigns, should be entitled to effect such insurance, and the premiums paid for the same by the mortgagee, or his assigns, with interest at six per centum per annum, should be a lien on said land added to the amount of the mortgage debt and secured by the mortgage.

30 On February 1st, 1929, three months' interest fell due on complainant's bonds and mortgage, and remained unpaid for more than 30 days thereafter, and no part thereof has yet been paid. Complainant has elected that the whole principal sum with all interest shall be now due.

Said John J. Murphy, Harry Buesser, or one of them, have always been in possession of the mortgaged premises.

Of the principal sum, \$2500.00, with interest thereon, from November, 1928, is due upon the complainant's bond and mortgage.

*Bill of Complaint.*

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

1. That Harry Buesser and Thelma Buesser, his wife, Henry Gubler, Jr., Leonard Metzger and John J. Murphy, who are the defendants to this suit, may answer this bill of complaint without oath and each statement therein made; 10

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

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

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

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. 30

DIPPEL, DAVIS & STEWART,  
Solicitors of Complainant.

DIPPEL & DAVIS,  
Of Counsel.

A true copy.

THOMAS BARBER,  
Clerk.

**Answer.**

(Filed May 14, 1929)

## IN CHANCERY OF NEW JERSEY.

10      Between

EDWIN ENGLER,	}
Complainant,	
and	
HARRY BUESSER,	}
Defendant.	

The Answer of the defendant, Harry Buesser.

20      Harry Buesser, answering the bill of complaint, says that :

1. Paragraph 1 is admitted.
2. Paragraph 2 is admitted.
3. Paragraph 3 is admitted.
4. Paragraph 4 is admitted.
- 30      5. Paragraph 5 is denied except that it is admitted that Harry Buesser is married; further answering said paragraph, this defendant says his wife's name is Palma.
6. Paragraph 6 is admitted.
7. Paragraph 7 is admitted.
- 40      8. Paragraph 8 is admitted except that it is denied that the principal sum of \$2500. with interest

*Answer.*

thereon from November, 1928, is due upon the complainant's bond and mortgage.

9. Further answering the bill of complaint, this defendant says that the default set forth in the bill of complaint was the result of honest mistake and misapprehension into which the defendant was led by the acts or declarations of the complainant in that said complainant on or about the 22nd day of November, 1928, agreed with the defendant that he would call at the residence of the defendant in North Bergen, New Jersey, whenever the future installments of interest would become due, and further agreed to waive strict performance by the defendant as to future payments not then in default, all as he had then presently done; and relying upon this promise, and ignorant of the address of complainant, this defendant was unable to pay the interest within the time set forth in said mortgage. 10 20

10. Further answering the bill of complaint, this defendant tenders himself ready and willing to pay all interest due on said mortgage as and when directed by the Court.

NICHOLAS S. SCHLOEDER,  
Solicitor for Defendant Harry Buesser. 30

**Notice on Motion for Order to Strike  
Out Answer.**

IN CHANCERY OF NEW JERSEY.

10	Between	EDWIN ENGLER, Complainant,  and  HARRY BUESSER, <i>et ux., et als.</i> , Defendants.
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To: NICHOLAS SCHLOEDER, Solicitor of Defendant,  
Harry Buesser, or to whom it may concern:

20 DEAR SIR:

PLEASE TAKE NOTICE that we shall apply to the  
Chancellor at the Chancery Chambers in Jersey  
City on Monday, June 17th, 1929, at 10:00 o'clock  
in the forenoon or as soon thereafter as counsel  
can be heard for an order to strike out the answer  
filed by you in the above stated cause on the ground  
that the allegations contained in the same are un-  
true in fact and sham, and shall support our ap-  
plication by the affidavit of plaintiff hereto an-  
30 nexed.

DIPPEL, DAVIS & STEWART,  
Solicitors of Complainant.

**Complainant's Affidavit in Support of  
Motion to Strike Out Answer.**

STATE OF NEW JERSEY, }  
COUNTY OF HUDSON, } ss. :

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

He is the complainant in the above entitled case. Deponent denies that he agreed that he would call at the residence of the defendant whenever the future installments of interest would become due. He further denies that he agreed to waive strict performance by the defendant as to future payments not then in default. Deponent further states that he sent a bill for the interest due February 1st and put his address on the back of the envelope but said envelope was never returned to him. Deponent further states that one week thereafter he telephoned and spoke to the wife of defendant concerning the interest on his mortgage and she said that her husband had forgotten it; subsequently deponent again telephoned and spoke to defendant's wife concerning the interest not then paid on his mortgage and she said she would tell her husband.

EDWIN ENGLER.

Sworn to and subscribed to before me this 11th day of June, 1929.

BESSIE ISBELL  
Notary Public of New Jersey.

**Answering Affidavit of Harry Buesser.**

IN CHANCERY OF NEW JERSEY.

10	Between EDWIN ENGLER, Complainant,  and  HARRY BUESSER, <i>et ux., et als.</i> , Defendants.	}	On Bill, etc.
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STATE OF NEW JERSEY, }  
 COUNTY OF HUDSON,    } ss. :

20       HARRY BUESSER, of full age, being duly sworn upon his oath according to law, deposes and says:

1. I am the defendant named in the bill of complaint filed in the above entitled matter. I have read the bill of complaint filed in this matter and find that the material allegations of the said bill, in so far as they relate to the forfeiture of the credit contained in the mortgage, which is sought to be foreclosed, are untrue as will more fully hereinafter appear.

30       2. It is true that the mortgages mentioned in said bill were set forth in paragraphs 1 to 7 inclusive, except that I deny my wife's name is Thelma. My wife's name is Palma.

3. I deny that the principal sum of \$2500. with interest from November, 1928, is due from the complainant's bond and mortgage.

40       4. The default set forth in the bill of complaint is the result of mistake and misapprehension into

*Answering Affidavit of Harry Buesser.*

which I was led by the acts or declarations of the complainant. The facts and circumstances which these arose out of are as follows:

5. On or about the 22nd day of November, 1928, the complainant, Mr. Engler, called at my home at #535 Thirty-fifth Street, North Bergen, for his interest payment which amounts to approximately \$37.50 quarterly. This was the first time I had met him as I had purchased the property but three months before. 10

6. I told him that I had found the method of quarterly payments expressed in the mortgage which I had found on the property when I purchased it rather trivial and annoying. He told me that he agreed with me and said that it did not make any difference to him when the interest was paid. He told me that I was a responsible man and that he was not concerned about getting his interest money. We even talked about making the interest payments semi-annually. He also told me that I had nothing to fear from him as far as these payments were concerned. He told me that it was a trivial amount and that he would drop in from time to time and collect whatever interest was due. He said there was no need to leave his address as he was not always home; that the better method for him was to drop down and get the interest in the future as he had done in this case. 20 30

7. I deny that he sent a bill for interest due February 1st and that he put his address on the back of the envelope.

8. I was lulled into security by conversation with him in the previous November. I did not worry about the payment due on February 1st, 40

*Answering Affidavit of Harry Buesser.*

1929, particularly since I had no word from him, and, as I did not know his address, I had no way of sending it to him.

9. Toward the end of February, I understand that he telephoned my wife and said that he would be down for the interest, but he did not thereafter appear.

10. The next time I heard from him was after the thirty day period had expired, in the early part of March, and he telephoned to my wife and I was informed by her that he had demanded his money. I was very much surprised and dumbfounded by this unconscionable attitude.

11. This attempted foreclosure is absolutely without moral or legal justification. There is no reason in the world why I should refuse or should be unable to pay the trivial sum of \$37.50. I believe that I am a man of large property; I am possessed of a cash income that averages over \$300. a day; and it would be ridiculous to assume that I defaulted in the interest payments or that I knowingly violated the terms of the mortgage. This mortgage sought to be foreclosed is a first mortgage of \$2500. The property value is actually in excess of \$8000. and the complainant is amply secured. No possible harm could come to the complainant by continuing the mortgage until the due date of the same.

HARRY BUESSER.

Sworn and subscribed to before me }  
this 14th day of June, A. D. 1929. }

NATHAN J. LITTANCE

Attorney at Law of New Jersey.

40

## New Jersey Court of Errors and Appeals

Between

EDWIN ENGLER,  
Complainant-Appellee,

and

HARRY BUESSER, *et als.*,  
Defendant-Appellant.

On Appeal  
from the  
Court of  
Chancery.

### APPELLANTS' BRIEF.

#### Statement of Facts.

This is an appeal from an order of the Court of Chancery striking out an answer filed by the defendant-appellant in a foreclosure suit.

The bill of complaint was filed on April 9, 1929. The default alleged was the failure of the defendant to pay three months' interest, which fell due on February 1, 1929, and permitting the same to remain unpaid for more than 30 days thereafter.

The defendant filed an answer admitting the default but alleging that it was the result of honest mistake and misapprehension to which he was led by the acts and declarations of the complainant, before the default was occasioned (Case, p. 11).

Thereafter the complainant moved to strike out the answer as sham, and annexed an affidavit in support of the motion (Case, p. 12). The appellant in reply made an affidavit in support of his answer, and in response to the affidavit of the complainant (Case, p. 14). Without taking any further affidavits or testimony of any kind and upon the two

affidavits mentioned, the Court of Chancery struck out the answer of the defendant. The matters contained in these affidavits will be further referred to under the points about to be made.

### POINT ONE.

**The Court erroneously found that the answer of the defendant was insufficient in law entitling the complainant in foreclosure to a forfeiture of the credit although the defendant alleged facts which showed that the default set forth in the Bill of Complaint was the result of honest mistake and misapprehension into which the defendant was led by the acts and declarations of the complainant.**

It will be observed in the first place, that the answer of the defendant adopts the very language of the Court of Errors and Appeals, in *Freund v. Weisman*, 101 N. J. Eq. 245, 248, thus:

“With respect to the waiver of payment of liens not yet in default for the specified period at the time of such waiver, the rule is otherwise, and has been stated in our cases substantially as follows: If a default which normally would entitle the mortgagee to call the principal was the result of honest mistake or misapprehension into which the defendant was led by the acts or declarations of the complainant, a court of equity will not under such circumstances hold the failure, to pay, a forfeiture of the credit. *DeGrott v. McCotter*, 19 N. J. Eq. 531, 533; *Wilson v. Bird*, 28 N. J. Eq. 352; *Security Trust Co. v. Paper Board Co.*, 57 N. J. Eq. 603, 607; *Bell vs. Romaine*, 30 N. J. Eq. 24; *Derechinsky v. Epstein*, 98 N. J. Eq. 79, citing cases.”

Thus, it only remains to inquire whether or not the general allegations of the answer using this language, are negatived by the other matters specially pleaded and by the affidavit filed in support thereof. It is clear, I respectfully submit, that it does not.

The answer states and the affidavit shows that these acts and declarations which mislead the defendant are three-fold:

1. That the complainant promised that he would call at the residence of the defendant for future payments of installments, which he failed to do.

2. That he would waive strict performance by the defendant as to future payments not then in default.

3. That defendant was ignorant of the address of the complainant, which, in part, at least, was the result of the failure of the complainant to leave his address, and his promise to call for the interest.

The specific allegations not only do not negative the allegations expressed in the language of the rule promulgated by the Court of Errors, but they support it.

The facts in this case resemble the early case of *DeGroot v. McCotter*, 19 N. J. Eq. 531. In that case, the complainant promised to call at the place of business of defendant in New York, and receive the interest which from time to time would fall due, declining to give the street and number of his residence in Jersey City.

In the instant case, the situation is even stronger, for a promise is alleged that he would not insist on strict performance.

The answer need not allege the evidence by which these allegations are to be proven, and even if this were necessary, it could not be urged as a basis for the complainant's motion to strike out answer.

Thus, in *Lettieri v. Mistretta*, 139 Atlantic 514, 516, the Court says:

"The complainants urge also, as a basis for their motion to strike defendant's answer, that it does not give the particulars or details claimed as constituting a defense; but, as was stated by counsel for the defendants on the argument, such objection is not a proper cause for the striking out of an answer, on motion, because chancery rules 44 and 45 afford the complainants ample means whereby they may secure further particulars or details, if such be deemed requisite or necessary. I will advise an order denying complainant's motion to strike the answer."

Under the circumstances here, it would be unconscionable to permit the complainant to take advantage of a default of which he is himself, at least, partly to blame. As was said in *Lettieri v. Mistretta*, *supra*:

"One who resorts to a court of conscience to enforce a forfeiture must be free of blame in the transaction. *Wilson v. Bird*, 28 N. J. Eq. 352."

Or, again, in the case of *DeGroot v. McCotter*, *supra*, at page 534, the Court quotes from the case of *Albert v. Grosvenor Investment Co.*, L. R. 3 Q. B. Div. 123, as follows:

"I see nothing which goes to show that, if by the consent of the person who is to receive payment the time of payment is extended, the omission to pay within the time specified must be a 'default' within the meaning of the word in the bill of sale; and it would be monstrous to hold that it was a default for the mortgagee might always lead the mortgagor into a snare by consenting that the time for payment should be extended, and then coming down upon him by insisting that there had been a default."

Finally the Court's attention is directed to the fact that the default which is made the basis of the suit occurred subsequent to the agreement alleged in the answer relative to future installments, the agreement being made in November, 1928, and the default occurring on March 1st, 1929.

### POINT TWO.

**The Court erroneously treated the motion leading to the making of the order complained of as the trial of an issue on motion instead of an inquiry as to whether there is in fact an issue to be tried.**

On this point, the Court in *Lettieri v. Mistretta*, *ubi supra*, says:

"As stated by Vice Chancellor Leaming in *South Camden Trust Co. v. Stiefel* (N. J. Ch.), 137 A. 91, the procedure followed on motions to strike an alleged sham pleading is regarded as merely an inquiry as to whether there is an issue of fact to be tried; a distinction being recognized between the determination whether there is a real issue to be tried and the trial of an issue upon a motion; whether what in form is an issue is a real issue. It is also stated in the case cited, that since a pleading which bases a defense on matters which are untrue is a mere sham and an obstruction of justice in a pending suit, in this state it has been thought to be within the powers of the court to test the truth of the defensive matter by affidavits filed in support of a motion to strike the pleading from the records."

The affidavit of Harry Buesser amply supports his answer. It likewise denies that complainant

sent a bill for interest due February 1st and which is addressed on the back of the envelope. The allegations in respect to the telephoning of his wife, are likewise refuted and are indeed immaterial. There is no inference arising out of the mere fact of the marriage relationship, as to agency, and none is even averred, much less proved. It is true that the complainant denies that he agreed to waive strict performance by the defendant as to future payments, not then in default, or call at residence of defendant for future installments of interest, but this simply creates an issue of fact which must be tried.

It is clear that the Vice Chancellor erroneously treated this matter as the trial of an issue upon a motion.

It is inconceivable, I respectfully submit, that the substantial rights of the defendant should be litigated in this summary way, in a proceeding (if the Court will accept my statement) lasting less than five minutes. This seems to be especially true, because of the nature of the case itself, the suit being to enforce a forfeiture, never favored in equity.

### **POINT THREE.**

**The allegations of the answer to the Bill of Complaint filed in this cause are not shown to be palpably or inherently false or so palpably false and insufficient as to enable the court to conclude that this defendant was seeking delay or trifling with the process of law.**

Illustrative of what must be shown in order to justify the striking out of pleading a sham are the following quotations:

“To warrant the court in striking out a plea as false or sham, it must be so palpably false or insufficient in law as to enable the court to conclude that the defendant is seeking delay or trifling with the process of the law. *Fidelity Insurance Co. v. Wilkes-Barre Railroad Co.*, 120 Atl. Rep. 734.”

*Muhlenbeck v. Town of West Hoboken*, 2 N. J. Misc. 7, 8.

“At common law a plea was considered sham when it was palpably or inherently false, and from the plain or conceded facts in the case must have been known to the party interposing it to be false. Such plea, says Chitty, ‘Has always been considered a very culpable abuse of justice, and has often been censured and set aside with costs’. 1 Chit. Pl. 542; 1 Tidd Pr. 611; 2 Bow 680.”

*Fidelity &c., Co. v. Wilkes-Barre*, 98 N. J. L. 507, 510 (C. of E.).

Now, applying these principles, the examination of the affidavit of Harry Buesser shows that it is not palpably and inherently false, but on the contrary, is highly plausible, and indeed true. On the contrary, the affidavit of the complainant seemed to have been framed to meet the allegations of the defendant’s answer.

### CONCLUSION.

**The order of the Court of Chancery should be reversed.**

Respectfully submitted,

NICHOLAS S. SCHLOEDER,  
Solicitor and Of Counsel for Defendant-  
Appellant.

The court in striking out a  
part of the will, it must be ascertained  
whether the law as to such a case  
is such that the defendant is not  
bound to pay the residue of the  
will, as in the case of the  
will of the late Mrs. John  
D. Smith.

It is held in the case of  
the will of the late Mrs. John  
D. Smith, that the court  
is not bound to pay the  
residue of the will, when  
it has struck out a part  
of the will, unless it be  
shown that the testator  
intended to pay the  
residue of the will, in  
the event of the striking  
out of a part of the will.

In the case of the will of  
the late Mrs. John D. Smith,  
the court held that the  
residue of the will was  
not to be paid, because  
the testator had not  
intended to pay the  
residue of the will, in  
the event of the striking  
out of a part of the will.  
The court held that the  
testator had intended  
to pay the residue of the  
will, in the event of the  
striking out of a part of  
the will, only if it be  
shown that the testator  
intended to pay the  
residue of the will, in  
the event of the striking  
out of a part of the will.

It is held in the case of  
the will of the late Mrs. John  
D. Smith, that the court  
is not bound to pay the  
residue of the will, when  
it has struck out a part  
of the will, unless it be  
shown that the testator  
intended to pay the  
residue of the will, in  
the event of the striking  
out of a part of the will.

In the case of the will of  
the late Mrs. John D. Smith,  
the court held that the  
residue of the will was  
not to be paid, because  
the testator had not  
intended to pay the  
residue of the will, in  
the event of the striking  
out of a part of the will.  
The court held that the  
testator had intended  
to pay the residue of the  
will, in the event of the  
striking out of a part of  
the will, only if it be  
shown that the testator  
intended to pay the  
residue of the will, in  
the event of the striking  
out of a part of the will.

It is held in the case of  
the will of the late Mrs. John  
D. Smith, that the court  
is not bound to pay the  
residue of the will, when  
it has struck out a part  
of the will, unless it be  
shown that the testator  
intended to pay the  
residue of the will, in  
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