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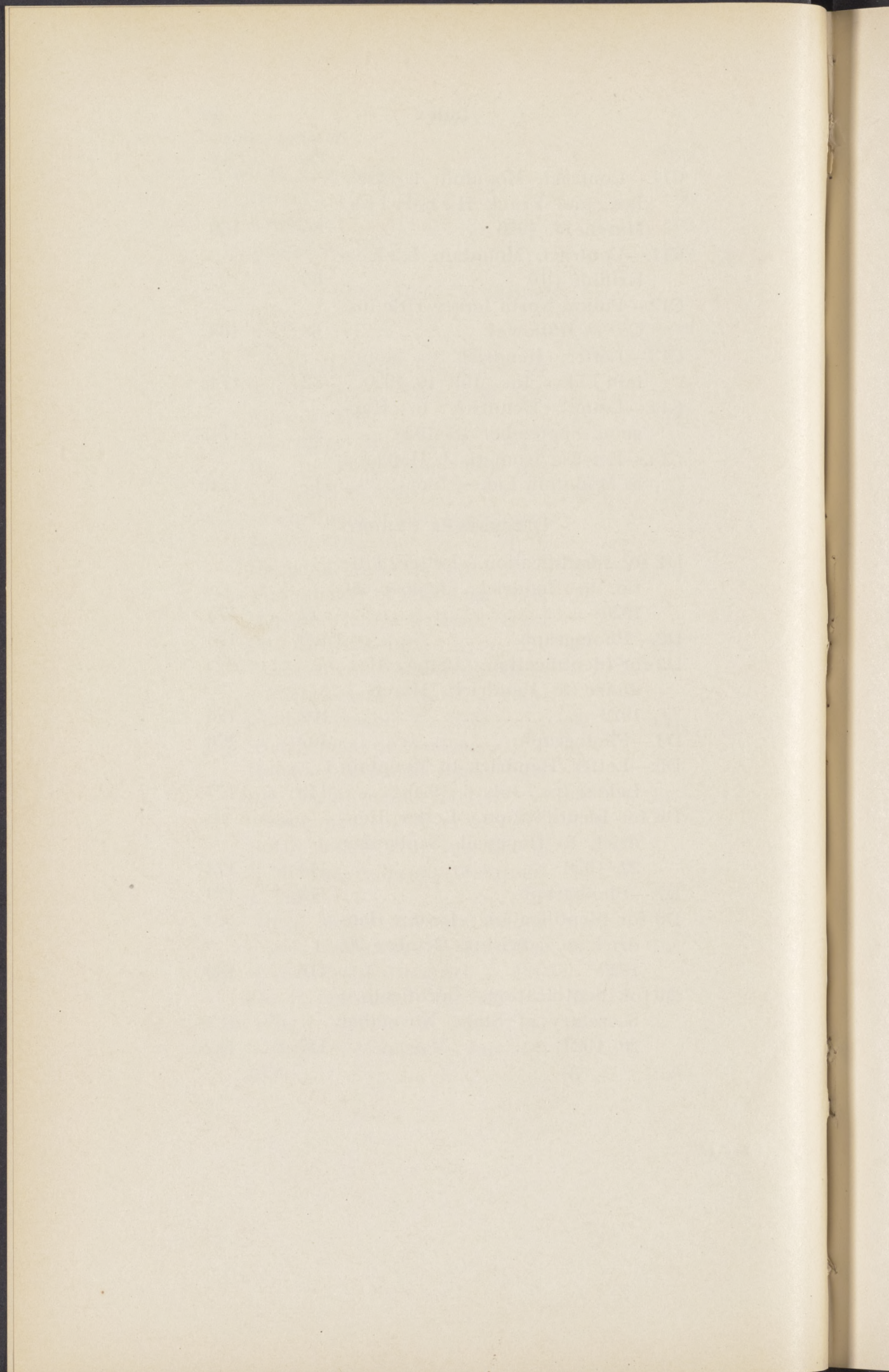
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## In Chancery of New Jersey

J. MORGAN HOLLOWAY, Complainant,  v.  FRANK HENDRICK and KATHERINE EDSON MUMFORD HENDRICK, Defendants.	}	On Bill to Foreclose.	10
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### Amended Notice of Appeal.

The defendants, Frank Hendrick and Katharine Edson Mumford, hereby appeal from the final decree made in the above entitled cause on February 9th, 1925, and from the whole and every part thereof, and from the order denying an application for a new trial made and filed February 16th, 1925, to the Court of Errors and Appeals in the Last Resort in All Causes. 20

Dated, February 11th, 1925.

EUGENE M. GREGORY,  
Solicitor for and of Counsel  
with Defendants. 30

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

EUGENE M. GREGORY,  
Of Counsel with Defendants.

**Petition of Defendants.**

NEW JERSEY COURT OF ERRORS &amp; APPEALS.

Between

J. MORGAN HOLLOWAY,  
Complainant-Appellee,  
and

FRANK HENDRICK and KATHARINE  
EDSON MUMFORD HENDRICK,  
Defendants-Appellants.

10

To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of Frank Hendrick and Katharine Edson Mumford Hendrick, the appellants in the above entitled cause, respectfully shows that:

20

1. Petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date February 9th, 1925, in a certain cause in said Court of Chancery wherein the said J. Morgan Holloway was complainant and the said Frank Hendrick and Katharine Edson Mumford Hendrick were defendants, in this respect, to wit, that the said decree adjudges that all the mortgaged premises, more particularly described in the Bill of Complaint, and covered by the mortgage now held by J. Morgan Holloway, Complainant, against the property of Frank Hendrick, and Katharine Edson Mumford Hendrick, Defendants, dated the 29th day of April, 1920, be sold to raise and satisfy the sum of Ten Thousand (\$10,000) Dollars with interest from

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*Petition of Defendants.*

April 29th, 1923, to the date of the decree, with complainant's costs and search fees, and that the sum of Eleven Thousand and Seventy (\$11,070) Dollars is due to the complainant on said mortgage, and orders the sale of the said mortgaged premises and the payment of the surplus into Court, and adjudges that the defendants Frank Hendrick and Katharine Edson Mumford Hendrick stand absolutely debarred and foreclosed of and from all equity of redemption, of, in and to the said mortgaged premises when sold by virtue of the decree, and adjudges that the sum of \$750 be allowed and paid to the Solicitors of the Complainant as counsel fees and that the same be included in the tax bill of costs. 10

And petitioners appeal from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that 20

1. That the bill of complaint upon which said decree is made fails to set out an equitable cause of action.

2. That there was a defect of parties defendant.

3. That the complainant had an adequate remedy at law. 30

4. That the Court was without jurisdiction to render the said decree because the bill of complaint and the evidence failed to make out an equitable cause of action, in that it appeared that the mortgagor, after giving a mortgage, sold part of the mortgaged premises to one of the defendants for a valuable consideration, and that the residue had not been sold nor was insufficient to satisfy the mortgage, but had, on the contrary, 40

*Petition of Defendants.*

been released, by a holder of the mortgage with notice of the purchase.

10 5. That the Court had no jurisdiction to make said decree on the ground that by doing so it deprived the defendants of their right to a trial by jury.

10 6. That all the matter admitted as evidence for the Complainant by the Court was inadmissible both from incompetency and from lack of proper proof and competent and admissible matter offered in evidence by the Defendants sufficient to disprove the case of the Complainant as alleged in the Complaint and admitted as proof by the Court was excluded by the Court and the decree constitutes depriving the defendants of their property without due process of law.

20 7. That there was no evidence before the Court upon which the Court could predicate a finding that a bond recited in the Complaint was ever executed or delivered or that any consideration therefor was ever paid.

30 8. That there was no evidence before the Court upon which the Court could predicate a finding that the mortgage recited in the complaint was ever executed or delivered or that any consideration therefor was ever paid.

9. That there was no evidence before the Court upon which the Court could predicate a finding that a deed dated July 1st, 1920 conveying three lots to the defendant Frank Hendrick was ever executed.

40 10. That there was no evidence before the Court upon which the Court could predicate a

*Petition of Defendants.*

finding that a release of mortgage as to any lots was ever executed or any consideration therefor paid.

11. That there was no evidence before the Court upon which the Court could predicate a finding that H. J. Hapgood executed an assignment of a mortgage on the premises or that any consideration therefor was paid or that such a mortgage was assigned to the complainant.

10

12. That there was no evidence before the Court upon which the Court could predicate a finding that the complainant is a stranger to all the transactions or any of them antecedent to the date of the purported assignment to him of a mortgage.

13. That there was no evidence before the Court upon which the Court could predicate a finding that the complainant is bound only by such notice as the record gives.

20

14. That there was no evidence before the Court upon which the Court could predicate a finding that the defendants had actual notice of the mortgage set up in the bill of complaint.

15. That there was no evidence before the Court upon which the Court could predicate a finding that there was a deed from Mountain Lakes, Inc. to Hendrick.

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16. That there was no evidence before the Court that there was any release of mortgage between a releasor and mortgagor or otherwise.

17. That there is no law which justifies the consideration of the original of an acknowledged instrument as evidence of the making, execution

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*Petition of Defendants.*

or delivery thereof without other proof than of the acknowledgment, unless duly certified under the seal of an officer who was in fact duly qualified to take such acknowledgment to have been duly acknowledged before him.

10        18. That there was evidence before the Court which obliged the Court to find that the purporting Foreign Commissioner of Deeds of the mortgage dated April 29th, 1920, of the assignment of the same date to Hackensack Trust Company, of the deed dated July 1st, 1920, of the release, and of the assignments from H. J. Hapgood to complainant's grantor Mountain Lakes, Inc. was not qualified to take acknowledgments of such instruments or to certify thereto or to affix an official seal to such certificates.

20        19. That there is no law which justifies a finding that an instrument was made, executed, and delivered upon the evidence of a reference to an instrument of a similar character in another instrument.

30        20. That there was no evidence before the Court upon which the Court could predicate a finding that the mortgage set up in the bill of complaint and attempted to be proved is recited in the deeds to the defendants.

21. That there is no law which justifies a finding that actual notice was had of an instrument not proved to have been made, executed, or delivered from a reference in another instrument to an instrument of similar character.

40        22. That there is no law which justifies a finding from a recital that a deed is taken subject to a mortgage that the grantee knows of or admits

*Petition of Defendants.*

the existence or validity of the mortgage or knows its terms and conditions or agrees thereto or agrees or assumes to pay it or that the property deeded to him will be responsible for the payment and satisfaction thereof.

23. That there was no evidence before the Court upon which the Court could predicate of finding that the defendants or either of them accepted title subject to the payment out of the property deeded to them of the principal sum of the mortgage set out in the complaint or any part thereof. 10

24. That there was no evidence before the Court upon which the Court could predicate a finding that the defendants or either of them or Mountain Lakes, Inc. regarded the deed from Mountain Lakes, Inc. to Hendrick as good between the grantor and grantee, without any acknowledgment or otherwise, as a conveyance of title from the grantor to the grantee. 20

25. That there was no evidence before the Court upon which the Court could predicate a finding that the defendants or either of them knew that the deed from Mountain Lakes, Inc. to Hendrick was not duly acknowledged. 30

26. That there is no law which would prevent or would have prevented the grantor of a defectively acknowledged or improperly recorded deed from giving to a subsequent grantee by a duly acknowledged and properly recorded deed superior title to that conveyed by the deed not duly acknowledged but recorded improperly at an earlier date.

27. That there is no law which justified a find- 40

*Petition of Defendants.*

ing from the absence of evidence that anyone has questioned a grantee's title that the grantee has received good title as against third parties or the grantor.

10 28. That there is no law which justifies the finding from the absence of question by anyone except certain third parties prejudiced thereby of the effect as a valid release between the mortgagor and a releasor of a release of mortgage without acknowledgment that the release was valid as an instrument in derogation of the rights of those or other third parties.

20 29. That there is no law which justifies a finding that by a pleading of a deed and a release of mortgage in his bill of complaint the complainant admits that at any time he had notice of them.

30 30. That there is no law which justifies a finding from a pleading by a complainant of a deed and a release of a mortgage that they were either made, executed, or delivered.

31. That there is no law which justifies a finding from an admission by the complainant that he had notice of a deed and a release of mortgage that either was valid as against the defendants.

30 32. That there is no law which justifies a finding that any reason for a demand that the originals of instruments purporting to be recorded is necessary to make the originals the only evidence.

33. That there was no evidence before the Court upon which the Court could predicate a finding that it is not apparent from anything in the case why the record of the instruments mentioned and the various assignments through which the

*Petition of Defendants.*

mortgage came into complainant's ownership would not have been sufficient.

34. That there was no evidence before the Court upon which the Court could predicate a finding that the complainant did produce all the original instruments except the release.

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35. That there is no law which justifies a finding that a release of mortgage was not in the complainant's possession at the time of the trial from a presumption based upon the gratuitous supposition that it was executed and delivered to the mortgagor.

36. That there was no evidence before the Court upon which the Court could predicate a finding that all the instruments purporting to be originals of the instruments mentioned in the bill of complaint were not at the time of the trial in the complainant's possession.

20

37. That there was no evidence before the Court upon which the Court could predicate a finding that a release of mortgage was executed and delivered to Mountain Lakes, Inc.

38. That there was no evidence before the Court upon which the Court could predicate a finding that the release was proved by the admission in evidence of a certified copy of the record.

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39. That there was no evidence before the Court upon which the Court could base the finding that the defendants made no objection to the admission in evidence of a certified copy of the record.

40. That there is no law which justifies a finding that the admission in evidence of a certified

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*Petition of Defendants.*

copy would be other than detrimental to a defense set up by the defendants where the production of the originals has been duly demanded and the defense is that the instrument was not duly acknowledged and never made, executed, or delivered.

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41. That there was no evidence before the Court upon which the Court could predicate a finding that the mortgage expressly stated that the mortgage is to cover a house on the lots contracted to be purchased by the defendant, Frank Hendrick and sought to be foreclosed.

20

42. That there is no law which justifies a finding that the holder of a mortgage after release of that part of the mortgaged land retained by the owner may foreclose the original mortgage against the remaining land and a house upon it not in existence at the date of the original mortgage.

30

43. That there is no law which justifies a finding that a mortgage reciting that the mortgaged lands contain a house may be foreclosed against owners of part of the land and a house upon that part by virtue of that recital when it is established that the recital was false at the date of the mortgage.

40

44. That there is no law which justifies a finding that equities do not arise, in favor of the owner of part of mortgaged lands and a house on that part, against an assignee, of a mortgage falsely reciting that the lands contain a house, placed on the lands, after the date of a contract by the mortgagor to sell the part of the lands and build a house upon that part with certain specifications, before any substantial performance under the con-

*Petition of Defendants.*

tract, from the record of the contract of purchase and sale and construction prior to the assignment of the mortgage, when the contract discloses that the recital in the mortgage that the land contained the house was false and disclosed in connection with the record of the deed to the owner filed after the filing of the contract and before the assignment of the mortgage that the contract had not been performed, and the assignment purported to be of a mortgage, upon the part of the lands and the house on it, created by the release of the rest of the lands by which the mortgage subject to which the deed to the owner was taken was to be satisfied. 10

45. That there was no evidence before the Court upon which the Court could predicate the finding that the defendants contended that their rights were that a mortgage of \$10,000 should be either placed on, satisfied out of, or remain an obligation on the three lots and the house as it was deeded to the defendant Frank Hendrick. 20

46. That there was no evidence before the Court upon which the Court could predicate the finding that the contract provided that a mortgage for \$10,000 was to be a lien on the property either prior to the performance of the contract by the seller or prior to the conveyance to the purchaser. 30

47. That there was no evidence before the Court upon which the Court could predicate the finding that Hapgood, the owner of the \$15,000 mortgage, at the time he executed the release to Mountain Lakes, Inc., had a right to have the mortgage released as to the other property.

48. That there was no evidence before the 40

*Petition of Defendants.*

10 Court upon which the Court could predicate the finding that the defendant Frank Hendrick demanded of the owner of the mortgage of \$15,000 that by the execution and delivery of a release he make the mortgage a lien only on three lots or that the mortgage was made a lien on the three lots alone in compliance with such demand.

49. That there was no evidence upon which the Court could predicate a finding that the defendants were by the said release placed in the position with respect to the principal amount of the mortgage in which they demanded they should be placed or consented to or signified their consent to the mortgage of \$10,000 by payment of interest or otherwise.

20 50. That there was no evidence before the Court upon which the Court could predicate the finding that the defendant Katharine Edson Mumford Hendrick ever paid any interest or had any knowledge of the payment of interest or that the defendant Frank Hendrick acted as her agent.

30 51. That there was no evidence before the Court upon which the Court could predicate a finding that the defendant Frank Hendrick had title to any part of the mortgaged premises after July 12th, 1920.

52. That there is no law which justifies a finding that a release by which a primary obligation on one man's property is made in whole or in part an obligation upon another's property does not affect the latter's rights injuriously.

40 53. That there was no evidence before the Court upon which the Court could predicate the finding that a settlement of the purchase price

*Petition of Defendants.*

was had under the contract of purchase and sale and construction in which the purchaser was allowed \$10,000 on account of the mortgage lien.

54. That there was no evidence before the Court upon which the Court could predicate the finding that the purchaser had any choice or opportunity for choice of terms of taking title or ever was informed of the terms or conditions of any mortgage upon the property contracted to be sold to and constructed for him or ever waived the due and full performance of the contract as the condition precedent set up in the contract of the obligation of any mortgage on the property sold. 10

55. That there was no evidence before the Court upon which the Court could predicate a finding that the contract of purchase and sale and construction had been substantially performed. 20

56. That there was no evidence before the Court upon which the Court could predicate a finding that any consideration existed at any time for the payment by the purchaser of any part of the sum of \$10,000 over and above the amount paid.

57. That there was no evidence before the Court upon which the Court could predicate the finding that the defendants or either of them ever agreed to pay more than the sum paid by the purchaser for the property as it existed. 30

58. That there was no evidence before the Court upon which the Court could predicate the finding that the defendants or either of them retained from the consideration which moved from them on their purchase a sufficient sum to pay the principal of the mortgage or any part thereof. 40

*Petition of Defendants.*

59. That there was no evidence before the Court upon which the Court could predicate a finding that the evidence does not support the claim that the defendants, because of the failure to construct a house according to the contract, owe nothing on the mortgage.

10

60. That there was no evidence before the Court upon which the Court could predicate the finding that under his contract the defendant Frank Hendrick was to take title subject to a mortgage which Mountain Lakes, Inc., was to secure on the property before conveying to Hendrick which mortgage was executed by Mountain Lakes, Inc., to North Jersey Title Insurance Company before the construction of the house was begun.

20

61. That there was no evidence before the Court upon which the Court could predicate the finding that the mortgage contracted to be given was not to be a purchase money in part payment for complete performance of the contract of purchase and sale and construction.

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62. At the time of the drawing of this petition, appellants have been unable to secure a full transcript of the testimony by reason of the fact that appellants were applying for a rehearing on the ground of newly discovered evidence. In view of this situation, appellants respectfully reserve the right to add such other grounds of appeal as might be disclosed by the record of the case and to make such changes in the foregoing grounds of appeal as may be shown to be necessary by the transcript of the testimony.

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63. The decree of the Court adjudging that eleven thousand and seventy (\$11,070.00) dollars

*Petition of Defendants.*

is due to the complainant on a mortgage dated the 29th day of April, 1920, and decreeing that all the property mortgaged thereby more particularly described in the bill of complaint and covered by the mortgage now held by the complainant dated the 29th day of April 1920, be sold to raise the said sum and that the defendants stand debarred and foreclosed of and from all equity of redemption, of, in and to the mortgaged premises is contrary to law and to the evidence and contrary to the course of equity of New Jersey in that the mortgage thus decreed to be foreclosed is not the mortgage of the defendants or either of them and appears in the complaint not to have been signed or assumed by either of the defendants and not to be security for a bond signed or assumed or agreed to be paid by the defendants or either of them but the bond of the complainant's intermediate grantor through its president guaranteed by the complainant's immediate grantor secured by a mortgage theretofore already cancelled through merger in the hands of the said president and in that this suit not being one to decree a mortgage but to foreclose one already existing and the undisputed evidence establishing the equitable right of the defendants to the benefit of a foreclosure of lands not of the defendants to satisfy the mortgage of April 29th, 1920.

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64. That the Court abandoned and ousted itself of jurisdiction by excluding evidence upon the question of the execution of the instruments set up in the bill of complaint and proceeding without evidence as to their execution by excluding evidence upon the question of performance by Mountain Lakes, Inc., of its contract with the de-

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*Petition of Defendants.*

10 defendant Frank Hendrick, by excluding evidence of privity of North Jersey Title Insurance Company, complainant's grantor, with Mountain Lakes, Inc., in a fraud upon the defendants, by making assumptions and indulging presumptions of fact without evidence, and by other rulings removing from the issue the elements of proof of a mortgage, consideration therefor, and the equities between the parties.

20 65. That the complainant's standing in equity was lost by the failure and refusal of his grantor and chief witness to respond to the *subpoena duces tecum* calling for the production of papers to be used by the defendants for the information of the Court in cross examination and in evidence and by the objections of his counsel to the admission of evidence by the defendants upon the issues, and to cross examination of complainant's witnesses.

30 66. That the Court was without jurisdiction to try the case and to make a decree in that Article X, Section 53, of an act respecting the Court of Chancery, Revision of 1902, empowering the Court of Chancery to decree the sale of mortgaged premises and Article XII, Sections 95 and 96 of an act respecting the Court of Chancery, Revision of 1902, are invalid and in violation of Article I, Part 7, of the Constitution of the State of New Jersey, guaranteeing the right of trial by jury, and in violation of Article IV, Section VIII, Part 3, of the Constitution of the State of New Jersey, guaranteeing against the passage of any law impairing the obligation of contracts or depriving a party of any remedy for enforcing a contract which existed when the contract was

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*Answer to Petition of Appeal.*

made, and in violation of the Fourteenth Amendment to the Constitution of the United States, guaranteeing against the passage of any law abridging the privileges and immunities of citizens of the United States, the depriving any person of life, liberty, or property, without due process of law, and the denial by a State to any person within its jurisdiction of the equal protection of the laws.

10

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

EUGENE M. GREGORY,  
Solicitor for and of Counsel with Appellant.

20

**Answer to Petition of Appeal.**

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

Between

J. MORGAN HOLLOWAY,  
Complainant-Respondent,

and

FRANK HENDRICK and KATHERINE  
EDSON MUMFORD HENDRICK,  
Defendants-Appellants.

On Appeal  
From the  
Court of  
Chancery.

30

The answer of J. Morgan Holloway, the above-named respondent, to the petition of appeal of Frank Hendrick and Katherine Edson Mumford Hendrick, the above-named appellants.

40

*Bill of Complaint.*

10 This respondent, not admitting the truth of all or any of the matters in the said petition contained, for answer thereto nevertheless admits that a decree was on February 9th, 1925, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition named and as therein set forth; but as to the substance and form of said decree this respondent begs leave to refer thereto when the same shall be produced.

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

GEORGE R. BEACH,  
Solicitor for Respondent.

20

THOMAS G. HAIGHT,  
Of Counsel with Respondent.

**Bill of Complaint.**

(Filed January 14, 1924.)

IN CHANCERY OF NEW JERSEY.

30 TO THE HONORABLE EDWIN ROBERT  
WALKER CHANCELLOR OF THE STATE OF  
NEW JERSEY:

The Complainant, J. Morgan Holloway, of the City of Jersey City, County of Hudson, and State of New Jersey, respectfully shows:

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FIRST.—That on or about the twenty-ninth day of April, in the year of our Lord One Thousand Nine Hundred and Twenty, Mountain Lakes, Incorporated, a corporation of the State of New Jersey, being indebted to the North Jersey Title In-

*Bill of Complaint.*

urance Company, a Corporation of the State of New Jersey, made, executed and delivered to it a bond of that date, in the penal sum of Thirty Thousand (\$30,000.00) Dollars, to secure the payment of the sum of Fifteen Thousand (\$15,000.00) Dollars, said latter sum to be payable on the twenty-ninth day of April, 1923, together with interest at the rate of six per cent. per annum, to be paid semi-annually.

10

SECOND.—To secure payment of the aforesaid bond the said Mountain Lakes, Incorporated, aforesaid, made, executed and delivered to the North Jersey Title Insurance Company, aforesaid, a mortgage of even date with said bond, thereby conveying to it the land in fee hereinafter described, on the express condition that such conveyance shall be void if payment shall be made in accordance with the terms of said bond and mortgage, which said mortgage, having been first duly acknowledged and certificate of acknowledgment duly endorsed thereon, was recorded in the Clerk's Office of the County of Morris on the sixth day of May, 1920, in Book R 8 of Mortgages for said County, at Page 47, &c.

20

THIRD.—Said mortgaged premises are described as follows:

30

“ALL those certain lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the Township of Hanover, in the County of Morris and State of New Jersey, and known and described as lots Nos. 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 46, Block T-1, as shown on and in connection with a map of the property of Mountain Lakes, Incorporated,

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*Bill of Complaint.*

C. O. Martindale, engineer, filed in the office of the Clerk of the County of Morris July 15th, 1916; being more particularly bounded and described as follows:

10 "BEGINNING at a stone monument set on the Northerly side of Lookout Road at the irregular intersection with Tower Hill Road; thence (1) South 73' 23" West along the Northerly side of Lookout Road, sixty and sixty-four hundredths (60.64) feet to a stone monument; thence (2) still along the Northerly side of Lookout Road, South 71' 19" West two hundred and seventy-eight and seventy-five hundredths (278.75) feet to a stone monument set on the dividing line between lots No. 32 and No. 34, Block T-1; thence (3) along said dividing line and an extension thereof, North 15' 51" West three hundred and seventy and twenty-three hundredths (370.23) feet to a stone monument set on the Northerly side of a new road known as Mountain Way; thence (4) along the Southerly side of Mountain Way, North 81' 18" East twenty-four and six tenths (24.6) feet to a stone monument; thence (5) still along the Southerly side of said Mountain Way, South 87' 49" East one hundred and eighty-eight and seventy-four hundredths (188.74) feet to a stone monument; thence (6) along the Westerly side of Tower Hill Road, South 48' 42" East one hundred and ninety-seven and eighty-nine hundredths (197.89) feet to a stone monument; thence (7) still along the Westerly side of Tower Hill Road, South 34' 3" East one hundred and nineteen and seventeen hun-

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*Bill of Complaint.*

dredths (119.17) feet to a stone monument set at the intersection of Tower Hill Road and Lookout Road; thence (8) along said intersection, south 19' 40" West seventeen and seventy-four hundredths (17.74) feet to the point or place of Beginning.

"Containing house known as House H. H."

10

FOURTH.—On or about the twenty-ninth day of April, 1920, the North Jersey Title Insurance Company, aforesaid, assigned by Deed of Assignment to H. J. Hapgood the mortgage in question, said assignment being duly recorded in the Clerk's Office of the County of Morris on May 3rd, 1920, in Book 39 of Assignments of Mortgages for said County at Page 141 &c.

FIFTH.—On or about the twenty-ninth day of April, 1921, H. J. Hapgood, aforesaid, assigned by Deed of Assignment to the Hackensack Trust Company, a Corporation of the State of New Jersey the mortgage in question, said assignment being duly recorded in the Clerk's Office of the County of Morris on May 4th, 1920, in Book 39 of Assignments of Mortgages for said County, at Page 155, &c.

20

SIXTH.—Mountain Lakes, Incorporated, aforesaid, conveyed by Warranty Deed dated July 1st, 1920, to one, Frank Hendrick, the following described property:

30

"ALL those certain lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the Township of Hanover, in the County of Morris and State of New Jersey, known as Lots No. 34, 36, 38 Block T-1, containing House No. H. H., as shown on a certain map

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*Bill of Complaint.*

entitled, 'Map of Mountain Lakes,' by C. O. Martindale, engineer, dated July 10, 1916, filed in the office of the Clerk of the County of Morris July 15, 1916, being more particularly bounded and described as follows:

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"BEGINNING at a stone monument set on the Northerly side of Lookout Road and distant South 71' 19" West one hundred and twenty-eight and fifty-seven hundredths (128.57) feet from a stone set on the Northerly side of Lookout Road at the first angle Westerly from Tower Hill Road; thence (1) South 15' 51" East one hundred and eighty (180) feet to a stone monument; thence (2) South 71' 19" West one hundred and fifty and eighteen hundredths (150.18) feet to a stone monument; thence (3) South 15' 51" East one hundred and eighty (180) feet to a stone monument set on the Northerly side of Lookout Road; thence (4) along the Northerly side of Lookout Road, North 71' 19" East one hundred and fifty and eighteen hundredths (150.18) feet to the point or place of Beginning," said deed reciting that the property was sold subject to the aforesaid mortgage, and which said deed was duly recorded in the Clerk's Office of the County of Morris on the ninth day of July, 1920, in Book G-26 of Deeds for said County, at Page 138.

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SEVENTH.—Frank Hendrick and Katharine Edson Munford Hendrick, his wife, by Warranty Deed dated July 14th, 1920, conveyed to Lillian E. Eason, the following described property:

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“ALL those certain lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being at Mountain Lakes, in the County of Morris and State of New Jersey, and more particularly described as lots No. 36, 38, and 40 in Block T-1, containing house known as House No. H. H., as shown on a certain map entitled ‘Map of Mountain Lakes,’ by C. O. Martindale, engineer, dated July 10, 1916, and filed in the office of the Clerk of Morris County, July 15, 1916, said deed reciting the same was conveyed subject to a mortgage of \$15,000.00, being the mortgage aforesaid.

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Said deed was duly recorded on the 15th day of July, 1920, in Book E-26 of Deeds for the County of Morris, at Page 195 &c.”

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EIGHTH.—Lillian E. Eason, by Warranty Deed dated July 14th, 1920, conveyed to Katharine Edson Mumford Hendrick wife of Frank Hendrick, the following described property:

“ALL those certain lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being at Mountain Lakes, in the County of Morris and State of New Jersey, and more particularly described as lots 36, 28 and 40, in Block T-1, containing house known as House No. H. H., as shown on a certain map entitled ‘Map of Mountain Lakes,’ by C. O. Martindale, engineer, dated July 10, 1916, and filed in the office of the Clerk of Morris County July 15, 1916, The said deed reciting that same was conveyed subject to a mortgage of \$15,000.00, being the mortgage aforesaid.

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Said deed was duly recorded on the 15th day of July, 1920, in Book E-26 of Deeds for the County of Morris, at Page 198."

10 NINTH.—That the Hackensack Trust Company, aforesaid, by Deed of Assignment dated the 22nd day of November, 1920, assigned the aforesaid mortgage to H. J. Hapgood, which said Deed of Assignment was recorded on the 24th day of November, 1920, in Book 40 of Assignments for the County of Morris, at Page 108.

20 TENTH.—On or about the 22nd day of November, 1920, the said H. J. Hapgood, upon the payment to him of the sum of \$5,000.00 by Mountain Lakes, Incorporated, aforesaid, by instrument of release of mortgage, released the following property from the lien of said mortgage;

30 "ALL those lots, tracts or parcels of land and premises situate, lying and being in the Township of Hanover, in the County of Morris and State of New Jersey, and known and described as Lots Nos. 33, 35, 37, 39, 40, 41, 42, 44, 46 Block T-1, as shown and in connection with the map of the property of Mountain Lakes, Incorporated, C. O. Martindale, Engineer, filed in the Office of the Clerk of the County of Morris, July 15th, 1916, being more particularly bounded and described as follows:

40 "BEGINNING at a stone monument set on the northerly side of Lookout Road at the irregular intersection with Tower Hill Road; thence (1) South 73' 23" west along the northerly side of Lookout Road, sixty and sixty-four hundredths (60.64) feet to a stone

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monument; thence (2) still along the Northernly side of Lookout Road, South 71' 19" West one hundred and twenty-eight and fifty-seven hundredths (128.57) feet to a stone monument set on the dividing line between Lots No. 38 and 40, Block T-1; thence (3) along said dividing line and the lands of Hendrick, North 15' 51" West one hundred and eighty (180) feet to a stone monument; thence (4) along the lands of Hendrick, South 71' 19" West one hundred and fifty and eighteen hundredths (150.18) feet to a stone monument set on the dividing line between lots No. 32 and 34 Block T-1; thence (5) along the continuation of said dividing line, North 15' 51" West one hundred and ninety and twenty-three hundredths (190.23) feet to a stone monument set on the Northernly side of a new road known as Mountain Way; thence (6) along the Southerly side of Mountain Way, North 81' 18" East twenty four and six tenths (24.6) feet to a stone monument; thence (7) still along the Southerly side of said Mountain Way, South 87' 49" East one hundred and eighty-eight and seventy-four hundredths (188.74) feet to a stone monument; thence (8) along the Westerly side of Tower Hill Road, South 48' 42" East one hundred and ninety-seven and eighty-nine hundredths (197.89) feet to a stone monument; thence (9) still along the Westerly side of Tower Hill Road, South 33' 3" East one hundred and nineteen and seventeen hundredths (119.17) feet to a stone monument set at the intersection of Tower Hill Road and Lookout Road; thence (10)

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10 along said intersection South nineteen degrees 40' East seventeen and seventy-four hundredths (17.74) feet to the point or place of Beginning, leaving lots No. 34, 36, and 38, Block T-1 conveyed to Frank Hendrick, covered by the above mortgage, which has been reduced to \$10,000.00, and interest from October 29, 1920." Said release of mortgage was duly recorded on the twenty-fourth day of November, 1920, in the Clerk's office in the County of Morris, in Book 22 of Releases, for said County, at page 76.

20 ELEVENTH.—On or about the twenty-third day of November, 1920, said H. J. Hapgood assigned to the North Jersey Title Insurance Company, aforesaid, the mortgage last above stated, by Deed of Assignment, with a covenant thereto that the amount due on said mortgage is the sum of \$10,000.00. Said Deed of Assignment, was duly recorded in the Clerk's Office in the County of Morris on November 24th, 1920, in Book 40 of Assignments of Mortgages for said County, at Page 110.

30 TWELFTH.—On or about the 4th day of February, 1921, by Deed of Assignment, said North Jersey Title Insurance Company, as aforesaid, assigned to J. Morgan Holloway complainant herein, the said mortgage aforesaid, there being a covenant in said assignment that the principal sum due on said mortgage has been reduced to the sum of \$10,000.00. Said Assignment was originally recorded in the Clerk's Office of the County of Morris on the 4th day of February, 1921, in Book 40 of Assignments of Mortgages, for said County, at Page 151, but owing to an error in

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the name which was corrected, was re-recorded in the Clerk's Office of the County of Morris on the 15th day of March, 1921, in Book 40 of Assignments of Mortgages, for said County, at Page 483.

THIRTEENTH.—That Complainant has received no part of the principal sum of \$10,000.00. due on said mortgage, and the interest on said mortgage is due and unpaid since the 29th day of April, 1923.

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FOURTEENTH.—That Complainant is without adequate remedy in the courts of law therefore prays:

A. That Frank Hendrick and Katharine Edson Mumford Hendrick, who are the defendants in this suit, may answer to this Bill of Complaint and each statement therein contained.

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

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

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D. That a decree 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.

E. That a Receiver be appointed to collect the rents of said premises pending the foreclosure.

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

GEORGE R. BEACH,

Solicitor for and of Counsel with Complainant.

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**Amended Answer to Bill of Complaint in  
Suit to Foreclose a Mortgage.**

IN CHANCERY OF NEW JERSEY.

Between

J. MORGAN HOLLOWAY,  
Complainant,

and

FRANK HENDRICK and KATHARINE  
EDSON MUMFORD HENDRICK,  
Defendants.

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The defendants, Frank Hendrick and Katharine Edson Mumford Hendrick, of the City of New York, State of New York, answering the complaint of J. Morgan Holloway, respectfully show:

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FIRST.—The defendants deny the allegations of the first paragraph of the complaint.

SECOND.—The defendants deny the allegations of the second paragraph of the complaint.

THIRD.—The defendants deny that the premises described in the third paragraph of the complaint were mortgaged by Mountain Lakes, Incorporated, to North Jersey Title Insurance Company, April 29th, 1920, or at any other time.

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The defendants deny that on April 29th, 1920, the premises described in the third paragraph of the complaint contained a house known as H. H. or any house or building whatsoever. The defendants deny that on April 29th, 1920, Mountain Lakes, Incorporated, owned or had the right to convey or mortgage lots Nos. 34, 36, and 38, Block T-1 alleged in the third paragraph of the complaint to be a part of the premises alleged to have been mortgaged. The defendants allege that on the 18th day of March, 1920, Mountain Lakes, Incorporated, sold and conveyed to the defendant Frank Hendrick the said three lots Nos. 34, 36, and 38, Block T-1 and the defendant Frank Hendrick on the said date paid Mountain Lakes, Incorporated, the full purchase price thereof. The defendants allege that on the said April 29th, 1920, North Jersey Title Insurance Company had due notice and actual knowledge of the rights of the defendant Frank Hendrick in the said three lots and that there was no house known as H. H. or any other house or building on April 29th, 1920, on the said premises alleged to have mortgaged to North Jersey Title Insurance Company on that date. The defendants allege that the complainant on July 6th, 1920, had notice of the rights in the said three lots on April 29th, 1920 of the defendant Frank Hendrick and that on April 29th, 1920, there was no house known as H. H. or any other house or building on the said premises alleged to have been mortgaged. The defendants allege that before the date of any alleged assignment of any interest in the premises alleged to have been mortgaged to the complainant, the complainant had actual knowledge of the said facts and the defendants allege that the said alleged mortgage

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10 if made was without any consideration and was  
invalid and if with consideration the mortgage  
was fully paid and the lien thereof, if any, duly  
discharged on December 29th, 1922 by and on be-  
half of Mountain Lakes, Incorporated, to the  
North Jersey Title Insurance Company on behalf  
of the complainant or any alleged holder thereof  
as is set forth herein below in the defendants'  
First Separate Defense.

20 FOURTH.—The defendants deny the allegations  
of the fourth paragraph of the complaint and  
allege that the alleged assignee H. J. Hapgood was  
in fact the said Mountain Lakes, Incorporated,  
and that the said North Jersey Title Insurance  
Company and the said H. J. Hapgood intended the  
said alleged assignment to operate as a cancela-  
tion of the said alleged mortgage and knew at the  
time of making the said alleged assignment that  
Mountain Lakes, Incorporated, had no right to  
convey and did not intend to convey any interest  
in the said three lots or in any house or any part  
of the premises alleged to have been mortgaged.  
The defendants allege that on July 6th, 1920, the  
complainant had notice of those facts and before  
the date of the alleged assignment to the com-  
plainant of any interest in the premises alleged in  
30 the complaint to have been mortgaged, the com-  
plainant had actual knowledge thereof. The de-  
fendants allege the said assignment was without  
any consideration and was invalid.

40 FIFTH.—The defendants deny the allegations  
of the fifth paragraph of the complaint. The de-  
fendants allege that on April 29th, 1920, The  
Hackensack Trust Company, the alleged assignee,  
had actual knowledge of the rights of the defend-

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ant Frank Hendrick. The defendants allege that the said H. J. Hapgood and the Hackensack Trust Company did not intend that the said alleged assignment should convey any interest in the said three lots or in any house or any interest in the premises alleged in the complaint to have been mortgaged. The defendants allege that on July 6th, 1920 the complainant had due notice of those facts and that before the date of the assignment to the complainant of any alleged interest in the premises alleged in the complaint to have been mortgaged, the complainant had actual knowledge of the fact that neither Mountain Lakes, Incorporated, North Jersey Title Insurance Company, H. J. Hapgood, nor Hackensack Trust Company had on April 29th, 1920, any right to convey any interest in the said three lots or in any house on the premises alleged in the complaint to have been mortgaged.

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SIXTH.—The defendants deny that the deed referred to in the sixth paragraph of the complaint recited that the said three lots and the house H. H. were sold subject to the mortgage alleged in the second paragraph of the complaint to have been made, executed, and delivered by Mountain Lakes, Incorporated, to North Jersey Title Insurance Company. The defendants deny that the said property was sold subject to the said alleged mortgage. The defendants allege that the said property was sold by Mountain Lakes, Incorporated to the defendant Frank Hendrick and paid for by the defendant Frank Hendrick before the date of the said alleged mortgage and that the said Mountain Lakes, Incorporated, Herbert J. Hapgood, North Jersey Title Insurance Company, and Hackensack Trust Company knew on April

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29th, 1920, that the said property was not sold subject to the said alleged mortgage and that neither Mountain Lakes, Incorporated, nor Herbert J. Hapgood had any right to encumber the said property. The defendants allege that on July 6th, 1920, the complainant had due notice that the said property was not sold subject to the said alleged mortgage and the defendants allege that before the date of the assignment to the complainant of any alleged interest in the premises alleged in the complaint to have been mortgaged, the complainant had actual knowledge of the fact that neither Mountain Lakes, Incorporated, North Jersey Title Insurance Company, H. J. Hapgood, nor Hackensack Trust Company had on April 29th, 1920, any right to convey any interest the said three lots or in any house on the premises alleged in the complaint to have been mortgaged. The defendants allege that the complainant at all said times had actual knowledge that the said property was not sold, as alleged in the sixth paragraph of the complaint, subject to the said mortgage.

SEVENTH.—The defendants deny that they conveyed the premises July 14th, 1920, as alleged in the seventh paragraph of the complaint, subject to the alleged mortgage alleged in the second and third paragraphs of the complaint to have been made, executed, and delivered by Mountain Lakes, Incorporated, to North Jersey Title Insurance Company.

EIGHTH.—The defendants deny that on July 14th, 1920, the premises were conveyed to the defendant Katharine Edson Mumford Hendrick, as alleged in the eighth paragraph of the complaint,

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subject to the alleged mortgage alleged in the second and third paragraphs of the complaint to have been made, executed, and delivered by Mountain Lakes, Incorporated, to North Jersey Title Insurance Company.

NINTH.—The defendants deny the allegations of the ninth paragraph of the complaint. The defendants allege that the said H. J. Hapgood was on the date of the alleged assignment to him by Hackensack Trust Company of the alleged mortgage himself of Mountain Lakes, Incorporated, the alleged maker of the said alleged mortgage, and that neither the said Hackensack Trust Company nor the said H. J. Hapgood, nor the said Mountain Lakes, Incorporated, on the date of said assignment had any right to convey any interest in the said three lots or the said house H. H. as they and the complainant on the said date well knew. The defendants allege that the said alleged assignment was without consideration and invalid.

TENTH.—The defendants deny the allegations of the tenth paragraph of the complaint. The defendants allege that on November 22nd, 1920, the said date of the alleged payment by H. J. Hapgood to Mountain Lakes, Incorporated, and of the alleged release by the said H. J. Hapgood of the nine lots mentioned in the tenth paragraph of the complaint, the said H. J. Hapgood was, as the complainant and the North Jersey Title Insurance Company well knew, himself Mountain Lakes, Incorporated, and neither individually nor through the said Mountain Lakes, Incorporated, as the complainant and North Jersey Title Insurance Company well knew, had any right or any power without the consent of the defendants to release

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the said nine lots from the lien of the mortgage, if any, upon the said nine lots or to leave the said three lots covered by a mortgage either of \$10,000.00 or of any amount. The defendants allege that they did not consent to the said alleged release of the said nine lots or to the alleged existence, creation, or leaving of the said alleged lien of \$10,000 dollars on the said three lots. The defendants allege that no such release took effect and that no such lien existed, was created, or was left, and that the complainant had due notice and was well-advised before the date of any conveyance of any alleged interest to him both that the said alleged transaction by the said H. J. Hapgood was not only without the consent of the defendants but also against their protest communicated orally and in writing to the complainant and was invalid and of no effect in releasing the said nine lots or creating or leaving a lien upon the said three lots and was a fraud upon the defendants and the complainant thereupon asserted that he himself did not rely upon the said alleged lien but solely upon the guarantee of North Jersey Title Insurance Company. The defendants allege that if any such release was executed and took effect as to the said nine lots it took effect also as to the said three lots and also that if any such lien either existed or was created or left upon the said three lots as alleged in the tenth paragraph of the complaint it was and was at all times known to the complainant to be without consideration and invalid and in fraud of the rights of the defendants. The defendants allege that the said alleged mortgage of \$10,000., if it ever existed, was fully paid and the lien thereof duly discharged on December 29th, 1922, by and on behalf of Mountain Lakes,

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Incorporated, to the North Jersey Title Insurance Company on behalf of the complainant or any alleged holder thereof as is set forth herein below in the defendants' First Separate and Distinct Defense.

ELEVENTH.—The defendants deny the allegations of the eleventh paragraph of the complaint. The defendants allege that at the date of the alleged assignment of the said alleged mortgage for \$10,000.00 neither the said H. J. Hapgood nor Mountain Lakes, Incorporated, nor any other person, firm, or corporation, had, as the complainant well-knew any right to any mortgage or any lien or any encumbrance on the said three lots or the said house H. H. and that the defendants were entitled as the complainant well-knew, by virtue of payment in full of the just and true and agreed price thereof to Mountain Lakes, Incorporated, to hold the premises free and clear of any incumbrance. The defendants allege that before the said date of the alleged assignment both North Jersey Title Insurance Company and the complainant had notice and actual knowledge of the said rights of the defendants.

TWELFTH.—The defendants deny the allegations of the twelfth paragraph of the complaint. The defendants allege that the said alleged assignments referred to in the eleventh and twelfth paragraphs of the complaint were a fraud upon the rights of the defendants, and that before the date of any alleged assignment of any alleged mortgage to the complainant the complainant had, due notice and actual knowledge that the said alleged mortgage was without validity and a fraud upon the rights of the defendants. The defendants allege that the complainant, if he re-

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10 received the said alleged assignment referred to in the twelfth paragraph of the complaint, accepted it with due notice and full knowledge that the said alleged assignment to the North Jersey Title Insurance Company by the said H. J. Hapgood referred to in the eleventh paragraph of the complaint and the said alleged assignment by the North Jersey Title Insurance Company were a fraud upon the rights of the defendants.

20 THIRTEENTH.—The defendants deny the allegations of the thirteenth paragraph of the complaint. The defendants allege that the complainant, if he ever paid any money to the North Jersey Title Insurance Company as a consideration for the said alleged assignment referred to in the twelfth paragraph of the complaint, accepted as the full and only consideration for the said money the agreement of the North Jersey Title Insurance Company to repay the said money with interest. The defendants allege that on the 29th day of December, 1922, the North Jersey Title Insurance Company received full payment on behalf of the complainant of the amount, if any, owing on any mortgage held by the complainant. The defendants allege that North Jersey Title Company had and received and had been paid 30 on or before April 29th, 1923, money on behalf of the complainant equal to the amount of interest due if any on any mortgage on the premises held by the complainant.

40 FOURTEENTH.—The defendants deny the allegations of the fourteenth paragraph of the complaint. The defendants allege that the complainant has a full, complete, and adequate remedy at law for the cause of action, if any, attempted to be set forth in the complaint, against

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North Jersey Title Insurance Company, H. J. Hapgood, and Mountain Lakes, Incorporated. The defendants allege that the complainant has foreborne to bring the said action against the said North Jersey Title Insurance Company, H. J. Hapgood, and Mountain Lakes, Incorporated, or either of them, and has elected to aid them in the effectuation of the fraud alleged herein to have been attempted by them and the complainant against the rights of the defendants.

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## DEFENDANTS' FIRST AFFIRMATIVE SEPARATE AND DISTINCT DEFENSE.

FIFTEENTH.—The defendants allege that North Jersey Title Insurance Company, Mountain Lakes, Incorporated, and H. J. Hapgood were jointly engaged for the three years ending December 29th, 1922, in the business of selling the bonds of Mountain Lakes, Incorporated, a company owned and managed by H. J. Hapgood, engaged in promoting a real estate development in Morris County, New Jersey. The defendants allege that in the prosecution of that business North Jersey Title Insurance Company during the said period sold to the public bonds of Mountain Lakes, Incorporated, to the aggregate amount of several hundred thousand dollars purporting to be secured by mortgages on land improved by residences, the fact being, as Mountain Lakes, Incorporated, and North Jersey Title Insurance Company well knew that the land was rough ungraded land and absolutely unimproved and without any building of any kind. The defendants allege that North Jersey Title Insurance Company took the alleged bond referred to in the first paragraph of the complaint and the al-

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leged mortgage referred to in the second paragraph of the complaint with full knowledge that the representation that the land therein described contained House H. H. was false. The defendants allege that North Jersey Title Insurance Company was induced to be a party to the alleged making, executing, and delivering, and the alleged filings and assignments and releases set forth in the complaint of the said alleged bond and mortgage by the execution by Charles J. Tagliabue, father-in-law of the said H. J. Hapgood and Treasurer of Mountain Lakes, Incorporated, and the delivery to North Jersey Title Insurance Company of a guaranty against loss to it arising out of its part in the transaction. The defendants allege that on December 29th, 1922, such guarantees of the said Charles J. Tagliabue to North Jersey Title Insurance Company, including the guaranty arising out of the said alleged bond and mortgage referred to in the first and second paragraphs of the complaint, to \$832,407.50, and that on that date the executors of the estate of Charles J. Tagliabue and North Jersey Title Insurance Company entered into an agreement by which in consideration of the payment of a sum of money to North Jersey Title Insurance Company by said executors North Jersey Title Insurance Company compromised, settled, and satisfied all its claims present and contingent or unliquidated against the estate of Charles J. Tagliabue upon or by reason of, or which might thereafter arise or accrue to North Jersey Title Insurance Company or its successors or assigns, upon any and all guaranties executed and delivered by Charles J. Tagliabue to North Jersey Title Insurance Company in his lifetime or held or owned by said Company and that thereupon the North Jersey Title Insurance Com-

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pany released the said estate and canceled the said obligations. The defendants allege that at or about the date of the execution of the said agreement Mountain Lakes, Incorporated, and H. J. Hapgood and North Jersey Title Insurance Company entered into an agreement by which Mountain Lakes, Incorporated, and H. J. Hapgood agreed that a formal transfer should be made to North Jersey Title Insurance Company of all the assets of Mountain Lakes, Incorporated, and, thereafter, in effectuation of the said agreement, the officers of Mountain Lakes, Incorporated, and H. J. Hapgood, through his attorney-in-fact, Claude V. Pallister, in combination with North Jersey Title Insurance Company, brought about, through certain proceedings in the United States District Court for the District of New Jersey, the transfer to North Jersey Title Insurance Company, without payment of any consideration, of all the assets of Mountain Lakes, Incorporated, including the said nine lots described in the third paragraph of the complaint. Defendants allege that at all the times between April 29th, 1920, and the date of the commencement of this suit and especially at the date of and continuously since the said transfer North Jersey Title Insurance Company was and has been the holder and owner of the said alleged mortgage, if any, and the complainant has been the holder only of the guaranty of North Jersey Title Insurance Company. The defendants allege that by the said agreement between North Jersey Title Insurance Company and the executors of the estate of Charles J. Tagliabue and the said agreement between North Jersey Title Insurance Company and Mountain Lakes, Incorporated, and H. J. Hap-

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10 good, the alleged bond referred to in the first paragraph of the complaint was duly and fully satisfied and the lien of the alleged mortgage referred to in the third paragraph of the complaint and the lien of the alleged mortgage referred to in the tenth, eleventh, and twelfth paragraphs of the complaint discharged.

## DEFENDANTS' SECOND AFFIRMATIVE SEPARATE AND DISTINCT DEFENSE:

20 SIXTEENTH.—The defendants allege that North Jersey Title Insurance Company had and received on April 29th, 1923, the date of the alleged default of the defendants sums of money paid under protest on account of interest on the said alleged mortgage aggregating more than the amount that would have been due and payable on the said date if the said mortgage had been a valid existing obligation as alleged in the complaint.

## DEFENDANTS' THIRD AFFIRMATIVE SEPARATE AND DISTINCT DEFENSE:

30 SEVENTEENTH.—The defendants allege that the complaint does not set forth facts sufficient to show that the complainant is a *bona fide* holder for value of a valid and subsisting mortgage upon the three lots and house described in the complaint.

## DEFENDANTS' FOURTH AFFIRMATIVE SEPARATE AND DISTINCT DEFENSE:

40 EIGHTEENTH.—The defendants allege that the alleged making, execution, and delivery of the said alleged bond and mortgage referred to in the first and second paragraphs of the complaint and the successive alleged assignments

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thereof alleged in the complaint were designed and intended by Mountain Lakes, Incorporated, H. J. Hapgood, and North Jersey Title Insurance Company as a fraud upon the defendants by which Mountain Lakes, Incorporated, H. J. Hapgood, and North Jersey Title Insurance Company designed and intended to create a mortgage without any right or justification whatsoever upon property of the defendants. The defendants allege that neither Mountain Lakes, Incorporated, H. J. Hapgood, nor North Jersey Title Insurance Company acquired any right, title, or interest by their said fraudulent acts in the property of the defendants and that the complainant as their alleged successor in title has no standing either at law or in a court of equity to assert a claim of a valid and subsisting mortgage against the premises.

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DEFENDANTS' FIFTH AFFIRMATIVE SEPARATE AND DISTINCT DEFENSE:

NINETEENTH.—The defendants allege that the alleged mortgage referred to in the tenth, eleventh, and twelfth paragraphs of the complaint has no existence except as it is alleged to be the alleged mortgage referred to in the second paragraph of the complaint and is alleged to be security for the alleged bond referred to in the first paragraph of the complaint. The defendants allege that if all the allegations of the complaint are to be taken as true the complainant's alleged assignors and the complainant may not obtain a foreclosure of a mortgage upon the said three lots of the complainant until foreclosure has been first had of the alleged mortgage upon the said nine lots retained by Mountain Lakes, Incorporated, when the al-

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leged conveyance of the said three lots was made to the defendants, and the said mortgage satisfied out of the said nine lots.

**DEFENDANTS' SIXTH AFFIRMATIVE SEPARATE AND DISTINCT DEFENSE:**

10 TWENTIETH.—The defendants allege that in or about the month of February, 1920, and prior to the date of the alleged bond and mortgage referred to in the first and second paragraphs of the complaint the defendant Frank Hendrick paid to H. J. Hapgood as President of Mountain Lakes, Incorporated, \$10,000 as payment in full of Lots 20 34, 36, and 38 in Block T-1 at Mountain Lakes and as advance payment on work to be done and materials to be supplied by Mountain Lakes, Incorporated, in the construction of a residence on the said three lots. The defendants allege that the agreement for the construction of the said house was reduced to writing and signed by H. J. Hapgood as President of Mountain Lakes, Incorporated and that one of the conditions of the said agreement was that the said house should be completed in accordance with plans and specifications and ready for occupancy with the grounds graded and planted with shrubs on or before July 1st, 1920. The defendants allege that the option was given by the 30 said contract to the defendant Frank Hendrick to pay for part of the work and materials by assuming a mortgage of \$10,000 but the defendants allege that the said contract was never performed by Mountain Lakes, Incorporated, and that the defendant Frank Hendrick on and before July 6th, 1920 paid in full to Mountain Lakes, Incorporated, for all work done and materials furnished under the said contract. The defendants allege that 40

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Mountain Lakes, Incorporated, was unable by reason of the fraudulent act of Mountain Lakes, Incorporated in placing of record the alleged mortgage referred to in the first paragraph of the complaint to convey the premises on July 6th, 1920 by a warranty deed free and clear but did deliver a deed subject to a mortgage for \$15,000 on the three lots and other property represented by Mountain Lakes, Incorporated, to be of the value of \$22,500 and more than sufficient to satisfy the said \$15,000, and that Mountain Lakes, Incorporated, agreed to satisfy the said mortgage. The defendants allege that on July 2nd, 1920, the defendant Frank Hendrick caused to be recorded in the Clerk's Office of Morris County in Book X 25 of Deeds on page 342 and following the said contract and thereby gave due notice that the said alleged mortgage was not a valid obligation upon the said three lots and the said House H. H. The defendants allege that the complainant had due notice and full knowledge of the facts herein set forth before the date of any alleged assignment of any alleged mortgage to the complainant and was duly notified, warned, and advised by the defendant Frank Hendrick orally and in writing and was informed by an inspection of the premises that any mortgage represented to exist upon the said three lots and House H. H. was a fraud and the defendants allege that the complainant took the said alleged mortgage, if he did take it, with full knowledge that it was a fraud upon the rights of the defendants.

**DEFENDANTS' SEVENTH AFFIRMATIVE  
SEPARATE AND DISTINCT DEFENSE:**

**TWENTY-FIRST.**—The defendants allege that the complainant is acting as the agent of North

*Amended Answer to Bill of Complaint.*

Jersey Title Insurance Company in bringing this suit against the defendants and that both North Jersey Title Insurance Company and the complainant have waived the obligation, if any, of Mountain Lakes, Incorporated, H. J. Hapgood, and Charles J. Tagliabue on the said alleged bond and mortgage referred to in the first and second paragraphs of the complaint and that there has taken place a merger of North Jersey Title Insurance Company and Mountain Lakes, Incorporated, and there was never any consideration to the defendants for the said alleged bond and mortgage, as the complainant well knew before the date of any alleged assignment of any interest therein to the complainant and neither North Jersey Title Insurance Company, Mountain Lakes, Incorporated nor the complainant ever acquired or now has any rights against the defendants or the said three lots and house under the said alleged bond and mortgage.

DEFENDANTS' EIGHTH AFFIRMATIVE SEPARATE AND DISTINCT DEFENSE:

TWENTY-SECOND.—The defendants allege that if there was any bond or any mortgage as alleged in the first and second paragraphs of the complaint the transaction out of which the said bond and mortgage arose was usurious and the relations thereto of the North Jersey Title Insurance Company and Hackensack Trust Company and the complainant were usurious and that the complainant herein is acting as the agent of North Jersey Title Insurance Company.

DEFENDANTS' NINTH AFFIRMATIVE SEPARATE AND DISTINCT DEFENSE:

TWENTY-THIRD.—The defendants allege that

*Amended Answer to Bill of Complaint.*

the house erected on the said three lots is not an improvement to the land and is not habitable and has no rental value and that Mountain Lakes, Incorporated, and H. J. Hapgood defrauded the defendants out of the money paid Mountain Lakes, Incorporated, for the said lots and work and materials in the construction of the said house and that this suit is a step in the effectuation of the said fraud of Mountain Lakes, Incorporated, and H. J. Hapgood.

10

WHEREFORE defendants pray:

- a. That the bill of complaint be dismissed.
- b. That a decree be made declaring that nothing is due the complainant by the defendants or either of them.
- c. That it be decreed that there is no mortgage upon the three lots and house of the defendants as alleged in the complaint.
- d. That a decree be made in favor of the defendants with costs.
- e. That, in the alternative, a decree be made ordering the sale of the said nine lots to satisfy the said mortgage of \$15,000.
- f. That the defendants remain in possession of the premises pending the final determination of the issues of this suit.
- g. That the complainant be ordered to reply to the matters set up in this answer.

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30

Frank Hendrick,  
Katherine Edson Mumford Hendrick,  
Defendants appearing for  
themselves in person.

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**Replication.**

## IN CHANCERY OF NEW JERSEY.

Between

J. MORGAN HOLLOWAY,  
Complainant,

and

FRANK HENDRICK and KATHERINE  
EDSON MUMFORD HENDRICK,  
Defendants.On Bill to  
Foreclose

10

The complainant joins issue on the amended answer of the defendant.

George R. Beach,  
Solicitor of Complaint.

20

**Order of Reference.**

(Filed July 9, 1924.)

## IN CHANCERY OF NEW JERSEY.

Between

J. MORGAN HOLLOWAY,  
Complainant,

and

FRANK HENDRICK and KATHERINE  
EDSON MUMFORD HENDRICK,  
Defendants.On Bill to  
Foreclose.

30

This matter being opened to the Court by Thomas G. Haight, of counsel with the complainant; and it appearing that due notice of this ap-

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## Case.

plication has been given to the defendants; and no good reason being shown to the contrary;

IT IS, on this 8th day of July, 1924, on motion of George R. Beach, solicitor for the complainant,

ORDERED that the above entitled cause be referred to Hon. J. F. Fielder, one of the Vice Chancellors of this Court to hear the same for the Chancellor, and to report thereon to him and advise what order or decree should be made therein.

10

E. R. WALKER,  
C.

A true copy.

THOMAS BARBER,  
Clerk.

20

IN CHANCERY OF NEW JERSEY.

Between

J. MORGAN HOLLOWAY,  
Complainant,

and

FRANK HENDRICK and wife.

On Bill to  
Foreclose.

30

Transcript of shorthand notes of testimony taken on final hearing in above stated cause, at Chancery Chambers, Jersey City, December 11, 1924, before His Honor, James F. Fielder, Vice-Chancellor.

APPEARANCES:

HON. GEORGE R. BEACH and Hon. THOMAS  
G. HAIGHT, for Complainant.

FRANK HENDRICK, Esq., *pro se.*

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*Case.*

Mr. Hendrick: I move to dismiss the bill of complaint on the ground that it is insufficient upon its face and does not set forth the cause of action.

10 Among other grounds apparent upon the face of the complaint, I urge, first, that there is a defect in the parties defendant, in that Mountain Lakes, Inc., the North Jersey Title Insurance Company and Herbert J. Hapgood should be parties defendant.

20 Second, that it appears upon the face of the complaint that the property retained and owned by the alleged mortgagor is primarily liable for the alleged mortgage and no allegation is contained in the bill of complaint that resort has been had to that property or that it is insufficient to satisfy the alleged mortgage wholly or in part; nor does the complaint contain any attempt to resort to that property.

Third, that the property alleged to be retained by the alleged mortgagor has been released from the obligation of the alleged mortgage and that therefore the property alleged to be owned by the defendant Catherine N. Hendrick was thereby released.

30 Fourth, that it appears upon the face of the bill of complaint that complainant has an adequate remedy at law against North Jersey Title Company who, as complainant's counsel stated, guaranteed the payment of the mortgage.

Fifth, that the mortgage was cancelled by assignment contemporaneously with the alleged making of the mortgage back to the mortgagor who was Hapgood.

40

*Ralph L. Kilby, direct.*

Sixth, there was no unconditional assignment, as has been stated by counsel for complainant, therefore, the North Jersey Title Insurance Company is a necessary party. I might say, it will develop in the proof that the assignment which was only stated in abstract in the complaint contained a contract of guarantee by the North Jersey Title Insurance Company, so that we have, as counsel says, a regular guaranteed mortgage and not a simple mortgage.

10

The Court: Motion denied.

#### COMPLAINANT'S CASE.

RALPH L. KILBY, sworn as a witness on the part of the complainant, testifies as follows:

*Direct examination by Mr. Haight:*

20

Q. Where do you reside? A. Mountain Lakes, New Jersey.

Q. Were you formerly connected with the Mountain Lakes, Incorporated? A. Yes, sir.

Q. In what capacity? A. Sales manager.

Q. Do you know Mr. Hapgood? A. Yes, sir.

Q. Were you also an officer of the Mountain Lakes, Inc., at one time? A. At one time.

Q. What was your position? A. I was a director.

30

Q. (Showing witness.) I show you a paper which purports to be an assignment from Mountain Lakes, Inc., to North Jersey Title Insurance Company, dated April 29, 1920, for \$15,000 and ask you if you recognize the signatures at the bottom of that instrument?

Mr. Hendrick: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

40

*Ralph L. Kilby, direct.*

A. Both signatures?

Q. Yes. A. I do.

Q. Do you know the signature of the person who purports to sign as assistant secretary on that instrument?

10

Mr. Hendrick: Same objection.

The Court: Objection overruled.

A. I do.

Q. That purports to be the signature of one M. Kelly, does it? A. It does.

Q. M. Kelly was a woman? A. Mary Kelly.

Q. Do you know where Mary Kelly resided at that time, about April 29, 1920?

Mr. Hendrick: Same objection.

The Court: Objection overruled.

20

A. She resided in Brooklyn, New York.

Q. You knew her, did you? A. I did.

Q. Was she employed by the Mountain Lakes, Inc.? A. She was.

Q. In what office? A. She was the president's private secretary.

Q. In what office was she? A. She was in his office.

30

Q. In New York or Mountain Lakes? A. In New York.

Q. Did you see Mary Kelly after 1920? A. Yes.

Q. When was the last time that you saw her, as nearly as you can fix the date? A. Either the latter part of October or the first part of November, 1922.

Q. Will you state to the Court the circumstances under which she left the employ of the Mountain Lakes Inc., at or about that time?

40

Mr. Hendrick: Objected to.

The Court: Objection sustained.

*Ralph L. Kilby, direct.*

Q. Do you know when, if at all, Miss Kelly left the employ of the Mountain Lakes, Inc.? A. She left the employ of Mountain Lakes, Inc., between the middle of October and the middle of November, 1922.

Q. And under what circumstances?

Mr. Hendrick: Objected to.

10

The Court: Objection overruled.

A. She left very suddenly, put on her hat and coat one noon time, went out to lunch and disappeared.

Q. Did you make any effort after that to locate her?

Mr. Henderson: I object because it is incompetent whether he did or not.

20

The Court: Objection overruled.

A. I did.

Q. What efforts did you make? A. I went over to Brooklyn to the place where she lived and inquired for her and found that she had called at her place of residence and packed up her things.

Mr. Hendrick: I object to that as hearsay.

The Court: Objection overruled.

30

Q. Go on. A. Packed up her things and left within an hour or two after getting there.

Q. What relation did the day that she left her boarding house, as you were advised, bear to the day that she left the employ of Mountain Lakes, Inc.? A. The same day.

Q. Go ahead. A. I found that she was an orphan, that she had a relative living in New York City either on Thirty-third or Thirty-second Street,

40

*Ralph L. Kilby, direct.*

east, and I was given the address of that relative. On the same day, about eight o'clock in the evening, I called at the house of this relative and found that Mary Kelly had not been there. I was advised by this relative that she thought—

*By the Court:*

10

Q. As a result of your inquiry, did you learn of her whereabouts? A. I did not, no, sir.

*By Mr. Haight:*

Q. Did you make efforts subsequent to that time to find her? Did you write her any letters or anything of that kind? A. I did not write her any letter, but I know that some letters were written to her.

20

Q. Did you see them written? A. I saw them written.

Q. Did you see them come back? A. I saw them come back.

Q. Whom were they written by? A. They were written by Miss Ethel Grace.

Q. In the office of Mountain Lakes, Inc.? A. She was employed in Mountain Lakes, Inc. office.

Q. When the letters came back, how were they marked?

30

Mr. Hendrick: Objected to.

The Court: Objection sustained.

Mr. Hendrick: I move to strike out the answers about the letters.

The Court: Motion denied.

Q. The letters did come back? A. They did.

Q. Have you ever seen Mary Kelly since that time? A. I have not.

40

*Ralph L. Kilby, direct.*

*By the Court:*

Q. Did she ever live in New Jersey, so far as you know? A. I never heard that she did.

Mr. Haight: While I have this witness on the stand, I want to have him identify the signature on another paper. I ask that the bond be marked for identification. 10

(Bond marked C-1 for identification.)

The Court: Is it the bond mentioned in the bill of complaint?

Mr. Hendrick: I don't know what it is.

The Court: If you do not know what it is, do not object to it.

Mr. Hendrick: Your Honor would not permit me to see it.

*By Mr. Haight:* 20

Q. I show you what purports to be an agreement made on the 18th of March, 1920, between Mountain Lakes, Inc., and Frank Hendrick, and ask you if you recognize the signature of the subscribing witness, Frank H. Erisman?

Mr. Hendrick: I object.

The Court: Objection overruled.

A. I do. 30

Q. Have you seen Mr. Erisman write? A. A great many times.

Q. Do you know that to be Mr. Erisman's signature? A. I do.

Q. Do you know where Mr. Erisman resides? A. I do.

Q. Whereabouts? A. He resides in Rockville Center, Long Island.

Q. In asking you to identify the signature of Miss Kelly on C-1 for identification, I think I neglected 40

*Ralph L. Kilby, cross.*

to ask you if you had ever seen her write? A. I have seen her write many times.

The Court: Do you want to ask him if he recognizes that as her signature?

Mr. Haight: Yes.

10 Q. Is that signature on C-1 for identification, the signature of Mary Kelly? A. It is.

Mr. Haight: I ask to have the agreement marked for identification.

(Agreement marked C-2 for identification.)

*Cross examination by Mr. Hendrick:*

Q. When did you last search for Miss Kelly?

20 A. Between the middle of October and the middle of November, 1922, shortly after she left.

Q. Have you sought for her since? A. Not directly.

Q. When did you last seek for her indirectly?

A. When I mailed the letters, one or two of them, which were written to her after she disappeared.

Q. What date was that? A. That was between the first of November and the 15th of November, 1922.

30 Q. How long was that after she had disappeared? A. I could not remember exactly. She disappeared between the 15th of October, 1922, and the 15th of November, 1922.

Q. That is, your search was limited to within a month after she disappeared? A. It was.

Q. Then you abandoned the search? A. I did.

Q. Do you know whether she has returned to her residence in Brooklyn? A. I do not.

40 Q. Have you attempted to ascertain? A. I have not.

*Ralph L. Kilby, cross.*

Q. Do you say positively that that is Miss Kelly's signature? A. I do.

Q. Do you entertain any doubt upon it? A. I do not.

Q. On what do you base your opinion that that is her signature? A. By having seen her sign her name a great many times and recognizing it as her signature. 10

Q. When did you last examine a signature of Miss Kelly? A. I do not exactly understand that question. I think I have critically examined no signature.

Q. Did you ever make a comparison of her signatures? A. I don't think I ever did.

Q. Did you ever compare something, for instance, two signatures? A. For comparison purposes? 20

Q. Yes. A. No, sir.

Q. While you were employed as an officer of the Mountain Lakes, Inc., were there any forgeries of signatures committed? A. Not that I know of.

Q. Will you explain your answer? A. Your question was: When I was employed as an officer by Mountain Lakes?

Q. Yes. A. That was at least twelve years ago.

Q. That you were employed? A. As an officer.

Q. And for twelve years you were an officer? A. 30  
I did not say that.

Q. During the period that Miss Kelly was employed in the office of Mountain Lakes and you were employed there, do you know whether there were any forgeries committed? A. I do not.

Q. Have you any knowledge with respect to any forgeries? A. Only heresay.

Q. Was it merely heresay? A. I never saw any forgeries committed. 40

*Ralph L. Kilby, cross.*

Q. Will you explain to his Honor why you sought Miss Kelly? A. Why I sought Miss Kelly?

Q. Yes. A. She left very suddenly and she was Mr. Hapgood's private secretary and did all the secretarial work, and he was very anxious to get her back and asked me to look for her.

10 Q. Now, at the time that you were seeking Miss Kelly was it alleged by anybody to you, so that it entered into your reason, that forgeries had been committed in connection with the business of Mountain Lakes, Inc.?

Mr. Haight: I object.

A. No, sir.

Mr. Haight: The witness has answered. Let it go.

20

Q. Do you know Charles G. Tagliabue? A. I do.

Q. Did you see him in the office of the Company on or about the first day of November, 1922, or a day or two thereafter?

The Court: How do you propose to make that proper cross examination?

30

Mr. Hendrick: By asking if Mr. Tagliabue did not then and there claim, in the presence of Miss Kelly, that his signature had been forged, and if that was not, to the knowledge of this witness, the reason that Miss Kelly left.

The Court: How does that bear on the question whether this signature in question is Miss Kelly's signature?

40

Mr. Hendrick: It bears on the ability of this witness to identify the signature of Miss Kelly. It also bears on the credibility of the witness.

*Ralph L. Kilby, cross.*

The Court: I decline to permit the question.

Q. Did Mr. Tagliabue ever say, in your presence and in the presence of Miss Kelly, that his signature had been forged?

Mr. Haight: I object.

The Court: Objection sustained.

10

Q. Have you attempted to procure the attendance of Mr. Erisman here?

Mr. Haight: I object to that as immaterial.

The Court: Objection sustained.

Mr. Haight: I now offer in evidence the bond which has been marked C-1 for identification and ask that it be marked Exhibit C-1.

20

Mr. Hendrick: I object. I ask your Honor to permit me to state the grounds of my objection. I object on the ground that the document is not a self-proving document, on the ground that the document purports to be acknowledged and I ask Your Honor to take judicial notice of the fact that Mr. Erisman, who was the person whose signature has been identified, was not at the time an officer authorized to take acknowledgments, and I urge that since the assignment is to a title company, that this Court must assume that it was known between the parties that the person taking the acknowledgment was not a duly authorized officer and that it was not their intention that there should be a mortgage; and on the ground that the docu-

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*Case.*

ment was not entitled to record and is void until duly recorded and that it cannot be proven in this way. I hand your Honor the certificate of the Secretary of State showing that at the time the document purports to be acknowledged, Mr. Erisman was not and had not been since May 31, 1918, according to the certificate, and is not now and has not been since that day a Commissioner of Deeds.

10

The Court: I overrule the objection.

(Bond heretofore marked C-1 for identification, received in evidence and marked Exhibit C-1.)

20

Mr. Haight: I now offer in evidence mortgage date April 29, 1920, made by Mountain Lakes, Inc., to North Jersey Title Insurance Company, for \$15,000, covering lots 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 46, in Block 2 on the map therein described; said mortgage having been acknowledged on April 29, 1920, and recorded in the office of the Clerk of Morris County on May 6, 1920, in Book R8 of Mortgages, pages 47, etc.

30

Mr. Hendrick: I object.

The Court: For the same reasons?

Mr. Hendrick: Yes; and I served a notice, under the statute, to produce the original instead of the record, and I submit to your Honor that the document does not prove itself. There is no proof that the person purporting to be an officer was an officer, and I have submitted to the Court the certificate of the Secretary of State.

40

The Court: Objection overruled.

(Mortgage is marked Exhibit C-2.)

*Case.*

Mr. Haight: I would state on the record that the bond bears the endorsement that 5,000 had been paid thereon, on November 22, 1920, and release given for lots 33, 35, 37, 39, 40, 41, 42, 44, 46.

Mr. Hendrick: I object to the endorsement on the bond and move to strike out the statement on the record.

10

The Court: Motion denied.

Mr. Haight: I now offer in evidence assignment of mortgage made by the North Jersey Title Insurance Company to H. J. Hapgood, dated April 29, 1920, acknowledged April 29, 1920, and recorded in the Clerk's office of Morris County, May 3, 1920, in Book 39 of Assignments of Mortgages for said county, at page 141, etc., the instrument purporting to assign the mortgage marked Exhibit C-2.

20

Mr. Hendrick: I object upon the ground that this assignment is of the same time as the mortgage and it appears to be a cancellation of the mortgage and cannot have any bearing upon the defendants herein or on the premises. It is to the person who signed the mortgage and it is dated the same day.

30

The Court: Objection overruled.

(Assignment is marked Exhibit C-3.)

Mr. Haight: I now offer in evidence assignment of mortgage from H. J. Hapgood to The Hackensack Trust Company, dated April 29, 1920, acknowledged April 29, 1920, and recorded in the office of the Clerk of Morris County on May 4, 1920, in Book 39 of Assignment of Mortgages, page 155,

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*Case.*

etc., the instrument purporting to assign the mortgage Exhibit C-2.

10 Mr. Hendrick: I object upon the ground that the service was made of a notice to produce originals and that proof is attempted to be made, as was attempted to be made of the alleged mortgage, of the document as a recorded document. I also ask your Honor to take judicial notice of the certificate of the Secretary of State before mentioned, and I urge that your Honor take judicial notice of the fact that this document was not, according to law, susceptible of record and was not duly recorded and that its record, if made, was illegal, and that it cannot be proved in  
20 evidence in this way.

The Court: Objection overruled.

(Assignment of mortgage is marked Exhibit C-4.)

30 Mr. Haight: I now offer in evidence assignment of mortgage from the Hackensack Trust Company to H. J. Hapgood, dated November 22, 1920, acknowledged November 22, 1920, and recorded in the office of the Clerk of Morris County, on November 24, 1920, in Book 40 of Assignment of Mortgages for said county, on page 108, etc., the instrument purporting to assign mortgage, Exhibit C-2.

Mr. Hendrick: I object upon the ground that it is no obligation against the defendant.

The Court: Objection overruled.

(Assignment marked Exhibit C-5.)

40 Mr. Haight: I now offer in evidence as-

*Case.*

signment of mortgage from H. J. Hapgood to North Jersey Title Insurance Company, dated November 23, 1920, acknowledged November 23, 1920, and recorded in the office of the Clerk of Morris County, November 24, 1920, in Book 40 of Assignment of Mortgages, at page 110, etc., the instrument purporting to assign the mortgage marked Exhibit C-2, and containing this recital— 10

Mr. Hendrick: I object; I make the same objection—acknowledgment before Erisman, the same as the other documents.

The Court: Objection overruled.

Mr. Haight: This instrument contains a recital that the mortgage now covers lots 34, 36 and 38 in Block T, as shown on map, originally made to secure the payment of \$15,000, which mortgage has now been reduced to the sum of \$10,000. 20

Mr. Hendrick: I object upon the further ground that the document is incompetent, irrelevant and immaterial, in that there is no evidence that the release was consented to by the defendants.

The Court: There is nothing binding on you. Objection overruled.

(Assignment is marked Exhibit C-6.) 30

Mr. Haight: I now offer in evidence assignment of mortgage made by North Jersey Title Insurance Company to J. Morgan Holloway, dated February 4, 1921, acknowledged February 4, 1921, and recorded in the office of the Clerk of Morris County, February 4, 1921, Book 40 of Assignment of Mortgages, page 151, etc.

Mr. Hendrick: I object upon the ground 40

*Case.*

10 that it appears upon the face of the paper that the document was changed and that there was a change in the document after one record was made, and that therefore the record was improper. I may say, if your Honor will permit, I have subpoenaed the original; I have demanded by legal notice that the original be produced.

The Court: This is it, is it not?

20 Mr. Hendrick: This is it. The document says: "Re-recorded," and the document shows on its face a change in the name; the document also shows that that was done without any re-acknowledgment, and the document itself recites that this transaction was the subject of a previous assignment, in which the name was different. I object on the ground that the proof should be made of the entire transaction and the execution of the deed as disclosed in the paper, because it is a question of notice and it may be important as to what notice was given.

The Court: Objection overruled.

(Assignment is marked Exhibit C-7.)

30 Mr. Haight: I think I ought to say, there is nothing in this instrument—

The Court: This is only a matter of argument later on. I have admitted the paper in evidence.

40 Mr. Haight: Mr. Beach received notice from Mr. Hendrick that he would require production of original documents, the notice being given under the Conveyance Act. The deed not being in our possession and capable of producing the original, I have served notice on Mr. Hendrick to produce

*Case:*

the deed made by Mountain Lakes, Inc., to him, dated July 1, 1920, recorded in the Clerk's office of Morris County, July 9, 1920, Book G20 of Deeds, page 133, covering lots 34, 36 and 38 in Block T I on the map referred to in the mortgage. I am prepared to offer a certified copy, if he has not the original.

10

(Mr. Hendrick produces deed.)

Mr. Haight: I now offer this deed in evidence.

Mr. Hendrick: I object upon the ground that the deed does not prove itself and that the commissioner who purported to acknowledge it was not a duly authorized commissioner, the same objection as heretofore.

20

The Court: You mean you did not get title? You mean you never got title? Objection overruled.

(Deed is marked Exhibit C-8.)

Mr. Haight: I direct Your Honor's attention to the fact that this deed contains the following recital: "Subject, however, to mortgage dated April 29, 1920, for \$15,000, covering the above and other properties, due April 29, 1923, with interest at six per cent."

30

Now I call for the production, pursuant to notice served on Mr. Hendrick, of deed from Frank Hendrick and Catherine Edson Mumford Hendrick to Lillian A. Eason, dated July 14, 1920, and recorded in the Clerk's Office of Morris County, July 15, 1920, in Book E26 of Deeds, page 198, etc.

(Deed is produced by Mr. Hendrick.)

40

*Case.*

Mr. Haight: I now offer in evidence the deed which Mr. Hendrick has produced.

Mr. Hendrick: I object.

The Court: For the same reason?

10 Mr. Hendrick: No. I object upon the ground that it is incompetent, irrelevant and immaterial and that the provision with respect to the deed being subject to a mortgage, according to the cases, makes the property retained, the other property, subject to the mortgage.

The Court: That is no reason for refusing to admit the document in evidence.

(Deed is marked Exhibit C-9.)

20 Mr. Haight: I call Your Honor's attention to the following recital in this deed: "Subject to a mortgage of \$15,000 on the said lots and other lots adjoining, to the North Jersey Title Insurance Company, for \$15,000, being the same premises heretofore conveyed to said Frank Hendrick by Mountain Lakes Inc."

I also direct Your Honor's attention to the fact that the deed covers lots 36, 38 and 40, and the deed from Mountain Lakes to Frank Hendrick covered lots 34, 36 and 38.

30 Now I call for the production of deed made by Lillian E. Eason to Catherine Edson Mumford Hendrick, dated July 14, 1920 and recorded in the office of the Clerk of Morris County, July 15, 1920, in Book 26 of Deeds, page 198.

(Mr. Hendrick produces document.)

Mr. Haight: I offer in evidence deed produced by Mr. Hendrick.

40 Mr. Hendrick: Same objection and the

*Case.*

further objection that it does not cover the property referred to in the bill of complaint.

The Court: Objection overruled.

(Deed is marked Exhibit C-10.)

Mr. Haight: I direct the Court's attention to the following recital in this deed: "Subject to a mortgage of \$15,000 covering said lots and the other lots adjoining, to the North Jersey Title Insurance Company, for \$15,000, being the premises heretofore granted to Frank Hendrick by Mountain Lakes, Inc.," and also to the fact that this deed covers lots 36, 38 and 40.

10

I now offer in evidence paper which has been marked C-2 for identification, being the contract between Mountain Lakes, Inc., and Frank Hendrick, dated March 18, 1920.

20

Mr. Hendrick: No objection.

(Contract is marked Exhibit C-11.)

Mr. Haight: I direct Your Honor's attention to the fact that the consideration—

Mr. Hendrick: I object to that copy.

The Court: You said you had no objection.

Mr. Hendrick: I withdraw that statement. I have a certified copy which may be used for the information of the Court. I am not satisfied that that is a copy and I would not have time to look it over.

30

Mr. Haight: I am perfectly willing to substitute a certified copy from the office of the Clerk of Morris County, but I offered the original because Mr. Hendrick demanded the production of the original.

Mr. Hendrick: I have no objection.

(Certified copy is marked Exhibit C-11-b.)

40

*William H. Zabriskie, direct.*

Mr. Haight: The certified copy bears the endorsement that it was recorded July 2, 1920, in Book X25 of Deeds, page 342, etc.

10 I will read from the copy that Mr. Hendrick produces. The consideration is stated to be \$22,200, payable as follows: \$10,000 on or before the signing of this agreement, the receipt whereof is hereby acknowledged; at the time of taking title by assuming and agreeing to pay a certain mortgage of \$10,000 with interest at six per cent., from July 1st, 1920, said mortgage to run for at least three years subsequent to the date of this agreement; at the time of taking title by paying the unpaid balance of \$2,200.

20 WILLIAM H. ZABRISKIE, sworn as a witness on the part of the complainant, testifies as follows:

*Direct examination by Mr. Haight:*

Q. Where do you reside? A. Oradell, New Jersey.

Q. Are you connected in any way with the North Jersey Title Company? A. I am.

Q. What is your position with that company? A. President.

30 Q. How long have you been president of the company? A. Since 1919. I am not sure about that.

Q. At any rate since 1920? A. Oh, yes; since 1920.

Q. I show you Exhibit C-2 and ask you whether or not you have, since November, 1920, collected interest on that bond and mortgage?

Mr. Hendrick: I object upon the ground

40

*William H. Zabriskie, direct.*

that it is not the proper proof. The question is incompetent and immaterial.

The Court: Objection overruled.

A. The interest was paid on it until October—the payment due October, 1923, was not paid.

Q. Had you collected it before that time? A. We had. 10

Q. You have collected none since April, 1923?

A. Since April, 1923.

Mr. Hendrick: I make the same objection and move to strike the answer out.

The Court: Objection overruled and motion denied.

Q. Have you paid taxes on that property? A. No.

Q. I mean your company? A. No. 20

Q. It appears by Exhibit C-7 that the North Jersey Title Insurance Company on February 4, 1921, transferred this mortgage marked Exhibit C-2 to J. Morgan Holloway. Has your company paid to Dr. Holloway the interest on this mortgage which you collected from Mr. Hendrick?

Mr. Hendrick: Objected to.

The Court: Objection overruled.

A. We have. 30

Q. Have you also paid interest to Dr. Holloway since the time that Mr. Hendrick ceased paying interest to your company?

Mr. Hendrick: I object. There is no proof that Mr. Hendrick paid interest or ceased paying interest.

The Court: How is it material that the North Jersey Title Insurance Company has paid interest on the mortgage to Dr. Hollo- 40

*William H. Zabriskie, cross.*

way at a time when it did not receive any interest?

Mr. Haight: It is not material. I want to show payment of interest was not interest received from Mr. Hendrick but interest that the Title Company paid under their obligation.

10

The Court: As you may have to recall Mr. Zabriskie to put that proof in later, I will permit you to do it now. Objection overruled.

A. We have.

Q. Why did you do that? A. Because we have guaranteed the payment of principal and interest.

Q. I show you a paper purporting to be a bond and mortgage insurance policy and ask you if that was issued by your company?

20

Mr. Hendrick: I object.

The Court: Objection overruled.

A. Yes.

Q. Is it by virtue of this guarantee that you have paid interest to Dr. Holloway?

Mr. Hendrick: Objected to.

The Court: Objection overruled.

30

A. It is.

Mr. Haight: I offer this paper in evidence.

Mr. Hendrick: I object.

The Court: Objection overruled.

(Policy is marked Exhibit C-12.)

*Cross examination by Mr. Hendrick:*

Q. How long have you been president of the

40

*William H. Zabriskie, cross.*

North Jersey Title Insurance Company? A. Since about 1919; I cannot remember the exact date.

Q. Have you, since that time, been in active charge of the management of the company? A. Yes.

Q. Did you have dealings with Herbert J. Hapgood? A. I did.

10

Q. When did you last see Mr. Hapgood? A. December, 1922.

Q. Have you seen him since that year? A. I have not.

Q. Under what circumstances did Mr. Hapgood go away?

Mr. Haight: I object. It is immaterial.

The Court: How is this proper cross examination?

Mr. Hendrick: I wish to show that I cannot get Mr. Hapgood and to show that Mr. Zabriskie sustained losses of several hundred thousand dollars by reason of the absence of Mr. Hapgood and has done nothing to bring him back.

20

The Court: Objection sustained.

Q. Did you see the premises including lots 34, 36 and 38 in Block T 1 at Mountain Lakes at any time before April 29, 1920?

30

Mr. Haight: I object to that as not proper cross examination.

The Court: How is it? This witness has been called to prove the payment of interest on the mortgage.

Mr. Hendrick: I know it, but it is claimed that it goes to prove the validity of the mortgage, as it appears that there was interest paid on the mortgage by somebody, April, 1923.

40

*William H. Zabriskie, cross.*

The Court: October, 1923.

The Witness: There is a year and a half due on it.

*By the Court:*

10 Q. Interest was paid on the mortgage to April, 1923? A. Yes.

Q. Not to October? A. Not to October.

The Court: The witness is merely called to prove what interest was paid to his company on the mortgage and what interest his company has paid to Dr. Holloway.

*By Mr. Hendrick:*

20 Q. Mr. Zabriskie, did you ever issue a title policy on the mortgage?

Mr. Haight: I object to that as immaterial and not proper cross examination.

The Court: Objection sustained.

Q. Did your guarantee include an assurance of title to Dr. Holloway?

Mr. Haight: Objected to.

The Court: Objection sustained. The mortgage shows for itself what it includes.

30 Q. On what sum did you receive interest? A. \$15,000 originally; subsequently \$10,000.

Q. These payments were made under protest, were they not—written protest? A. I believe so.

Q. All of them? A. Yes, sir.

Q. And an original payment of \$450 interest on \$15,000 mortgage was made under protest, was it not? A. They were all made under protest when you were paying it.

*William H. Zabriskie, cross.*

*By the Court:*

Q. When was the first payment of interest on this mortgage received? A. The first payment came from H. J. Hapgood.

Q. Was that made under protest? A. No, sir; not the first.

Q. What payments are you speaking of that were made under protest? A. The ones since Mr. Hendrick has been the owner of the property.

10

*By Mr. Hendrick:*

Q. Do you mean to say that Mr. Hapgood made the payment of \$450? A. Yes, sir.

Q. The whole payment? A. The whole payment.

Q. And that payment was made on or about October 29, 1920? A. I cannot tell you that. I have not the record.

20

Q. And now, when you refer to Mr. Hapgood you mean Mountain Lakes, do you not? He was Mountain Lakes, was he not? A. He was president of Mountain Lakes.

Q. You said Mr. Hapgood. Do you mean Mr. Hapgood personally or Mountain Lakes? A. I cannot remember that, because I cannot keep these payments in my mind. I do not handle them personally.

30

Q. I ask you again, in view of your answer, whether, when you dealt with Mr. Hapgood, you thought you were dealing with Mountain Lakes? A. Practically.

Q. Always? A. Practically.

Q. When he left, Mountain Lakes went. Was that your idea of it?

The Court: How is it material what this

40

*William H. Zabriskie, cross.*

witness thought about Mountain Lakes after Mr. Hapgood left?

Mr. Hendrick: I am cross examining him, testing his credibility.

The Court: I do not see what that has to do with his credibility.

10 Q. I show you a letter dated October 20, 1920, and ask you if you sent that letter? A. Well, it was sent from our office. Of course I did not sign it.

*By the Court:*

Q. Was it sent by your authority? A. I am responsible for it.

(Letter is marked D-1 for identification.)

20 Mr. Hendrick: I offer the letter in evidence.

Mr. Haight: Objected to. This is not a proper time to offer it in evidence.

The Court: This is not the proper time. I decline the offer at this time.

Q. Have you read this letter? A. I did not read it just now. I just looked at the signature.

Q. Will you read it? A. (After reading letter) I have read it.

30 Q. In view of your having read the letter, I ask you if you remember who paid the \$450 that you mentioned with respect to the first payment of interest on the \$15,000 mortgage? A. I cannot answer that. That is a detail that is impossible for me to answer.

Q. You base your assertion that there was unpaid interest due on October 29, 1923, on the fact that the \$450 was paid by Mr. Hapgood, do you? A. Yes.

40

*William H. Zabriskie, cross.*

Q. And if you were wrong as to that you would have to give somebody else credit for the \$450 in your calculation? A. Why, surely, if there is an error made.

*By the Court:*

Q. If you found that interest was paid—if you found that the \$450 payment of interest in question was not made by Mr. Hapgood, would you still deduct that \$450 out of your cash and give it back to somebody else? It was paid on the mortgage? A. It was paid on the mortgage. 10

Q. I think Mr. Hendrick is differentiating between Mountain Lakes, Inc., and Mr. Hapgood. The \$450 was paid as interest for the first six months? A. It was.

Q. It was paid by somebody for interest on the mortgage? A. Yes. 20

*By Mr. Hendrick:*

Q. You cannot tell whether it was paid by Mountain Lakes or Mr. Hapgood?

Mr. Haight: Objected to.

*By the Court:*

Q. You cannot tell whether it came by check or in cash? A. I could not say. 30

Q. If it came by check, you don't know whose check? A. I do not.

Mr. Hendrick: I ask for production of letter written by me October 5th.

Mr. Haight: I have no such letter.

*By Mr. Hendrick:*

Q. To save time, Mr. Zabriskie, as to your recol-

40

*William H. Zabriskie, cross.*

lection as to that payment, did you have any correspondence with me as to whether that payment should be made? A. I do not recall it.

Q. Do you recall that I wrote you that there should be no interest payment made by me? A. There was a letter or some sort of communication from you that you were not liable for \$450 and that you had assumed a mortgage of \$10,000 and you were not going to pay \$450. As I understand it, this (indicating) is an answer to that.

Q. Is that your recollection? A. That is my recollection of it.

*By the Court:*

Q. When you say "This is an answer to that," you are referring to D-1 for identification? A. Yes; I am referring to this letter.

*By Mr. Hendrick:*

Q. Now, didn't you receive letters from me in which I said that there should be no mortgage on the premises, on my premises, whatsoever? A. Yes.

Mr. Haight: I object and I ask that that answer be stricken out, on the ground that the letters are the best evidence.

The Court: I will deny the motion on that ground.

Mr. Haight: I also ask that the answer be stricken out on the ground that it is not proper cross examination.

The Court: I will deny it on that ground.

Mr. Haight: I object on the further ground that it is immaterial and irrelevant.

The Court: Objection sustained.

*William H. Zabriskie, cross.*

Q. Mr. Zabriskie, did you receive letters in which you were informed that at the time the mortgage for \$15,000 was placed or attempted to be placed, that there was no house on the premises?

Mr. Haight: I object upon the ground that it is not proper cross examination and on the further ground that the letters are the best evidence and that the witness should be shown the letters before he is asked as to the contents of them and on the further ground that it is immaterial and irrelevant. 10

The Court: Sustained on all three grounds.

Mr. Hendrick: My friend has the letters.

The Court: Ask for them.

Mr. Hendrick: I call for the production of letter of July 6th. 20

(Letter produced.)

The Court: The production of the letter eliminates one objection and allows two grounds to stand.

Q. Your company is a title policy company, is it not; you issue policies? A. We do.

Q. Did you issue any policies at Mountain Lakes at any time?

Mr. Haight: Objected to. 30

The Court: Objection sustained.

Mr. Hendrick: If I can show that Mr. Zabriskie is unworthy of belief—

The Court: I guess if you could show me that, I would not believe him.

Mr. Haight: Counsel asked for the production of a letter, which I gave him.

Mr. Hendrick: This witness has testified that the payments were made under protest. 40

*William H. Zabriskie, cross.*

The Court: That is, the payments made by you were made under protest. Payments prior to that time were made by Mr. Hapgood or Mountain Lakes.

10 Q. Was your company ever at any time affiliated with Mountain Lakes, Inc.?

Mr. Haight: I object to that as immaterial and not proper cross examination.

The Court: Objection sustained.

Q. Has your company received any payment, in any form, on the principal of this mortgage? A. No, sir, I correct that. We had a payment made of \$5,000 on account of the principal.

Q. Your company received that? A. It did.

20 Q. Payment made to you? A. Made to the company.

Q. Made to your company? A. Made to the company.

Q. Made by whom? A. That I do not know. By Mountain Lakes or some of its representatives.

Q. Do you know when? A. The record may show. I don't know.

Q. Did you bring the records that I subpoenaed? A. I did not.

30 Q. You did not bring the records I subpoenaed? A. Physical impossibility.

Q. When you took this mortgage from Mountain Lakes Inc., you guaranteed it, did you, so that your company was at the same time the mortgagee and the guarantor? A. Not at the same time, no.

Q. But whether at the same time or different times, your company was both mortgagee and guarantor? A. It was; yes.

40 Q. Was that your practice? A. Yes.

*William H. Zabriskie, cross.*

Q. So that when you take a mortgage as mortgagee, you take it as guarantor? A. No.

The Court: I do not want you to wander off into a lot of things that are not proper cross examination. This witness is here to prove payment of interest on the mortgage, as I have said several times.

10

Q. Did you receive any security from anybody for your guarantee of this mortgage?

The Court: How is that material? The fact that somebody secured him or his company for the guarantee that was issued to Dr. Holloway and that his company may have that security, does not pay off the mortgage. The mortgage is to be paid by the man who is liable on it.

20

Mr. Hendrick: I take it that I am not the man that is liable, nor is my property liable, according to the proof. If it be assumed at this point in the case that the property held by defendants, or supposed to be held by the defendants, is liable, I take it that proof that somebody else had been liable and that somebody else had paid off the mortgage, would redound to exonerate the person who might otherwise have been liable.

30

The Court: I agree with you absolutely.

Q. Is it not a fact that Charles H. Tagliabue gave you a guarantee as an inducement for your company to take and guarantee the payment of this alleged mortgage?

Mr. Haight: I object to that upon the

40

*William H. Zabriskie, cross.*

ground that it is not cross examination and is irrelevant and immaterial.

The Court: Are you referring to this particular mortgage or every mortgage?

Mr. Hendrick: This particular mortgage.

The Court: I will allow the question.

10

A. No; there was not.

Q. Mortgages, including this mortgage? A. No; there was no guarantee of this mortgage.

Q. Will you produce the books that I subpoenaed so that I may examine you on that? A. I will have to submit that to the Court. I could not physically produce what I was asked to produce on that subpoena. I was served at half-past four on Tuesday afternoon. I might say that everything in connection with this case is here.

20

Q. Will you produce the guarantee of Mr. Tagliabue? A. No; I cannot produce it.

Q. Was Mr. Tagliabue an officer of Mountain Lakes, Inc.? A. I don't know.

Q. Was he not the treasurer? A. I don't know.

Q. Did you ever know? A. I never knew; I never had any dealings only with the president.

Q. That is when Hapgood was the company? A. Yes.

30

Q. And the whole company? A. Yes.

Q. When your company re-assigned the mortgage of April 29, 1920, the mortgage that Hapgood made, you re-assigned it to Mountain Lakes, did you not?

Mr. Haight: Objected to.

The Court: Objection sustained.

Q. Mr. Tagliabue was the son-in-law—

Mr. Haight: Objected to.

40

The Court: Objection sustained. I have

*William H. Zabriskie, cross.*

got to stop this. I am going to confine you to a cross examination on the direct evidence.

Q. Mr. Zabriskie, did you know, at the time that you took the mortgage, the mortgage referred to in the complaint, that there was no house on lots 34, 36 and 38? 10

Mr. Haight: Objected to as immaterial.

The Court: Objection sustained.

Q. Mr. Zabriskie, did your company enter into an agreement with the executors of Charles J. Tagliabue, deceased, by which, for \$50,000, you released the estate of Charles J. Tagliabue from guarantees amounting to between \$800,000 and \$900,000? 20

Mr. Haight: I object upon the ground that it is not proper cross examination.

The Court: Objection sustained on many grounds.

Q. Was the guarantee that Mr. Tagliabue gave you a general guarantee or was it confined to a specific mortgage or mortgages?

Mr. Haight: I object. The witness has already testified that he had no guarantee as to that particular loan. 30

The Court: Objection sustained.

Q. Did you receive a payment from the estate of Charles J. Tagliabue to cover liability of Mountain Lakes, Inc.?

Mr. Haight: I object to that as not proper cross examination and immaterial and irrelevant.

The Court: Objection sustained. 40

*William H. Zabriskie, cross.*

Q. Did you receive a demand from me to know the name of the assignee of the mortgagee referred to in the complaint in or about the month of October, 1920?

Mr. Haight: I object to that as not a proper way to prove it.

10

The Court: Objection sustained and also because it is immaterial.

Q. Did you write me a letter in which you refused to give me the name of the holder of the mortgage referred to in the complaint?

Mr. Haight: I object to that on the ground that it is not proper cross examination; it is irrelevant and immaterial and incompetent and not a proper way to prove the contents of the letter.

20

The Court: Objection sustained.

Mr. Hendrick: Will Your Honor bear with me until I find the letter?

The Court: I do not care whether you have the letter or not. I would not permit it to be offered in evidence.

Mr. Hendrick: Your Honor would not?

The Court: No, sir.

30

Q. Is it not a fact, Mr. Zabriskie, that your company, the North Jersey Title Insurance Company, has succeeded to the ownership of all of the property of the Mountain Lakes, Inc.?

Mr. Haight: I object upon the ground that it is not proper cross examination and immaterial and irrelevant.

The Court: Objection sustained.

Q. Are you an officer of the Bell Hall Company?

40

*William H. Zabriskie, cross.*

Mr. Haight: Objected to on the ground that it is immaterial.

The Court: Objection sustained.

Mr. Hendrick: It is a preliminary question.

The Court: Objection still sustained.

Q. Have you made any attempt to find Herbert J. Hapgood? 10

Mr. Haight: I object upon the main grounds.

The Court: Objection sustained.

Q. Is it not a fact that you visited Mr. Hapgood in Florida?

The Court: You must know, Mr. Hendrick, that you are asking questions that are not proper cross examination. 20

Mr. Hendrick: I want to know whether he has not seen Mr. Hapgood since—

The Court: I don't care whether he saw Mr. Hapgood yesterday. That has nothing to do with the amount due on the mortgage.

Mr. Haight: I have two letters purporting to have been written by Mr. Hendrick to H. J. Hapgood and Mountain Lakes, Inc. I can prove them by calling Mr. Hendrick, but I will ask him to admit the execution of them. 30

Mr. Hendrick: That (indicating) is not signed by me, but I will say that I authorized it to be sent. I will admit the sending of them.

Mr. Haight: I offer in evidence letter written by Mr. Hendrick to Mountain Lakes, 40

*J. Morgan Holloway, direct.*

Inc., dated July 10, 1920. I offer that to show that he demanded that we reduce the mortgage from \$15,000 to \$10,000; therefore his contention regarding the release of these lots becomes of no effect, because we have done what he demanded should be done.

10 Mr. Hendrick: The proof is not such as should be made because my friend's own witness has admitted that I demanded that the whole amount be taken off.

(Letter is marked Exhibit C-13.)

Mr. Haight: I now offer in evidence letter written by Frank Hendrick to H. J. Hapgood, Mountain Lakes, Inc., 170 Broadway, New York City, dated September 18, 1920.

20 Mr. Hendrick: Objected to. The point is that the completion of the contract was a condition precedent to the beginning of the payment of any mortgage. As a matter of fact, the house was never completed.

The Court: The letter will be admitted.

(Letter is marked Exhibit C-14.)

J. MORGAN HOLLOWAY, the complainant, sworn as a witness in his own behalf, testifies as follows:

30

*Direct examination by Mr. Haight:*

Q. You are the complainant in this case? A. I am.

Q. Have you ever received any interest on this mortgage other than from the North Jersey Title Insurance Company? A. I have not.

Mr. Hendrick: I object and move to strike out the answer.

40

The Court: Objection overruled.

*J. Morgan Holloway, cross.*

*Cross examination by Mr. Hendrick:*

Q. Mr. George R. Beach is your attorney, is he not? A. He is.

Q. Did Mr. Beach inform you that he had received a letter about November 26, 1920, from me informing him that there was no mortgage on the property and that any mortgage assumed to be on the property would be disputed?

10

Mr. Haight: I object upon the ground that it is not proper cross examination and is irrelevant and immaterial and not a proper way to prove the contents of a written instrument.

The Court: Objection sustained.

Mr. Hendrick: I call for the production of the letter.

20

Mr. Haight: I have no such letter.

Q. Do you know what interest has been paid to the North Jersey Title Insurance Company? A. Not at all. I don't know, that is, what has been paid to them or what has been paid by them.

Q. You got your interest from them, didn't you? A. Yes.

Q. You look to them for the payment of the mortgage, don't you?

30

Mr. Haight: I object.

The Court: Objection sustained.

Mr. Haight: With the exception of the copy or copies of the releases, complainant rests.

The Court: Who made the release?

Mr. Haight: I think it was made by Hapgood. Mr. Zabriskie said they gave him \$5000.

40

*John H. Himmelman, direct.*

Mr. Hendrick: That is not what you claim.

Mr. Haight: It doesn't make any difference. The fact is that \$5000 was paid on this mortgage.

The Court: Credited on the mortgage?

10

Mr. Haight: Credited on the bond in Hapgood's own writing and a release was thereupon given at the time that Hapgood was the record owner of this property, releasing the mortgage in respect to lots 33, 35, 37, 39, 40, 41, 42, 44, 46, in Block T I.

The Court: You would, as I understand it, admit a certified copy of the release with the same force and effect as if the original was produced, subject to such objections as you might have to the original.

20

Mr. Hendrick: May that be reserved until the complainant's proof is complete?

The Court: Yes; you may wait until the release is produced.

#### DEFENDANTS' CASE.

JOHN H. HIMMELMAN, sworn as a witness on the part of the defendant, testifies as follows:

30

*Direct examination by Mr. Hendrick:*

Q. Where do you reside? A. Boonton, New Jersey.

Q. What is your business? A. Contractor; general contractor.

Q. Builder? A. Builder.

Q. How long have you lived in Boonton? A. Thirty years.

Q. How long have you been a builder? A. Fifteen years.

40

*John H. Himmelman, direct.*

Q. Now, are you familiar with the development at Mountain Lakes? A. I am.

Q. Have you examined the properties there? A. I have.

Q. And have you bought property? A. I have been interested in property up there, yes.

Q. And in that way, you are acquainted with the property? A. I am. 10

Q. Have you built property there? A. I have.

Q. How long have you been a builder? A. Fifteen years.

Q. In that neighborhood? A. Yes, sir.

Q. Were you generally familiar with the development at Mountain Lakes? A. I was.

Q. Have you examined the house at 40 Lookout Road, known as house HH? A. Who lived in the house? 20

Q. That was my house, my wife's house. A. Yes, sir.

The Court: That is supposed to be the house on the premises in question?

Mr. Hendrick: Yes.

The Court: Supposed to be the house supposed to be on the premises in question?

Mr. Hendrick: Yes. 30

Q. When did you examine the house? A. A month or six weeks ago.

Q. Did you make a thorough examination? A. I did.

Q. Did you also examine a house No. 278, being the property of Jansen? A. Yes, sir.

Q. On Lookout Road? A. On Lookout Road.

Q. That house is the third house to the west of the house that you mentioned first? A. Yes, sir. 40

*John H. Himmelman, direct.*

Q. And it is about 1000 feet away? A. Somewheres in that neighborhood.

Q. What, in your opinion, is the present value of house HH?

10 Mr. Haight: I object to that as immaterial and irrelevant.

The Court: How is it material?

Mr. Hendrick: I wish to prove that the contract was not completed and that the house does not comply with the guarantee in the contract that the house to be built would be similar and equal in every respect to house 278, and I shall prove also that there was a deliberate and willful purpose not to make it equal and similar, a default in the contract, and that that was brought home to the North Jersey Title Company, and that the alleged mortgage with which it is attempted to charge the house contains clauses with respect to value and with respect to repairs which it could not, under the circumstances, be assumed that anyone who had not seen the mortgage and had not signed it, could be assumed to have agreed to pay.

20

30 The Court: What do you refer to?

Mr. Hendrick: The point that I am making is that the house that was produced at the time when the contract called for construction of a completed house, was worth less than the mortgage, and I am going to try to prove Mr. Zabriskie knew it or ought to have known it, and that Dr. Holloway knew it or ought to have known it, or be charged with notice of it, and that they had notice of that fact.

40

*John H. Himmelman, direct.*

The Court: As I understand, at the time you made the contract to buy the property, there was no house on the property.

Mr. Hendrick: No house on the property.

The Court: One was to be built under the contract.

Mr. Hendrick: Yes, and I gave Mr. Hapgood \$10,000 and a little later I hurried to give him \$2,200 and a little later I gave him indefinite payments and at the close, when I was told that he was going into bankruptcy, that I had better take something, that he would have to give a \$15,000 mortgage on it and that he would construct it, and I insisted, in order to complete, as I thought, the payments on it, on giving him \$2300.

10

20

The Court: I am just asking now whether at the time you entered into the contract to buy the property, the contract referred to a house which was to be built on the property?

Mr. Hendrick: It did.

The Court: The seller or vendor agreed to construct a house; is that it?

Mr. Hendrick: He did.

The Court: There was none on it at the time of making the contract?

30

Mr. Hendrick: There was not. The contract was dated March 19, and the mortgage was placed on the property on April 29, and before the mortgage was placed on, I propose to prove that I had paid more than the value of the house as delivered to me. I take it that there are certain equities that arise out of that situation.

40

*John H. Himmelman, direct.*

The Court: I cannot see the relevancy or materiality or how it is binding on this holder of the mortgage.

10 Mr. Hendrick: This contract was recorded months before the assignment, and Mr. Zabriskie has admitted that before that time his attention was called to the contract and the failure to complete—

The Court: I have not heard Mr. Zabriskie say that.

Mr. Hendrick: May I recall Mr. Zabriskie?

The Court: You are going to do that. I think I will allow this, subject to striking it out in case it does not appear from other testimony to be relevant to the issue.

20 Q. (Question repeated.) What, in your opinion, is the present value of house HH?

The Court: That is another question. I will sustain the objection on the question of value.

Q. Now, as compared with house No. 278, is house HH equal to house 278?

Mr. Haight: Objected to.

30 The Court: Objection sustained. It does not appear from the contract that it was to be equal or identical.

Q. Did you examine the construction of house HH? A. I did.

Q. Was it good or bad?

Mr. Haight: Objected to upon the ground that it is immaterial and irrelevant.

The Court: Objection sustained.

40

*William Zabriskie, direct.*

Q. What, if anything, did you observe about the construction of house HH?

Mr. Haight: I object to that as immaterial and irrelevant.

The Court: Same ruling.

Q. What, in your opinion, is the difference in value between house 278 and house HH? 10

Mr. Haight: Same objection.

The Court: Same ruling.

Q. As a builder, do you consider house HH a complete house?

Mr. Haight: I object to that upon the same ground.

The Court: Objection sustained. 20

Q. Is house HH a proper and habitable dwelling?

Mr. Haight: Same objection.

The Court: Same ruling.

Mr. Hendrick: As to the form of the question?

The Court: No; as to materiality and relevancy.

*No cross examination:*

30

WILLIAM ZABRISKIE, a witness heretofore sworn on the part of the complainant, called as a witness on the part of the defendant, testifies as follows:

*Direct examination by Mr. Hendrick:*

Q. Did you receive letters from me in or about the month of October and month of November, 1920, in which I informed you—

40

*Allen E. Alexander, direct.*

The Court: That form of the question is going to be objectionable. You cannot prove the contents of a letter by asking if he received a letter containing certain things.

10 Mr. Haight: If you call upon me for the production of the letter, giving the date, I will try to give it to you.

Mr. Hendrick: The first one is July, 1920.

Mr. Haight: Here are several letters.

Q. I ask you if you have produced, in accordance with the subpoena, the letters which I show you? A. I do not quite get the question. I did not produce any under the subpoena.

20 *By Mr. Haight:*

Q. That came out of your file that you handed to me. A. There is part of another letter in there that does not belong here.

The Court: Mr. Zabriskie finds that there is part of a letter that does not belong there.

Mr. Hendrick: I withdraw the witness.

30 ALLEN E. ALEXANDER, called as a witness on the part of the defendant, testifies as follows:

*Direct examination by Mr. Hendrick:*

Q. Mr. Alexander, were you in the office of Mountain Lakes, Incorporated, on July 1st, 1920?

A. Yes, sir.

Q. And did you see me there? A. Yes. I do not remember the exact date, but in that neighborhood.

40 Q. You were the salesman who sold me the lots at Mountain Lakes? A. Yes.

*Allen E. Alexander, direct.*

Q. And do you remember that I paid \$10,000 in cash? A. Yes, sir.

Q. And you signed the contract? A. Yes, sir.

Q. And that contract provided for taking title on July 1st, 1920? A. Somewhere in that neighborhood.

Q. At the office of the company? A. Yes. 10

Q. Was I there? A. Yes, sir.

Q. You were there? A. Yes.

Q. And Mr. Hapgood was not there? A. Mr. Hapgood was not there.

Q. Did you thereafter, in the presence of Mr. Hapgood, have a telephone conversation with me with respect to the taking of title and the date of taking title? A. Yes, sir.

Q. And did you talk to me about coming down and taking title at that time? A. Yes. 20

Q. And what, if anything, did you say to me with respect to coming down to take title?

Mr. Haight: I object to this. It is utterly irrelevant and incompetent.

(Argument.)

The Court: Objection overruled.

Q. What did you say to me and what did I say to you? A. This was some time ago and I couldn't really recollect anything like the exact words or anything, but the gist of the proposition was to get Mr. Hendrick down to the office and to close the proposition, especially from my standpoint, because then I would get my commission. That is what I was trying to do. 30

*By the Court:*

Q. Who wanted you to get Mr. Hendrick to the office? A. Mr. Hapgood. 40

*Allen E. Alexander, direct.*

Q. Did you tell that to Mr. Hendrick over the 'phone? A. Yes.

Q. What did you tell him? A. I asked him to come down to the office and to close up the proposition.

10 Q. What else did you say? A. Why, I made it as strong as possible for him to come down there and I believe I asked him as a personal favor to come down.

Q. You being interested in the commission all the time? A. Yes.

*By Mr. Hendrick:*

20 Q. What did you say in order to induce Mr. Hendrick to come down? Did you make any argument from the point of view of Mr. Hendrick's interest? A. Well, now, I cannot recall just exactly the reason. I knew—

*By the Court:*

Q. This is what you said to Mr. Hendrick? A. Yes. I think I told Mr. Hendrick that if he came down—or, if he didn't come down and close the proposition, it would be very embarrassing for both Mr. Hapgood and myself.

*By Mr. Hendrick:*

30 Q. Did you say why? A. Why, we all needed the money.

Q. Is that all you recall? A. That is the gist of what I can recall at this time.

Q. Well, now, I wish you would search your recollection and see if you can remember anything else? A. (No answer).

Q. Did you say at the time—

40 The Court: I am going to let you lead a little.

*Allen E. Alexander, direct.*

Q. Was there anything said about the taking of title and waiving the terms of the contract?

Mr. Haight: I object.

The Court: It is leading, but I am going to permit it.

A. Well, I don't think in those words, but the idea of the conversation, as far as I can recollect, was to get Mr. Hendrick up here and close this contract up, in a friendly way, even if it was not strictly in accordance with this contract that he had. 10

*By the Court:*

Q. This you told to Mr. Hendrick? A. Yes; over the telephone, as I recollect.

*By Mr. Hendrick:* 20

Q. And did you say anything about the matter being fixed up later? A. That I do not recollect.

Q. Now, did you say it would be for my interest to come quickly and take what I could get, because Hapgood and Mountain Lakes were in a shaky condition?

Mr. Haight: Objected to on the ground that it is leading, and on the further ground that it is misleading. 30

The Court: It is very leading, but I am going to permit it.

A. In substance, something along those lines.

Q. And in accordance with that conversation, I came down, didn't I? A. Yes.

Q. Were you present? A. Yes.

Q. Did you hear the conversation that was had between Hapgood and me? A. As I recollect, Hapgood was not there. 40

*Allen E. Alexander, direct.*

Q. I am speaking of the other time that I did come down in response to the conversation, when I got the deed? A. (No answer.)

*By the Court:*

10 Q. Pardon me. May I ask you if in response to that conversation, did Mr. Hendrick come down? A. He came to the office; yes.

Q. That same day? A. That I cannot remember. My recollection is that when Mr. Hendrick came to the office, Mr. Hapgood was not there.

Q. I am not so much interested in knowing that as in knowing when Mr. Hendrick came to the office? A. He came in answer to that telephone conversation.

20 Q. How long did it take him—a week or a day, or an hour? A. Well, I don't think it was that same day; I think it was the next day.

*By Mr. Hendrick:*

Q. Might it not have been the same day? A. It might have been the same day.

Q. Were you there when I came down? A. Yes.

Q. Were you there at the time Mr. Hapgood gave me a deed? A. I think I was.

30 *By the Court:*

Q. Was it that same day that Mr. Hendrick came? A. I think it was. This is some years ago.

*By Mr. Hendrick:*

Q. Did you see whether or not any money or checks were given? A. At that time?

Q. Yes. A. No; I don't remember.

Q. You were interested in that, were you not? A. No; not at that time. When you first came in

40

*Allen E. Alexander, direct.*

the office with Liberty Bonds, I remember the transfer, handing over \$10,000 worth of Liberty Bonds.

*By the Court:*

Q. You were interested in your commission still, were you not? A. Yes. May I explain that I was also interested in having Mr. Hendrick take over more property? 10

*By Mr. Hendrick:*

Q. Now, Mr. Alexander, were you there when Mr. Hapgood handed me a deed? A. Yes.

Q. And do you remember the conversation that took place? A. I cannot say I do.

Q. Do you remember whether or not any money was given to him at that time? A. I cannot say that I do. 20

Q. Well, now, if the Court will permit me to refresh your recollection, do you recall my handing over to Mr. Hapgood a check and his saying: "No; you don't need to pay any money"? A. I do.

Q. Now, do you recall about the amount of that check? A. It was around \$2,200, if I remember correctly, somewheres around that neighborhood.

Q. Did Mr. Hapgood say anything about the deed being in accordance with the contract? 30

Mr. Haight: I submit that this is leading off into a realm that is utterly irrelevant and immaterial.

The Court: Objection overruled.

A. I don't recollect.

Q. Do you know who the commissioner was who took the acknowledgment? A. Was he present? 40

*Allen E. Alexander, direct.*

Mr. Haight: Objected to.

The Court: Objection sustained.

Q. Did you observe whether or not the deed as handed to me had a seal on it? A. No, sir.

Q. You saw the deed, did you not? A. No.

10 *By the Court:*

Q. Did you say "No"? A. I don't remember whether I saw it. Usually I didn't bother to look at the deeds handed over in another department.

*By Mr. Hendrick:*

Q. Did you receive and communicate to Mr. Hapgood and did you hear in his presence allegations by me to the effect that he had not completed his contract at that time?

20 Mr. Haight: Objected to.

The Court: The question is objectionable as leading, but I will admit it.

*By the Court:*

Q. What did you hear said? A. That Mr. Hendrick complained that the contract was not carried out the way he thought it should be.

*By Mr. Hendrick:*

30 Q. In what respects? A. In respect to the construction of the house.

Q. And in what respect in that way? A. Well, I cannot recall the exact things that you objected to, but there were several,—in the way the house was constructed.

*By the Court:*

40 Q. Is this before or after the deed was delivered? A. As I remember, it was about that time.

*Allen E. Alexander, direct.*

Q. Can you tell me whether it was before or after the deed was delivered? A. I could not say.

*By Mr. Hendrick:*

Q. Can you say whether it was before or after?  
A. I thing both before or after.

Q. And at the time? A. About around the time. 10

Q. Now, at those times was the house 278 mentioned in the complaint?

The Court: I don't think that is material, and I don't think I will allow it.

Mr. Hendrick: As to whether Hapgood admitted it was true at that time.

*By the Court:*

Q. What did Mr. Hapgood say in answer to this complaint? A. My recollection is that he smoothed the matter over temporarily. 20

Q. What did he say? A. He said he would fix anything up that was wrong.

*By Mr. Hendrick:*

Q. Did he say anything that he would fix, that you recall? A. No; I cannot recall.

Q. Did the negotiations which ripened into this contract take place with you in the presence of Mr. Hapgood? A. Nearly all of them. 30

*By the Court:*

Q. That is, the negotiations that led up to the execution of the contract? A. Yes.

*By Mr. Hendrick:*

Q. And did you, in those negotiations, show me photographs of houses at Mountain Lakes and

*Allen E. Alexander, direct.*

give me a list of prices—photographs issued to you by the company?

Mr. Haight: Objected to.

The Court: Objection sustained.

10 Q. Did you show me a photograph of House 278?

Mr. Haight: Objected to?

The Court: Objection sustained.

Q. Did you tell me, in the presence of Mr. Hapgood, the price at which House 278 had been sold?

Mr. Haight: Objection to.

The Court: Objection sustained.

20 (At this point recess is taken until two o'clock in the afternoon. After recess witness resumes the stand and direct examination continues.)

Q. Mr. Alexander, was there any house on Lots 34, 36, 38 or the adjoining lots, on March 18, 1920?

The Court: That is the date of the contract?

Mr. Hendrick: Yes, sir.

30 A. No, sir. Those are the lots that they built the house on.

*By the Court:*

Q. Are you asking a question or making a statement? A. I don't remember the number of the lots. If those are the lots he refers to, there was no house on them.

*By Mr. Hendrick:*

40 Q. Were you present when I paid Mr. Hapgood a short time later a sum of about \$2,200?

*Allen E. Alexander, direct.*

The Court: He has already testified to that. He said he recalled that you produced a check for something like \$2,200.

Mr. Hendrick: This was a short time after I paid the \$10,000.

Mr. Haight: Do you contend that you paid more than \$12,000? 10

Mr. Hendrick: Oh, yes.

Mr. Haight: Your contract did not call for more than that.

Mr. Hendrick: Yes.

(Question repeated by request of Court.)

The Court: When you say "a short time later," what do you mean?

Mr. Hendrick: After the payment of the \$10,000.

*By the Court:* 20

Q. Do you recall that? A. Yes.

*By Mr. Hendrick:*

Q. Do you remember how long after the payment of the \$10,000 it was? Was it a couple of weeks? A. It was some time. It was at least that I would say.

Q. It was in that month, was it? A. I would say it was about a couple of weeks later—two or three weeks. 30

Q. About the first of April? A. Yes.

Q. Did you watch the progress of construction of the house and performance of the contract? A. Yes; it was not part of my business but I took occasion to go up there several times.

Q. Now, were you there on or about July 6, 1920?

A. I would say so, yes.

Q. Now, I show you a picture and ask you if that represents the condition on or about July 1st, 1920? 40

*Allen E. Alexander, direct.*

Mr. Haight: I object. This question is utterly immaterial and irrelevant.

The Court: Objection sustained.

(Photograph is marked D-2 for identification.)

10 Q. Did this contract which was entered into provide for the grading of the grounds?

The Court: The contract will show that.

Mr. Hendrick: This is a preliminary question.

The Court: Ask him whether the grounds were graded.

Q. Were the grounds graded July 6th, 1920?

Mr. Haight: Objected to.

20 The Court: Objection overruled.

A. I would say no.

Q. Were rooms tiled at that time? A. That I don't remember.

Mr. Haight: May it be understood, without my stating it, that I object to this line of questions?

The Court: All right.

30 Q. Were the fixtures in at that time?

The Court: I understand that there is an objection. Objection sustained.

Q. Were the bath tubs in at that time?

The Court: Objection sustained.

Q. Were you present when there was any conversation with Mr. Hapgood with respect to the completion of the house? A. Oh, yes.

40 Q. Did he, on July 6th, 1920, agree to complete

*Allen E. Alexander, direct.*

the house and to complete the grading? A. That was understood.

*By the Court:*

Q. It could not be understood unless it was said.

A. I don't know whether it was July—

*By Mr. Hendrick:*

10

Q. On or about that time? A. Yes; on or about that time.

Q. And thereafter? A. Yes.

(Motion to strike out. Denied.)

Q. Was there a house on the three lots to which I have referred on April 29th, 1920? A. No, sir.

Q. I show you a letter and ask you if you wrote that letter as an agent of Mountain Lakes, Incorporated.

20

Mr. Haight: I object to the form of the question. Agency cannot be proved in that way.

Mr. Hendrick: I will ask him if he wrote the letter. Strike out "as agent of Mountain Lakes, Incorporated."

*By the Court:*

Q. Is that your handwriting? A. Yes, sir.

30

*By Mr. Hendrick:*

Q. Did you talk with Mr. Hapgood about this letter before you sent it? A. I haven't read the letter. I just looked at the handwriting.

Q. Will you read the letter? A. (After reading letter.) I don't remember whether I talked to Mr. Hapgood about that, but I talked to somebody in the company and found out—

40

*Allen E. Alexander, direct.*

*By Mr. Haight:*

Q. Don't state what you found out. A. Well, that was the reason. I answered his letter. I got the information.

10 Mr. Hendrick: I offer the letter in evidence.

Mr. Haight: I object to it. It is immaterial. It has nothing to do with this issue.

The Court: Objection sustained.  
(Letter is marked D-3 for identification.)

*By Mr. Hendrick:*

Q. Did you talk with Mr. Hapgood at any time about the price at which House 278 was sold?

20 Mr. Haight: Objected to; that has nothing to do with this case.

The Court: Objection sustained.

Q. Did you, before the contract was signed, tell me the price at which House 278 had been sold?

Mr. Haight: Objected to.

The Court: Objection sustained.

30 Q. Do you know at what price House 278 was sold?

Mr. Haight: Same objection.

The Court: Same ruling.

Q. Do you know where Mr. Erisman is? A. Yes, sir.

Q. Has he a place of business? A. Yes, sir.

Q. Is he in the real estate business? A. Yes.

*By the Court:*

40 Q. Where is he? A. Hickville Center.

*Allen E. Alexander, cross.*

Q. Long Island? A. Yes, sir.

Q. Does he live there or have his place of business there? A. Both.

*By Mr. Hendrick:*

Q. Did he work for Mountain Lakes, Incorporated? A. Yes, sir. 10

Q. How long did he work for that company?

A. All the time I was there and several years before.

Q. And what were his duties?

The Court: That is not material.

Q. Did you see him take acknowledgments in the office?

Mr. Haight: Objected to.

The Court: Objection sustained. 20

*Cross examination by Mr. Haight:*

Q. You stated that the time in July when the title was closed, or just before that, you communicated with Mr. Hendrick and induced him to come down to close title? A. Yes.

Q. A few days before that he had come to the office of Mountain Lakes, Incorporated, in New York, prepared to close title, had he not? 30

Mr. Hendrick: I object to that as calling for a conclusion.

Q. He came there to close title? A. Yes.

Q. Mr. Hapgood was not present? A. No.

Q. Did Mr. Hendrick say anything about his willingness or desire to close title at that time? A. Why, I understood that he came down there for that purpose.

Q. What did he say to you, if anything? A. That I don't remember just exactly what he said. 40

*Allen E. Alexander, cross.*

Q. Why did you subsequently ask him to come down? A. Because Mr. Hapgood asked me to get him down to close title.

Q. That was between July 1st and July 6th?

A. Yes.

10 Q. Now, then, when you called him up and asked him to come down, did he demur at all to come down? A. Yes.

Q. What did he say? A. I don't remember the exact words he used or just exactly what he did say, except that he was not anxious to come down to the office and close.

Q. His complaint at that time was that there was a \$15,000 mortgage on the property and there should have been only \$10,000?

20 Mr. Hendrick: I object to that as not proper cross examination and calling for a conclusion and not asking for what was said.

The Court: Objection overruled.

A. That is the substance.

Q. That was the only complaint at that time, was it not?

(Same objection. Same ruling.)

30 A. Well, I think he had several other complaints, but that was the serious complaint.

Q. The house was not entirely completed? A. No.

Q. And the grading had not been entirely completed? A. No.

Q. And he complained about that? A. Yes.

Q. And Mr. Hapgood paid \$5,000 off on account of the mortgage? A. Yes.

40 Q. And he said the house would be completed? A. Yes.

*Allen E. Alexander, cross.*

Q. And also that the ground would be graded?

A. Yes.

Mr. Hendrick: I object to this line of testimony by Judge Haight.

The Court: Objection overruled.

Q. That is correct, is it? A. Yes, sir.

10

Q. Now, did Mr. Hendrick at that time offer to pay the \$2200 that the contract called for the payment of, at the time of the closing of the title?

A. Why, he did pay the \$2200.

Q. Did Mr. Hapgood tell him that he need not pay that until he had paid off the mortgage? A. That is my recollection.

Q. Or rather until he had reduced the mortgage to \$10,000? A. Yes.

Q. What did Hendrick say to that? A. My recollection is that he insisted upon paying this \$2200 besides. Just exactly what that was for I don't remember.

20

Q. Now, were the grounds subsequently graded?

Mr. Hendrick: Objected to.

The Court: Objection overruled.

Q. Were the grounds subsequently graded by Mountain Lakes, Incorporated? A. Why, I would not call them graded, no, sir.

30

Q. There was some work in grading done? A. Yes, sir.

Mr. Hendrick: I object unless it is said by whom, and whether he knows.

Q. My questions referred to Mountain Lakes, Incorporated. Did you so understand it in answering the question? A. Yes, sir.

40

*Allen E. Alexander, redirect.*

Q. Were the stumps removed? A. My recollection is that the stumps were removed. The ground was harrowed.

Q. Also the small stones? A. No; I would not say that.

Q. Were the grounds sodded? A. Partially.

10 Q. And were 150 shrubs set out? A. I doubt it.

Q. How many would you say were set out? A. A few shrubs were set out.

Q. The house was in course of completion on April 29, 1920, was it not? A. April 29th?

Q. Yes. A. In course of construction?

Q. Yes; in course of construction. A. Yes.

Q. They were completing it? A. Yes.

*Redirect examination by Mr Hendrick:*

20 Q. They were completing it for a long time afterwards, were they not? A. Yes.

Q. Were there periods of weeks at a time when they did nothing on it?

Mr. Haight: Objected to.

The Court: Objection sustained.

Q. I show you a picture of the house and ask you if you know who did the grading which is apparent on that picture.

30 Mr. Haight: I object to the form of the question. If he will ask whether that is a picture of the house at a certain time and the witness says "Yes," I have no objection to the picture going in.

The Court: Objection sustained.

Q. Is that a picture of the house at a certain time? A. Yes, sir.

*Allen E. Alexander, redirect.*

*By the Court:*

Q. At what time? A. Well, I could not say what time. It was around the fall of the year.

Q. 1920? A. Yes, sir.

*By Mr. Hendrick:*

Q. Do you know who did that grading? A. No, sir. 10

Q. That is not the grading that you referred to as having been done by Mountain Lakes, Incorporated, is it? A. No, sir.

Q. Do you know, as a matter of fact, that that was not done by Mountain Lakes? A. Yes.

*By the Court:*

Q. The grading that you said was done by Mountain Lakes? A. No; the grading that is in that picture. 20

*By Mr. Hendrick:*

Q. Did you see me working on that grading? A. Yes, sir.

Q. With an Italian? A. Yes, sir.

Q. And a team of horses? A. Yes, sir.

Q. Did you hear Mr. Hendrick say anything to the effect that the \$10,000— 30

The Court: The form of the question should be: What did Mr. Hendrick say about the \$10,000.

Mr. Hendrick: I am asking for his recollection.

The Court: At what time?

Mr. Hendrick: At the time of the so-called closing. 40

*Allen E. Alexander, redirect.*

*By Mr. Hendrick:*

Q. Tell us what Mr. Hendrick said about \$10,000 at the time of the so-called closing. A. Why, I cannot recall anything particularly that you said about the \$10,000 mortgage.

10 Q. Was it not a fact that Mr. Hendrick's complaint, as today you have testified, was that the contract was not completed at all and that no mortgage should be on the house; was not that the fact that was set up at that time? A. He complained in regard to the contract not being completed, I recollect.

*By the Court:*

20 Q. What do you mean by "the contract not being completed"? A. That was Mr. Hendrick's objection.

Q. What do you mean by "the contract not being completed"? Do you mean the contract for building? A. Yes; building the house.

*By Mr. Hendrick:*

30 Q. Was it not a fact that on July 1st you told me at 170 Broadway, the office of Mountain Lakes, Incorporated, that Mr. Hapgood had been compelled to put a mortgage of \$15,000 on the lots, including these lots? A. I don't recollect about the "compelled" part. I know that he did.

Q. Didn't you tell me that for the first time at that time? A. I think so; yes.

Q. Now, Mr. Alexander, didn't I thereupon, in the presence of Mr. Hapgood, tell you that I wanted to close up the thing in advance by paying and getting my deed?

Mr. Haight: I object.

40 The Court: Objection sustained.

*Allen E. Alexander, redirect.*

Q. Mr. Alexander, did you take me into House 278 and show it to me?

(Objection. Objection sustained.)

Q. Do you know Mr. Zabriskie?

(Objection. Objection sustained.)

10

Q. Do you know where Mr. Hapgood is?

(Objection as immaterial. Objection sustained.)

Q. Do you know where the files of Mountain Lakes are?

(Same objection. Same ruling.)

Q. I show you a picture, being D-2 for identification, and ask you if that does not represent the state of the grading on July 6th, 1920? A. Yes; I would say that it does.

20

Mr. Hendrick: I offer the picture in evidence.

Mr. Haight: I have no objection.

(Picture heretofore marked D-2 for identification marked Exhibit D-2.)

Q. I show you another picture and ask you the same question with respect to it. A. I couldn't state what date that was.

30

Q. On or about that time? A. Yes, sir.

Mr. Hendrick: I offer the picture in evidence.

Mr. Haight: Objected to.

The Court: It will be admitted.

(Marked Exhibit D-4.)

Mr. Hendrick: I make the same offer with respect to this picture.

40

*Allen E. Alexander, redirect.*

Mr. Haight: I object on the ground that it is not redirect examination.

The Court: Objection sustained, but not for that reason. I sustain the objection on the ground that the picture is not properly identified.

10

Q. Is it not a fact that I graded the property?

The Court: He has already testified that he saw you and one or two Italians grading the property.

Mr. Haight: There is one thing on which I neglected to examine the witness, and with the permission of the Court, I will take it up now.

20

*By Mr. Haight:*

Q. You say that Mr. Hendrick paid an extra \$2,200 or \$2,300, whichever the case might be. Was that for extras?

Mr. Hendrick: I object as not proper re-direct—not proper re-cross.

30

Mr. Haight: I was going to ask Your Honor to indulge me. I want to demonstrate that the \$2,300 was for extras, because it might appear that he paid \$2,300 additional and that that sum should be applied on account of this mortgage.

The Court: All right. I will admit it.

Mr. Hendrick: I object to it. The question is: What was said?

Mr. Haight: This is cross examination.  
(Question repeated.)

Mr. Hendrick: I object to the question on the ground that it is incompetent, irrelevant,

40

*Allen E. Alexander, redirect.*

and immaterial, and not proper cross examination.

The Court: Reframe the question and ask the witness: Do you know what the \$2,200 or \$2,300 paid by Mr. Hendrick was paid for?

Q. Consider that as the question. Answer the Court's question? 10

The Court: And consider that Mr. Hendrick makes the same objection as he made to the previous question. The objection will be overruled.

A. Yes, sir.

Q. You do know? A. Yes.

Q. What was it for? A. For extras.

Q. What do you mean by "extras"? A. Additional construction in the house, outside of the original contract. 20

*By the Court:*

Q. Ordered by whom? A. Ordered by Mr. Hendrick.

*By Mr. Hendrick:*

Q. That was your understanding, was it? A. Yes. 30

Q. You gathered that from what you learned at the time of the alleged closing, is that right? A. Yes.

Q. Did you also understand that Mr. Hendrick insisted at that time that the \$15,000 mortgage was not a proper charge on the house?

Mr. Haight: I object. That has been asked and answered. 40

*Allen E. Alexander, redirect.*

Q. Did you not hear Mr. Hendrick say to Mr. Hapgood: "I insist on paying this because you have not completed your contract and that pays for everything that you have done"?

Mr. Haight: I object to that on every rule of evidence known to the law.

10

The Court: I will overrule it on the ground that it is leading. If you will ask Mr. Alexander to repeat the conversation that was had between you and Mr. Hapgood at the time you paid this \$2,200 or \$2,300 all right.

Q. Will you repeat any conversation that you now remember with respect—

20

The Court: With respect to the payment of the \$2,200 or \$2,300, whatever it was.

A. The thing I remember on that, Hapgood said that it was not necessary to be paid at that time and Mr. Hendrick insisted upon paying it at that time. Now, I do not exactly recollect what it was for, but it was for some extras in the contract. Now, the rest of the conversation I cannot recollect.

*By the Court:*

30

Q. You have given us all the conversation that you can recollect on the subject of the \$2,200 that you say you understand was for extra work? A. Yes.

*By Mr. Hendrick:*

Q. Now, your testimony now is that you don't remember any conversation to the effect that it was for extras; is that right?

Mr. Haight: I object. The witness has not said that.

40

The Court: Objection overruled.

*Allen E. Alexander, redirect.*

A. I don't even remember that the conversation in regard to the \$2,200 said anything about extras.

Q. Now, to refresh your recollection, do you remember that I delivered to Mr. Hapgood a letter in which I said that I made that payment without prejudice to a claim that he had not fulfilled his contract; do you remember that? A. Yes. 10

Q. And that I gave him that letter at that time; do you remember that? A. I think you did at that time.

Q. Do you know where that letter is now? A. No, sir.

Mr. Haight: Here is the letter. Show it to him.

Mr. Hendrick: I ask my friend if he has the other files of Mountain Lakes, Incorporated. 20

Mr. Haight: Here is the whole file, but you cannot take time to go over it now. You asked for that letter, and there it is.

Mr. Hendrick: Do you wish me to put the letter in evidence?

The Court: You have the letter. What do you want to do with it?

Mr. Hendrick: I offer it in evidence.

Mr. Haight: I have no objection. 30

(Letter is marked Exhibit D-5.)

Q. Now, do you recall—is your recollection refreshed—to the effect that that letter demanded the delivery of a warranty deed of the house to me?

Mr. Haight: I object. The letter speaks for itself.

The Court: Objection sustained. 40

*Allen E. Alexander, redirect.*

Mr. Hendrick: May I ask if you have any other letters?

Mr. Haight: I won't give you these letters to go over as you see fit. If you will tell me what you want, I will give them to you.

10 Q. Now, that letter was delivered during this conversation, was it?

The Court: He says so.

Q. Did Mr. Hapgood deliver any deed to me—a free and clear deed—

(Objected to. Objection sustained.)

Q. Now, I ask you to read that letter. Have you read the last paragraph? A. Yes.

20 Q. I ask you if that refreshes your recollection with respect to any demand made by me on Mr. Hapgood at that time.

The Court: I do not see how this is proper redirect examination. You have gone all over this thing a couple of times.

Mr. Hendrick: I call for letter of September 22.

30 Q. I ask you to read a letter which I show you.

Mr. Haight: I object. It cannot be redirect examination or touch anything upon which cross examination was directed.

The Court: Objection sustained.

Mr. Hendrick: I offer the letter in evidence.

Mr. Haight: Objected to.

The Court: Objection sustained.

(Letter is marked D-6 for identification.)

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*John H. Himmelman, direct.*

Mr. Haight: This photograph was called for. It should go in evidence.

The Court: Let it be marked.

(Photograph marked Exhibit D-7.)

Mr. Hendrick: I object unless the date of the picture is shown.

The Court: It is just as admissible as those you showed. Objection overruled. 10

JOHN H. HIMMELMAN, heretofore sworn as a witness on the part of the defendants, recalled:

*Direct examination by Mr. Hendrick:*

Q. I now ask you what you observed when you examined House HH, about the construction of it.

The Court: That has been asked before and overruled. 20

Mr. Hendrick: I have laid new grounds.

The Court: Objection still sustained.

Mr. Hendrick: I wish to prove the non-completion of the contract. I wish to prove that the premises are worth—

The Court: I don't think the value has anything to do with the case. I will not admit it.

Mr. Hendrick: I now call for letter sent to Judge Beach by me, on or about November 26, 1920—a letter in which I notified the judge that there should be no mortgage on the premises. 30

Mr. Beach: I have no such letter, unless you have a copy. I never received any such letter.

Mr. Hendrick: I have a copy.

*William H. Zabriskie, direct.*

WILLIAM H. ZABRISKIE, a witness heretofore sworn on part of complainant, called as a witness on the part of defendant.

*Direct examination by Mr. Hendrick:*

10 Q. Mr. Zabriskie, I show you a letter dated October 20, 1920, and ask you if you received that letter from me, produced from your files.  
A. Yes, sir.

Mr. Hendrick: I offer the letter in evidence.

Mr. Haight: Objected to as immaterial, irrelevant and incompetent.

The Court: Objection sustained.

(Letter is marked D-8 for identification.)

20 Mr. Hendrick: I call for the production of letter of November 26, 1920, addressed to George R. Beach.

Mr. Beach: We haven't the letter. I never received it. I don't know anything about it.

Defendant Rests.

30 Mr. Haight: I now offer in evidence certified copy of release of mortgage, H. J. Hapgood to Mountain Lakes, Inc., dated November 22, 1920; recorded November 24, 1920, in Book 22 of Releases, page 77, releasing from the lien of the mortgage certain lots described in the bill of complaint.

Mr. Hendrick: I understand that the paper is offered in accordance with the notice under the statute to produce the originals.

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*Case.*

Mr. Haight: It is offered in lieu of the original.

Mr. Hendrick: I object to any offer of it which purports to be a proof of recording and I object to its being received in evidence on the ground that Frank H. Erisman has not been shown to be a commissioner of deeds of New Jersey, on the grounds heretofore stated. 10

The Court: Objection overruled.

(Marked Exhibit C-15.)

Mr. Hendrick: I now ask permission to offer in evidence certificate of the Secretary of State of the State of New Jersey, dated November 29, 1924, to the effect that he has searched the record of Foreign Commissioners of Deeds for New Jersey and has failed to find that Frank H. Erisman has been such Foreign Commissioner of Deeds since May 31, 1918, and further certifying that said Erisman has not been a Foreign Commissioner of Deeds for New Jersey from that period to the date of the certificate. 20

Mr. Haight: I object on the ground that it is incompetent and on the further ground that it is immaterial. 30

The Court: Objection sustained.

Mr. Hendrick: I ask that the certificate be marked for identification.

(Certificate marked D-9 for identification.)

Case Closed.

*Exhibits.***Exhibit C-1.**

MOUNTAIN LAKES INC.,  
TO  
NORTH JERSEY TITLE INS. CO.

10 Know all Men by these Presents That Mountain  
Lakes, Inc., a Corporation of the State of New  
Jersey, is held and firmly bound unto the North  
Jersey Title Insurance Company, a Corporation  
of the State of New Jersey, having its principal  
office located at Hackensack, New Jersey, in the  
penal sum of Thirty Thousand (\$30,000) dollars, in  
gold coin of the United States of America, to be  
paid to the said North Jersey Title Insurance Com-  
pany, its successors or assigns: For which Pay-  
ment well and truly to be made it binds itself,  
20 its successors and assigns firmly by these presents.  
Sealed, with its seal and dated the 29th day of  
April, One Thousand Nine Hundred and Twenty.  
The Condition of the above obligation is such that  
if the above bounden Mountain Lakes, Incorpo-  
rated, its successors or assigns, shall well and truly  
pay or cause to be paid, unto the above named  
North Jersey Title Insurance Company or to its  
successors or assigns, the just and full sum of Fif-  
teen thousand (\$15,000) dollars in gold coin of  
30 the United States of America, at the present legal  
standard of weight and fineness, on the 29th day  
of April, which will be in the year One Thousand  
Nine Hundred and Twenty Three, and the interest  
thereon to be computed from the date hereof, at  
and after the rate of six per cent. per annum, and  
to be paid semi-annually in gold coin as aforesaid,  
and shall also pay all taxes, assessments, water  
rents, fire or windstorm insurance premiums, and  
other governmental or municipal rates, charges  
40 and liens imposed or acquired upon the property

*Exhibits.*

described in the mortgage given to secure the payment of this bond, which mortgage is hereto annexed, without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force and virtue. And it is Expressly Agreed, that should any default be made in the payment of the said interest or any part thereof, 10  
on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond and become due and payable; and should the said interest or any part thereof remain unpaid and in arrear for the space of thirty days or said tax, assessment 20  
water, rent, fire or windstorm insurance premium, or other municipal or governmental rate, charge, imposition or lien or any or either of them remain unpaid and in arrear for the space of sixty days, or should there be a total or partial destruction, by fire or wind of any building on the premises described in the mortgage given to secure the payment of this bond or should the said mortgaged premises be suffered to deteriorate in value for lack of repairs, then and from thence forth, that is to say, in any of the cases so mentioned the 30  
aforesaid principal sum of Fifteen Thousand (\$15,000) dollars, with all arrearage of interest thereon, shall at the option of the said North Jersey Title Insurance Company, or its legal representatives become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything herein before contained to the contrary thereof in anywise notwithstanding. 40

*Exhibits.***Exhibit C-2.**

10 This Indenture made the 29th day of April, in  
the year of our Lord One thousand nine hundred  
and twenty, Between Mountain Lakes, Incorporated,  
a corporation of the State of New Jersey, party  
of the first part, and North Jersey Title In-  
surance Company, a corporation of the State of  
New Jersey, having its principal office at Hacken-  
sack, in said State of New Jersey, party of the  
second part: Whereas, the said Mountain Lakes,  
Incorporated, is justly indebted to the said party  
of the second part, in the sum of Fifteen Thousand  
and (\$15,000) Dollars, in gold coin of the United  
States of America, secured to be paid by a certain  
bond or obligation, bearing even date with these  
20 presents, and hereto prefixed, as by the said bond  
or obligation, and the condition thereof, will more  
fully appear: Now this Indenture Witnesseth,  
That the said party of the first part, for the better  
securing the payment of the said sum of money  
mentioned in the condition of the said bond or  
obligation with interest thereon according to the  
true intent and meaning thereof, and also for and  
in consideration of the sum of One Dollar, to it in  
hand paid by the said party of the second part,  
30 at or before the ensealing and delivery of these  
presents, the receipt whereof is hereby acknowl-  
edged, has granted, bargained, sold, aliened, re-  
leased, conveyed, and confirmed, and by these  
presents does grant, bargain, sell, alien, release,  
convey, and confirm, unto the said party of the  
second part, and to its successors and assigns, for-  
ever, all that tract of land and premises herein-  
after particularly described, situate, lying and  
being in the Township of Hanover, County of

*Exhibits.*

Morris, State of New Jersey: and known and described as lots Nos. 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 46, Block T-1 as shown on and in connection with a map of the property of Mountain Lakes, Incorporated, C. O. Martindale, engineer, filed in the office of the Clerk of the County of Morris, July 15th, 1916, being more particularly bounded and described as follows: Beginning at a stone monument set on the northerly side of Lookout Road, at the irregular intersection with Tower Hill Road, thence (1) South  $73^{\circ} 23'$  west along the northerly side of Lookout Road, sixty and sixty-four one hundredths (60.64) feet to a stone monument thence (2) still along the northerly side of Lookout Road south  $71^{\circ} 19'$  west two hundred and seventy-eight and seventy-five one hundredths (278.75) feet to a stone monument set on the dividing line between lots No. 32 and No. 34 Block T-1 thence (3) along said dividing line and an extension thereof North  $15^{\circ} 51'$  west three hundred and seventy and twenty-three one hundredths (370.23) feet to a stone monument set on the northerly side of a new road known as Mountain Way thence (4) along the southerly side of Mountain Way North  $81^{\circ} 18'$  East twenty-four and six tenths (24.6) feet to a stone monument thence (5) still along the southerly side of said Mountain Way, South  $87^{\circ} 49'$  east one hundred and eighty-eight and seventy-four one hundredths (188.74) feet to a stone monument thence (6) along the westerly side of Tower Hill Road south  $48^{\circ} 42'$  east one hundred and ninety-seven and eighty-nine one hundredths (197.89) feet to a Stone monument thence (7) still along the westerly side of Tower Hill Road south  $34^{\circ} 03'$  east one hundred and nineteen and seventeen one hundredths (119.17)

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*Exhibits.*

feet to a stone monument set at the intersection of Tower Hill Road, and Lookout Road, thence (8) along said intersection south  $19^{\circ} 40'$  west seventeen and seventy-four one hundredths (17.74) feet to the point or place of beginning, containing house known as "H H".

10 Together with all and singular the tenements hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions remainder and remainders, rents, issues, and profits, thereof. And also, all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well as in law as in equity, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances.

20 To Have and To Hold, the above granted and described premises with the appurtenances unto the said party of the second part, its successors and assigns, to its and their own proper use, benefit and behoof forever. Provided always, and these presents are upon this express condition, that if the said party of the first part, its successors or assigns, shall well and truly pay unto the said party of the second part, its successors or assigns, the said sum of money, mentioned in the  
30 condition of said bond or obligation, and the interest thereon and shall also pay all taxes, assessments, water rents and other governmental or municipal rates, charges, and liens imposed or acquired, upon the property hereinbefore described at the time and times and in the manner mentioned in the said condition according to the true intent and meaning, thereof, then these presents and the estate hereby granted shall cease determine, and be void.

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*Exhibits.*

And the said Mountain Lakes, Incorporated, for itself, its successors, and assigns, does covenant and agree to and with the said party of the second part, that the said party of the first is lawfully, seized of a good and indefeasible estate, of inheritance, in said premises, and has good right to convey the same, and that it will pay unto the said party of the second part, its successors or assigns, the said sum of money and interest as mentioned above and expressed, in the conditions of the said bond. And it is Also Agreed, by and between the parties to these presents, that the said party of the first part shall and will keep the buildings erected and to be erected upon the lands above conveyed, insured against loss or damage by fire and wind, in an amount and in companies to be approved by the said party of the second part, its successors or assigns, and assign the policy and certificates thereof to the said party of the second part; and in default thereof, it shall be lawful for the said party of the second part to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, payable on demand with interest at the rate of six per cent. per annum, from the time of payment of such premium or premiums. And the said Mountain Lakes, Incorporated, the owner of the lands above described for itself, its successors and assigns does further covenant and agree to and with the said party of the second part, its successors and assigns that it will not hereafter apply for any deduction, by reason of any mortgage from the taxable value of the lands embraced in this mortgage. And it is further Agreed, that in

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*Exhibits.*

10 case the said Mountain Lakes, Incorporated, its successors or assigns, shall claim any deduction from the taxable value of said lands in violation of this agreement or should there be a total or partial destruction by fire or wind, of any building on the premises described, in this mortgage or should the said mortgaged premises be suffered to deteriorate in value for lack of repairs, then and from thence forth that is to say, in any of the cases so mentioned, this mortgage shall become and be immediately due and payable and the amount of tax paid by the mortgagee shall be added to the principal of the debt secured hereby and recoverable therewith, with interest thereon from the time of payment.

20 IN WITNESS WHEREOF, the said party of the first part hath caused these presents to be signed by its President and its corporate seal to be hereto affixed, the day and year first above written.

Mountain Lakes Incorporated,  
(Corporate Seal) H. J. HAPGOOD,  
President.

Attest:

30 M. Kelly,  
Ass't Secretary.

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

40 Be it Remembered That on this 29th day of April, Nineteen Hundred and Twenty, before me personally appeared M. Kelly, who being my me duly sworn, deposed and made proof to my satisfaction that he is the Ass't Secretary, of the Mountain Lakes Incorporated, the mortgagor named in the foregoing mortgage; that he well knows the

*Exhibits.*

corporate seal of said Company: that the seal affixed to said mortgage is the corporate seal of said Company: that the said seal was so affixed and the said mortgage signed and delivered by H. J. Hapgood, who was at the date thereof the President of said Company, in the presence of this deponent, and said H. J. Hapgood, President, at the same time acknowledged, that he signed, sealed and delivered the same as his voluntary act and deed, and as the voluntary act and deed of said Company, and that deponent, at the same time subscribed his name to said mortgage as an attesting witness to the execution thereof. 10

M. KELLY.

Sworn and subscribed before me }  
 this 29th day of April, 1920. } 20

Frank Hill Erisman,  
 A Foreign Commissioner of  
 Foreign Deeds For New Jersey, in  
 Commissioner and for New York City,  
 Seal And in the State of New York

Received & Recorded May 6, 1920, at 10:15  
 O'clock A. M.

E. BERTRAM MOTT,  
 Clerk. 30

State of New Jersey, }  
 County of Morris, } ss. :

I, ELIAS BERTRAM MOTT, Clerk of the County of Morris, do hereby Certify that the foregoing is a true copy of the record of a Mortgage given by Mountain Lakes, Inc. To North Jersey Ttile Ins. Co. as fully and entirely as the same remains in my

*Exhibits.*

office in Book R-8 of Mortgages for said County, on page 47, etc.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County, at Morristown, this 1st day of September A. D. nineteen hundred and Twenty.

10

(Seal) E. BERTRAM MOTT,  
Clerk.

Endorsed

CERTIFIED COPY.

Mortgage dated April 29, 1920 Recorded May 6, 1920, in Book R-8 of Mortgages, on pages 47 &c.

ELIAS BERTRAM MOTT, Clerk

20

**Exhibit C-3.**

KNOW ALL MEN BY THESE PRESENTS,

That the NORTH JERSEY TITLE INSURANCE COMPANY, a corporation of the State of New Jersey, having its principal office located at Hackensack, New Jersey, party of the first part, in consideration of the sum of One Dollar and other valuable consideration, lawful money of the United States of America, to it in hand paid by H. J. HAPGOOD of NEW YORK CITY, party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred, and set over, and by these presents does grant, bargain, sell, assign, transfer, and set over unto the said party of the second part, a certain Indenture of Mortgage, bearing date the Twenty-ninth day of April, One Thousand Nine Hundred and Twenty, made by MOUN-

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*Exhibits.*

TAIN LAKES, INCORPORATED, a Corporation of the State of New Jersey, to the said NORTH JERSEY TITLE INSURANCE COMPANY, given to secure the payment of Fifteen Thousand (\$15,000) Dollars, which mortgage is recorded in the Clerk's office of the County of Morris, in Book of Mortgages, pages and covers Lots 33 to 42, inclusive, 44 and 46, Blk. T-1, at Mountain Lakes, known as house "HH". 10

TOGETHER with the bond or obligation therein described, and the money due and to grow due thereon, with the interest.

TO HAVE AND TO HOLD the same, unto the said party of the second part, his executors, administrators and assigns, forever, subject to the proviso or condition of said mortgage, and subject to the terms and conditions of a certain contract of warranty, bearing even date herewith, whereby the said NORTH JERSEY TITLE INSURANCE COMPANY insures the payment of said bond and mortgage under certain conditions set forth in said contract. 20

IN WITNESS WHEREOF, the said party of the first part hath caused its corporate seal to be hereto affixed and these presents to be signed by its President and attested by its Secretary, the Twenty-ninth day of April, in the year of our Lord One Thousand Nine Hundred and Twenty. 30

NORTH JERSEY TITLE INSURANCE COMPANY,

NORTH JERSEY TITLE  
SEAL  
INSURANCE CO.

WM. H. ZABRISKIE,  
President.

Attest:

Frances H. Plympton,  
Assistant Secretary. 40

*Exhibits.*

State of New Jersey, }  
 County of Bergen, } ss.:

10 On this Twenty-ninth day of April, Nineteen  
 Hundred and Twenty, before me, the subscriber,  
 personally appeared FRANCES H. PLYMPTON,  
 who being by me duly sworn, deposed and made  
 proof to my satisfaction that he is the ASSISTANT  
 SECRETARY of the NORTH JERSEY TITLE  
 INSURANCE COMPANY, the assignor named in  
 the foregoing assignment; that he well knows the  
 corporate seal of said Company; that the seal  
 affixed to said assignment is the corporate seal of  
 said Company; that the said seal was so affixed  
 and the said assignment signed and delivered by  
 20 WILLIAM H. ZABRISKIE, who was at the date  
 thereof the President of said Company, in the  
 presence of this deponent, and said President at  
 the same time acknowledged that he signed, sealed  
 and delivered the same as his voluntary act and  
 deed, and as the voluntary act and deed of said  
 Company, and that deponent at the same time  
 subscribed his name to said assignment as an at-  
 testing witness to the execution thereof.

FRANCES H. PLYMPTON.

30 Sworn and subscribed before me this )  
 29th day of April, 1920. }

Robt. J. Minion,  
 A Notary Public of the  
 State of New Jersey.

NORTH JERSEY TITLE  
 SEAL  
 INSURANCE CO.

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*Exhibits.*

3107

Received

MORRIS COUNTY CLERK'S OFFICE

May 3 11.05 A. M. 1920

MORRISTOWN, N. J.

E. Bertram Mott, Clerk

218

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—  
584—  
Assignment of Mortgage.NORTH JERSEY TITLE  
INSURANCE CO.

To

H. J. Hapgood.

—  
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Dated April 29th, 1920

—  
Received in the Clerk's Office of the  
County of Morris, N. J. on the 3rd  
day of May A. D., 1920, at 11.05  
o'clock in the forenoon, and Recorded  
in Book No. 39 of Assignments of  
Mortgages for said County, on pages  
141 &c.E. Bertram Mott,  
Clerk.

30

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*Exhibits.***Exhibit C-4.**

H. J. Hapgood

To

The Hackensack Trust Co.

10 Know all men by these Presents That H. J. Hapgood, of the Township of Hanover, County of Morris and State of New Jersey, party of the first part, in consideration of the sum of One dollar (\$1.00), and other good and valuable consideration, lawful money of the United States of America, to him in hand paid by The Hackensack Trust Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, party of the second part, at or before  
20 the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant, bargain, sell, assign, transfer and set over unto the siad party of the second part, its successors or assigns, a certain Indenture of Mortgage, bearing date the 29th day of April, one thousand nine hundred and Twenty made by Mountain Lakes, Inc., a New Jersey corporation, to North Jersey Title Insurance Company, a New Jersey Corporation, on lots  
30 #33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 46 Block T-1, as shown on, and in connection with, a map of the property of Mountain Lakes, Inc., C. O. Martindale, engineer, filed in the office of the Clerk of the County of Morris, July 15th, 1916, containing house known as house "HH", to secure the payment of the sum of Fifteen thousand (\$15,000) dollars, with interest @ 6%, and assigned by said North Jersey Title Insurance Company to the party of the first part,  
40 by assignment bearing even date herewith, which

*Exhibits.*

mortgage is about to be recorded in the Clerk's office of the County of Morris in Book \_\_\_\_\_ of Mortgages, pages \_\_\_\_\_. Together with the bond or obligation therein described, and the money due and to grow due thereon, with the interest. To Have and to Hold, the same unto the said party of the second part its successors or assigns for its and their use forever, subject only to the proviso in the said Indenture of Mortgage mentioned: And he does hereby make, constitute and appoint the said party of the second part his true and lawful attorney, irrevocable, in his name, or otherwise, but at its proper costs and charges, to have, use and take all lawful ways and means for the recovery of all the said money and interest; and in case of payment, to discharge the same as fully as he might or could do if these presents were not made: And he does hereby covenant, promise and agree, to and with the said party of the second part, that there is now due and owing upon the said Bond and Mortgage the sum of Fifteen thousand (\$15,000.) dollars with interest @ 6%.

10

20

In Witness Whereof, I, H. J. Hapgood have hereunto set my hand and seal the 29th day of April, in the year one thousand nine hundred and twenty.

30

H. J. HAPGOOD

Signed, Sealed and Delivered }  
 in the Presence of }  
 FRANK H. ERISMAN

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

Be it Remembered, That on this 29th day of April in the year one thousand nine hundred and

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*Exhibits.*

Twenty before me the subscriber personally appeared H. J. Hapgood who, I am satisfied is the assignor in the within Deed of assignment named; and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

FRANK HILL ERISMAN

Foreign Commissioner of Deeds For  
New Jersey in and for New York  
City and in the State of New York.

Foreign  
Commissioners  
Seal

Received and Recorded May 4, 1920, at 9:47  
o'clk., A. M.

E. BERTRAM MOTT,  
Clerk.

State of New Jersey, }  
County of Morris. } ss. :

I, E. BERTRAM MOTT, Clerk of the County of Morris, do hereby Certify that the foregoing is a true copy of the record of an Assignment of Mortgage given by H. J. Hapgood to The Hackensack Trust Co. as fully and entirely as the same remains of record in my office in Book 39 of Assignment of Mortgages for said County, on pages 155, etc.

*Exhibits.*

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said County, at Morristown, this 16th day of October A. D. nineteen hundred and twenty four.

(Seal) E. BERTRAM MOTT,  
Clerk. 10

Endorsed:

## CERTIFIED COPY

Assignment of Mortgage dated April 29, 1920. Recorded May 4, 1920 in Book 39, Assignment of Mortgages, Pages 155 &c.

ELIAS BERTRAM MOTT,  
Clerk. 20

**Exhibit C-5.**

KNOW ALL MEN BY THESE PRESENTS:

THAT on this Twenty-second day of November, 1920.

THE HACKENSACK TRUST COMPANY, a Corporation of the State of New Jersey, party of the first part, in consideration of the sum of Fifteen Thousand Dollars lawful money of the United States of America to it in hand paid by H. J. HAPGOOD OF THE TOWNSHIP OF HANOVER, COUNTY OF MORRIS, and STATE OF NEW JERSEY, party of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred, and set over, and by these presents does grant, bargain, sell, assign, transfer, and set over unto the said party of the second part, his executors, administrators or as-

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*Exhibits.*

10 signs a certain Indenture of Mortgage, bearing date the Twenty-ninth day of April, One Thousand Nine Hundred and Twenty, made by MOUNTAIN LAKES, INC. to NORTH JERSEY TITLE INSURANCE COMPANY; given to secure the payment of Fifteen Thousand Dollars, which mortgage is recorded in the Clerk's Office of the County of Morris in Book R-8 of Mortgages, pages 47—and assigned by NORTH JERSEY TITLE INSURANCE COMPANY to H. J. HAPGOOD.

Together with the bond or obligation therein described, and the money due and to grow due thereon, with the interest.

20 TO HAVE AND TO HOLD the same, unto the said party of the second part, his executors, administrators or assigns, forever, subject only to the proviso in the said Indenture of Mortgage mentioned: AND it does hereby make, constitute, and appoint the said H. J. HAPGOOD party of the second part, its true and lawful attorney irrevocable, in its name or otherwise, but at his own proper costs and charges, to have, use and take all lawful ways and means for the recovery of all the said money and interest; and in case of payment to discharge the same as fully as it might or could do if these presents were not made: AND

30 it does hereby covenant, promise and agree, to and with the said party of the second part, that there is now due and owing upon the said Bond and Mortgage the principal sum of Fifteen Thousand Dollars (\$15,000) and interest from October 29th, 1920.

40 IN WITNESS WHEREOF, the said party of the first part hath caused its corporate Seal to be here-to affixed and attested by its Secretary, and these

*Exhibits.*

presents to be signed by its President, the day and year first above written.

THE HACKENSACK TRUST COMPANY,  
FRANK B. PLYMPTON,  
President.

Signed, Seal and Delivered in the Presence of 10  
THE HACKENSACK  
TRUST COMPANY  
INCORPORATED  
1899  
Hackensack, N. J.

ATTEST:

CHARLES H. PLENTY,  
Secretary.

State of New Jersey, }  
County of Bergen, } ss. :

BE IT REMEMBERED, That on this Twenty- 20  
second day of November, Nineteen hundred and  
Twenty, before me personally appeared CHARLES  
H. PLENTY and made proof to my satisfaction  
that he is the SECRETARY of THE HACKEN-  
SACK TRUST COMPANY the assignor named in  
the foregoing Assignment; that he well knows the  
corporate seal of said corporation; that the seal  
affixed to said Assignment is the corporate seal of  
said corporation; that the said seal was so affixed  
and the said Assignment signed and delivered by 30  
FRANK B. PLYMPTON who was at the date there-  
of the President of said corporation, in the pres-  
ence of this deponent, and said President, at the  
same time acknowledged that he signed, sealed  
and delivered the same as his voluntary act and  
deed, and as the voluntary act and deed of said  
corporation, and that deponent, at the same time,

*Exhibits.*

subscribed his name to said Assignment as an at-  
testing witness to the execution thereof.

CHARLES H. PLENTY.

Sworn and Subscribed to before me this }  
22nd day of November, 1920. }

10

Frederick E. Koester,  
Commissioner of Deeds for N. J.

325

—  
891

ASSIGNMENT OF MORTGAGE.

THE HACKENSACK TRUST COMPANY

20

To

H. J. HAPGOOD.

Dated, November 22nd, 1920.

30

Received in the Clerk's Office of the  
County of Morris, N. J. on the 24th day  
of November, A. D., 1920, at 9.31 o'clock  
in the forenoon, and recorded in Book No.  
40 of Assignments of Mortgages for said  
County, on page 108 &c.

E. Bertram Mott, Clerk.  
North Jersey Title Insurance Co.  
Hackensack, New Jersey.

40

*Exhibits.***Exhibit C-6.**

H. J. Hapgood  
 To  
 The North Jersey Title Insurance Co.

Know all men by these Presents, That I, H. J. Hapgood, of Mountain Lakes, New Jersey, party of the first part, in consideration of the sum of Ten Thousand (\$10,000) Dollars, lawful money of the United States of America, to me in hand paid by The North Jersey Title Insurance Company of Hackensack, N. J. party of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant, bargain, sell, assign, transfer and set over unto the siad party of the second part, its successors, heirs or assigns Indenture of Mortgage bearing date the 29th day of April one thousand nine hundred and Twenty made by Mountain Lakes, Incorporated on lands in the Township of Hanover, County of Morris and now covering lots #34, 36, 38 Block T-1, as shown on map of C. O. Martindale Engineer, filed July 15, 1916, original made to secure the payment of the sum of Fifteen Thousand (\$15,000) Dollars, which mortgage has now been reduced to the sum of Ten Thousand (\$10,000) Dollars, and which mortgage is recorded in the clerk's office of the County of Morris, in Book R-8 of Mortgage, page 47. Together with the bond or obligation therein described, and the money due and to grow due thereon, with the interest.

To have and to hold, the same unto the said

*Exhibits.*

party of the second part their successors, heirs or assigns for them and their use forever, subject only to the proviso in the said Indenture of Mortgage mentioned: And I do hereby make, constitute and appoint the said party of the second part true and lawful attorney, irrevocable, in my name,  
 10 or otherwise, but at its proper costs and charges, to have, use and take all lawful ways and means for the recovery of all the said moneys and interest: and in case of payment, to discharge the same as fully as I might or could do if these presents were not made:

And I do hereby covenant, promise and agree, to and with the said party of the second part, that there is now due and owing upon the said Bond and Mortgage the sum of Ten Thousand (\$10,000)  
 20 Dollars and interest from October 29, 1920.

In Witness Whereof, I have hereunto set my hand and seal the 23rd day of November in the year one thousand nine hundred and Twenty.

H. J. HAPGOOD

Signed, Sealed and Delivered }  
 in the presence of }

Frank H. Erisman.

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

Be it Remembered, That on this 23d day of November in the year one thousand nine hundred and twenty before me A Foreign Commissioner of Deeds for the State of New Jersey personally appeared H. J. Hapgood who, I am satisfied he is the assignor of in the within Deed of assignment named: and I have first made known to him the

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*Exhibits.*

contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

FRANK HILL ERISMAN  
Foreign Commissioner of Deeds For  
New Jersey in and for New York  
City And in the State of New York.

10

A Foreign  
Commissioner  
Seal

Received & Recorded Nov. 24, 1920, at 9:21 o'clock  
A. M.

E. BERTRAM MOTT,  
Clerk.

20

State of New Jersey, }  
County of Morris, } ss. :

I, E. BERTRAM MOTT, Clerk of the County of Morris, do hereby Certify that the foregoing is a true copy of the record of an Assignment of Mortgage given by H. J. Hapgood, to The North Jersey Title Insurance Co., as fully and entirely as the same remains of record in my office in Book 40, of Assignment of Mortgages, for said County, on page 110, etc.

30

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said County, at Mor-

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*Exhibits.*

ristown, this Sixteenth day of October, A. D., Nineteen hundred and twenty-four.

E. BERTRAM MOTT,  
Clerk.

(Seal)

10      Endorsed:

CERTIFIED COPY.

Dated, November 23, 1920.

Recorded November 24, 1920.

Book 40, of Assignment of Mortgages.

Page 110, etc.

ELIAS BERTRAM MOTT,  
Clerk.

20

**Exhibit C-7.**

NORTH JERSEY TITLE INS. Co.,

To

J. MORGAN HALLOWAY.

30

Know all men by these Presents, That the North Jersey Title Insurance Company, a corporation of the State of New Jersey, having its principal office located at Hackensack, New Jersey, party of the first part, in consideration of the sum of One Dollar and other valuable consideration, lawful money of the United States of America, to it in hand paid by J. Morgan Halloway, of Jersey City, New Jersey, party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant, bargain, sell, assign, transfer, and set over unto the

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*Exhibits.*

said party of the second part, a certain Indenture of Mortgage, bearing date the Twenty-ninth day of April, One Thousand Nine Hundred and Twenty, made by Mountain Lakes, Incorporated, a corporation of the State of New Jersey, to the said North Jersey Title Insurance Company, given to secure the payment of Fifteen Thousand Dollars, now reduced to Ten Thousand (\$10,000) Dollars, which mortgage is recorded in the Clerk's Office of the County of Morris, in Book R-8, of Mortgages, pages 47, etc., and heretofore assigned to the party of the second part by assignment dated November 23rd, 1920, in which assignment the name of the party of the second part is erroneously stated to be J. Halloway Morgan. 10

Together with the bond or obligation therein described and the money due and to grow due thereon, with the interest. 20

To Have and to Hold, the same, unto the said party of the second part, his executors, administrators and assigns, forever, subject to the *proviso* or condition of said mortgage, and subject to the terms and conditions of a certain contract of warranty, bearing date the Twenty-third day of November, One Thousand Nine Hundred and Twenty. Whereby the said North Jersey Title Insurance Company insures the payment of said bond and mortgage under certain conditions set forth in said contract. 30

In Witness Whereof, the said party of the first part hath caused its corporate seal to be hereto affixed and these presents to be signed by its President and attested by its Secretary, the Fourth day

*Exhibits.*

of February, in the year of our Lord One Thousand and Nine Hundred and Twenty-one.

NORTH JERSEY TITLE INSURANCE CO.,

WM. J. ZABRISKIE,  
President.

10 Attest:

FREDERICK E. KOESTER,  
Secretary.

(Corporate Seal)

State of New Jersey, )  
County of Bergen, } ss.:

20 On this Fourth day of February, Nineteen Hundred and Twenty-one, before me the subscriber, personally appeared Frederick E. Koester, who being be me duly sworn, deposed and made proof to my satisfaction that he is the Secretary of the North Jersey Title Insurance Company, the assignor named in the foregoing assignment, that he well knows the corporate seal of said Company, that the seal affixed to said assignment is the corporate seal of said Company; that the said seal was so affixed and the said assignment signed and delivered by William H. Zabriskie, who was at the date thereof the President of said Company, in the presence of this deponent, and said President at the same time acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, and as the voluntary act and deed of said Company, and that deponent at the same time

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*Exhibits.*

subscribed his name to said assignment as an at-  
testing witness to the execution thereof.

FREDERICK E. KOESTER.

Sworn and subscribed before me this }  
4th day of February, 1921. }

JAS. B. RICARDO,

10

Commissioner of Deeds, New Jersey.

Received and recorded February 4, 1921, at 3:27  
o'clock P. M.

E. BERTRAM MOTT,

Clerk.

State of New Jersey, )  
County of Morris, } ss.:

I, E. BERTRAM MOTT, Clerk of the County of  
Morris, do hereby Certify that the foregoing is a  
true copy of the record of an Assignment of Mort-  
gage given by North Jersey Title Ins. Co. to J.  
Morgan Halloway, as fully and entirely as the  
same remains of record in my office in Book 40,  
of Assignment of Mortgages for said County, on  
page 151, etc.

20

IN TESTIMONY WHEREOF, I have hereunto set my  
hand and affixed the seal of said County, at Mor-  
ristown, this Sixteenth day of October, A. D., Nine-  
teen hundred and Twenty-four.

30

E. BERTRAM MOTT,

Clerk.

(Seal)

Endorsed:

CERTIFIED COPY.

Dated February 4, 1921.

Recorded February 4, 1921.

Book No. 40, of Assignment of Mortgages.

Page 151, etc.

40

ELIAS BERTRAM MOTT,

Clerk.

*Exhibits.***Exhibit C-8.**

THIS DEED MADE the 1st day of July, in the year of Our Lord One Thousand Nine Hundred and Twenty

10 BETWEEN Mountain Lakes, Incorporated, a corporation duly organized under the laws of the State of New Jersey, party of the First Part;

AND FRANK HENDRICK, of the City of New York, in the county of New York, and State of New York, party of the Second Part;

20 WITNESSETH, That the said Party of the First Part, for and in consideration of other good and valuable consideration and ten (10) Dollars, lawful money of the United States of America, to it in hand paid by the said Party of the Second Part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said Party of the First Part, therewith fully satisfied, contented and paid, has granted, bargained and sold, and by these presents does grant, bargain, sell and convey, to the said Party of the Second Part, and to his heirs and assigns forever,

30 ALL those certain tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the Township of Hanover in the County of Morris and State of New Jersey, known as lots No. 34, 36, 38 Block T-1 containing House No. HH as shown on a certain map entitled "Map of Mountain Lakes" by C. O. Martindale, engineer, Dated July 10, 1916, filed in the office of the Clerk of the County of Morris, July 15, 1916, being more particularly bounded and described as

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*Exhibits.*

follows: BEGINNING at a stone monument set on the northerly side of Lookout Road and distant south  $71^{\circ} 19'$  west one hundred and twenty-eight and fifty-seven one hundredths (128.57) feet from a stone monument set on the northerly side of Lookout Road at the first angle westerly from Tower Hill Road, thence (1) south  $15^{\circ} 51'$  east one hundred and eighty (180) feet to a stone monument, thence (2) south  $71^{\circ} 19'$  west one hundred and fifty and eighteen one hundredths (150.18) feet to a stone monument, thence (3) south  $15^{\circ} 51'$  east one hundred and eighty (180) feet to a stone monument set on the northerly side of Lookout Road, thence (4) along the northerly side of Lookout Road, north  $71^{\circ} 19'$  east one hundred and fifty and eighteen one hundredths (150.18) feet to the point or place of beginning. SUBJECT however, to a mortgage dated April 29, 1920 for \$15,000. covering the above and other property and due April 29, 1923 with interest at six percent.

The party of the first part further covenants to allow the party of the second part, his family and guests, to use the lakes and waterway between on the property, and also the public beaches to be set apart on the shores of the said lakes, subject to such rules and regulations, as to their use by the said party of the second part, as may from time to time be made. And it is expressly understood and agreed that the covenants of the party of the first part in this respect shall attach to and run with the land.

The party of the first part hereby covenants to and with the party of the second part that the said party of the second part may use any and all streets now built or that may be hereafter built at Mountain Lakes, N. J., but reserves to itself, its

*Exhibits.*

10 successors and assigns, all other rights in the streets including laying and maintaining pipes and conduits for sewer, gas, electricity, water and for any other purpose and erecting and maintaining poles and wires for telephones, lighting and for any other purpose, on all roads and streets now  
10 constructed or which may be hereafter constructed and on which the party of the second part may have any right; and it is expressly understood and agreed that this covenant shall attach to and run with the land.

20 And as a part of the consideration hereto the party of the second part, for himself, his heirs and assigns, does hereby covenant and agree to and with the party of the first part, its successors and assigns, that without the written consent of the  
20 said party of the first part, its successors or assigns, the said party of the second part, his heirs or assigns, shall not at any time hereafter erect or cause or procure, permit or suffer to be erected upon the hereby granted premises or any part thereof, any building other than a single family private dwelling house to cost not less than \$15000. and not to be located within 50 feet of the street line and 25 feet of the other boundary lines of  
30 said property and a private family garage of a design suitable to said property (to be approved in writing by the party of the first part, its successors or assigns) which shall be erected upon a spot to be likewise approved by the party of the first part; nor at any time use or employ, cause or procure, permit or suffer to be used or employed by his lessees or tenants of said premises, or any part thereof, or by any other person holding possession of said premises, or any part thereof, under his title, any buildings erected or which may  
40

*Exhibits.*

hereafter be erected upon the said premises or any part thereof for any use or purpose other than a single family private dwelling house and a garage in connection with same, nor at any time let, cause, procure, or suffer to be erected or maintained a fence upon any part of said premises other than a hedge or light ornamental fence of a design to be approved by the party of the first part, its successors or assigns. And it is expressly understood and agreed that the said several covenants on the part of the party of the second part shall attach to and run with the land. 10

TOGETHER with all and singular, the tenements, hereditaments and appurtenances to the same belonging or in anywise appertaining:

ALSO, all the estate, right, title, interest, property, claim and demand whatsoever, of the said Party of the First Part, of, in and to the same, and every part and parcel thereof: 20

TO HAVE AND TO HOLD, all and singular the above described land and premises, with the appurtenances, unto the said Party of the Second Part, his heirs and assigns, to the only proper use, benefit and behoof of the said Party of the Second Part, his heirs and assigns forever. 30

AND the said Party of the First Part does for itself and its successors, covenant to and with the said Party of the Second Part his heirs and assigns that the said party of the First Part is the true, lawful and right owner of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereto belonging; and that the said land and premises, or any part thereof, at the time of 40

*Exhibits.*

the sealing and delivery of these presents, is not encumbered by any encumbrance whatsoever, by which the title of the said Party of the Second Part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any manner, or to any extent, whatsoever, except as herein provided,

AND ALSO, that the said Party of the First Part now has good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid,

AND ALSO, that the said Party of the First Part will WARRANT and forever defend the said land and premises unto the said Party of the Second Part his heirs and assigns, forever against the lawful claims and demands of all and every person or persons, free, clear and discharged of and from all manner of encumbrances whatsoever, except as herein provided.

IN WITNESS WHEREOF, the said Party of the First Part has caused these presents to be signed by its President and its common seal to be hereto affixed the day and year first above written.

Mountain Lakes, Incorporated,

H. J. HAPGOOD,  
President.

Signed, Sealed and Delivered  
in presence of  
C. V. Pallister,  
Asst. Secy.

(Seal)

*Exhibits.*

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

BE IT REMEMBERED That on this 1st day of July, in the year of our Lord, One thousand Nine Hundred and Twenty, before me, the subscriber, a Foreign Commissioner of Deeds for the State of New Jersey, personally appeared C. V. Pallister, to me known, who, being by me duly sworn according to law, on his oath saith that he is the Ass't. Sec'y., of Mountain Lakes, Incorporated, the grantor in the foregoing deed mentioned. That the seal affixed to said deed is the corporate seal of said company; that it is so affixed by order of the said company. That H. J. Hapgood is the President of the said company; that he saw the said H. J. Hapgood as such President sign the said deed and heard him declare that he signed, sealed and delivered the same as the voluntary act and deed of the said company by their order, and the deponent signed his name thereto at the same time as an attesting witness.

10

20

C. V. PALLISTER,  
 Asst. Secy.

Sworn and subscribed to before me }  
 the day and year above mentioned. }

30

Frank Hill Erisman,  
 Foreign Commissioner of Deeds,  
 (Seal) For New Jersey in and for  
 New York City and in the  
 State of New York.

40

*Exhibits.***Exhibit C-9.**

THIS INDENTURE, made the Fourteenth day of July in the year of our Lord One Thousand Nine hundred and twenty

10 BETWEEN FRANK HENDRICK and KATHAR-  
INE EDSON MUMFORD HENDRICK, his wife, of  
the Borough of Brooklyn, in the County of Kings  
and State of New York of the First Part:

AND LILLIAN E. EASON of No. 1150 41st  
Street, in the Borough of Brooklyn, County of  
Kings, City and State of New York, of the Second  
Part:

20 WITNESSETH, That the said parties of the  
first part, for and in consideration of Ten (\$10.00)  
dollars and other good and valuable consideration  
lawful money of the United States of America, to  
us in hand well and truly paid by the said party  
of the second part, at or before the sealing and  
delivery of these presents the receipt whereof is  
hereby acknowledged, and the said parties of the  
first part therewith fully satisfied, contented and  
paid, have given, granted, bargained, sold, aliened,  
released, enfeoffed, conveyed and confirmed, and  
30 by these presents do give, grant, bargain, sell, alien,  
release, enfeoff, convey and confirm unto the said  
party of the second part, and to her heirs and  
assigns forever,

ALL those certain lots, tracts or parcels of land  
and premises, hereinafter particularly described,  
situate, lying and being at Mountain Lakes, in  
the County of Morris and State of New Jersey, and  
more particularly described as Lots Nos. 36, 38  
and 40 in Block T-1 containing house known as

*Exhibits.*

house No. H H, as shown on a certain map entitled "Map of Mountain Lakes" by C. O. Martindale, engineer, dated July 10th, 1916, and filed in the office of the Clerk of Morris County, July 15, 1916, the said lots and house being the property of the party of the first part. Subject to a mortgage of Fifteen thousand dollars, granted on the said lots and other lots adjoining, to North Jersey Title Insurance Company, for fifteen thousand (\$15,000) dollars, being the same premises heretofore granted to the said Frank Hendrick by Mountain Lakes, Inc.

10

TOGETHER with all and singular, the houses, buildings, trees, ways, waters, profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining:

20

ALSO, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof.

TO HAVE AND TO HOLD, all and singular the above described land and premises, with the appurtenances unto the said party of the second part, her heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part her heirs and assigns forever; and the said Frank Hendrick and Katharine Edson Mumford Hendrick, his wife, do for themselves, their heirs, executors and administrators, covenant and grant to and with the said party of the second part her heirs and assigns, that the said Frank Hendrick and Katharine Edson Mumford Hendrick, his wife, are the true, lawful and right owners of all and singular the above described land and premises and of every part and parcel thereof, with the appur-

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*Exhibits.*

tenances thereunto belonging, and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever:

AND ALSO, that the said parties of the first part now have good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid.

AND ALSO, that Frank Hendrick will

WARRANT, secure and forever defend the said land and premises unto the said Lillian E. Eason, her heirs and assigns forever, against the lawful claims and demands of all and every person or persons freely and clearly freed and discharged of and from all manner of encumbrances whatsoever.

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

FRANK HENDRICK,  
KATHARINE EDSON MUMFORD HENDRICK.

Signed, Sealed and Delivered }  
in the presence of }

Margaret Caldwell.

*Exhibits.*

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

BE IT REMEMBERED, That on this Fourteenth day of July in the year of our Lord One Thousand Nine Hundred and twenty before me, personally appeared FRANK HENDRICK and KATHARINE EDSON MUMFORD HENDRICK, his wife, who, I am satisfied are the grantors mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

10

And the said Katharine Edson Mumford Hendrick, being by me privately examined, separate and apart from her husband, acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, freely, without any fear, threats or compulsion of her said husband.

20

MARGARET CALDWELL,

(Seal)

Commissioner of Deeds,  
 City of New York.

Residing in New York County.

New York County Clerk's No. 112, New York County Register's No. 2261.

30

Kings County Clerk's No. 296, Kings County Register's No. 2031.

Bronx County Clerk's No. 9, Bronx County Register's No. 21014.

My commission expires May 25, 1922.

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*Exhibits.*

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

No. 22719

10 I, WILLIAM F. SCHNEIDER, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, DO HEREBY CERTIFY, That MARGARET CALDWELL, whose name is subscribed to the Certificate of the Proof or Acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such Proof or Acknowledgment, a COMMISSIONER OF DEEDS in and for The City of New York, duly commissioned and sworn, and authorized by the laws of said State to take the Acknowledgments and Proofs of Deeds of Conveyances for Land, Tenements or Hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such Commissioner of Deeds, and verily believe that the signature to said Certificate of Proof or Acknowledgment is genuine.

20

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County, the 14th day of July, 1920.

30

WM. F. SCHNEIDER,  
 Clerk.

40

*Exhibits.***Exhibit C-10.**

THIS INDENTURE, made the Fourteenth day of July in the year of our Lord One Thousand Nine hundred and twenty, BETWEEN LILLIAN E. EASON, of the Borough of Brooklyn, in the County of Kings and State of New York of the First Part: AND KATHARINE EDSON MUMFORD HENDRICK, wife of Frank Hendrick, of the Borough of Brooklyn, in the County of Kings and State of New York of the Second Part:

10

WITNESSETH, That the said party of the first part, for and in consideration of Ten (\$10.00) dollars and other good and valuable consideration lawful money of the United States of America, to me in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part therewith fully satisfied, contended and paid, has given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents does give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to her heirs and assigns forever,

20

ALL those certain lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being at Mountain Lakes in the County of Morris and State of New Jersey, and more particularly described as Lots 36, 38 and 40 in Block T-1, containing house known as house No. H H, as shown on a certain map entitled "Map of Mountain Lakes" by C. O. Martindale, engineer, dated July 10, 1916, and filed in the office of the Clerk of Morris County, July 15, 1916, the

30

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*Exhibits.*

said lots and house being the property of the party of the first part. Subject to a mortgage of fifteen thousand dollars granted on the said lots and other lots adjoining, to North Jersey Title Insurance Company, for Fifteen thousand (\$15,000) dollars, being the premises heretofore granted to  
10 Frank Hendrick by Mountain Lakes, Inc.

TOGETHER with all and singular, the houses, buildings, trees, ways, waters, profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining:

ALSO, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof.

20 TO HAVE AND TO HOLD, all and singular the above described land and premises, with the appurtenances unto the said party of the second part, her heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part her heirs and assigns forever; and the said Lillian E. Eason does for herself, her heirs, executors and administrators, covenant and grant  
30 to and with the said party of the second part her heirs and assigns, that the said Lillian E. Eason, is the true, lawful and right owner of all and singular the above described land and premises and of every part and parcel thereof, with the appurtenances thereunto belonging, and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, here by made or intended to be made,  
40

*Exhibits.*

for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever:

AND ALSO, that the said party of the first part now has good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid. 10

AND ALSO, that Lillian E. Eason will WARRANT, secure, and forever defend the said land and premises unto the said Katharine Edson Mumford Hendrick, her heirs and assigns forever, against the lawful claims and demands of all and every person or persons freely and clearly freed and discharged of and from all manner of encumbrances whatsoever.

IN WITNESS WHEREOF, the said party of the first part has hereunto set her hand and seal the day and year first above written. 20

LILLIAN E. EASON (L. S.)

Signed, Sealed and Delivered }  
in the presence of }

MARGARET CALDWELL

City and States of New York, }  
County of New York, } ss. : 30

BE IT REMEMBERED, That on this Fourteenth day of July in the year of our Lord One Thousand Nine Hundred and twenty before me, personally appeared Lillian E. Eason who, I am satisfied is the grantor mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon she acknowledged that she signed, sealed and delivered the same as her

*Exhibits.*

voluntary act and deed, for the uses and purposes therein expressed.

MARGARET CALDWELL  
Commissioner of Deeds,

(Seal)

City of New York

10

Residing in New York County  
New York County Clerk's No. 112,  
New York County Register's No. 2  
Kings County Clerk's No. 229,  
Kings County Register's No. 2031  
Bronx County Clerk's No. 9,  
Bronx County Clerk's No. 20114  
Commission expires May 25, 1922

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

20

No. 22720

30

I, WILLIAM F. SCHNEIDER, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, DO HEREBY CERTIFY, That Margaret Caldwell whose name is subscribed to the Certificate of the Proof or Acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such Proof or Acknowledgment, a COMMISSIONER OF DEEDS in and for The City of New York, duly commissioned and sworn, and authorized by the laws of said State to take the Acknowledgments and Proofs of Deeds of Conveyances for Land, Tenements or Hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such Commissioner of Deeds, and verily believe that the signature to said Certificate of Proof or Acknowledgment is genuine.

40

*Exhibits.*

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County, the 14 day of July, 1920.

WM. F. SCHNEIDER

(Seal)

Clerk.

---

**Exhibit C-11.**

10

MOUNTAIN LAKES, INC.,

and

FRANK HENDRICK.

Article of Agreement, made and entered into the 18th day of March, in the year One Thousand Nine Hundred and Twenty, Between Mountain Lakes, Inc., a corporation duly organized under the laws of the State of New Jersey, party of the first part, and Frank Hendrick, of New York, N. Y., party of the second part, in manner following.

20

The said party of the first part, in consideration of the sum of Twenty-two thousand two hundred (\$22,200) Dollars, to it duly paid by the said party of the second part, hereby agrees to sell the said party of the second part; all those certain lots, tracts or parcels of land and premises, situate, lying and being at Mountain Lakes in the County of Morris and State of New Jersey and more particularly described as Lots Nos. 36, 38, 40 in Block T-1 containing house known as house No. H H, as shown on a certain map entitled "Map of Mountain Lakes" by C. O. Martindale, engineer, dated July 10, 1916, and filed in the Office of the Clerk of Morris County, July 15, 1916, the said lots being the property of the said party of the first part and the party of the first part agrees to convey to the said party of the second part all of this property by reference to said map and also by description

30

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*Exhibits.*

at lengths by metes and bounds, on the fulfilling by the party of the second part of the terms of this agreement in regard to all payments and obligations as hereinafter mentioned.

10 With the privilege on the part of the party of the second part of changing said lots from 36 and 38 and 40, Block T-1 to lots 34 and 36 and 38, Block T-1, or to 38 and 40-42, Block T-1, prior to the time the house is started. The party of the first part agrees to build and complete said house similar and equal in every respect to house No. 278, as per blueprint submitted, including the following, on or before July 1st, 1920:

1—Enclose the side porch.

20 2—Extend the roof of the third floor over the side porch, making an additional enclosed porch on the second floor.

3—The roof to be a hip roof with hip dormers in the front and rear with additional dormers at each end if desired by the party of the second part.

4—Two bathrooms on the second floor, and kitchen to be tiled.

5—Beach of maple flooring in the kitchen, Oak Flooring, the same as in house No. 278, in the other rooms on the first floor.

30 6—Build two bookcases in the solarium about four feet high, with a glass door to the solarium of first floor.

7—Make the bedroom over the living room, into one large room with fireplace and with two closets in one end and a window seat between—fire-place standard size.

40 8—Grade the grounds in our customary manner removing stumps and small stones, seed the same and set our 150 shrubs of various kinds.

*Exhibits.*

9—Make a drive from the road under the porte cochere and a path to the rear door.

10—Trim the dining room in solid wainscoting, beamed ceiling, and stain the same in color selected by purchaser. Windows on the east to be high casement windows.

11—Trim the living room in either Chestnut to be stained or in basswood for white enamel, as designated by purchaser. 10

12—Put a medicine cabinet in second story bathroom.

13—Put up four clothes polies.

14—Paint the outside trim in color selected by purchaser.

The party of the first part further covenants to allow the party of the second part, his family and guests, to use the lakes and waterway between on the property and also the public beaches to be set apart on the shores of the said lakes, subject to such rules and regulations, as to their use by the said party of the second part, as may from time to time be made. And it is expressly understood and agreed that the covenants of the party of the first part in this respect shall attach to and run with the land and be inserted and be made a part of the deed. The party of the first part hereby covenants to and with the party of the second part that the said party of the second part may use any and all streets now built or that may be hereafter built at Mountain Lakes, N. J., but reserves to itself, its successors and assigns, all other rights in the streets including laying and maintaining pipes and conduits for sewer, gas, electricity, water, and for any other purpose and erecting and maintaining poles and wires for telephones, lighting and for any other purpose, on all roads and 20 30 40

*Exhibits.*

streets now constructed or which may be hereafter constructed and on which the party of the second part may have any right; and it is expressly understood and agreed that this covenant shall attach to and run with the land, and be inserted and made a part of the deed.

- 10     And as a part of the consideration hereto the party of the second part, for himself, his heirs and assigns, does hereby covenant and agree to and with the party of the first part, its successors and assigns, that without the written consent of the said party of the first part, its successors or assigns, the said party of the second part, his heirs or assigns, shall not at any time hereafter erect or cause or procure, permit or suffer to be erected upon the hereby granted premises or any part thereof, any building other than a single family private dwelling house to cost not less than \$15000 and not to be located within 50 feet of the Street line and 25 feet of the other boundary lines of said property and a private family garage of a design suitable to said property (to be approved in writing by the party of the first part, its successors or assigns) which shall be erected upon a spot to be likewise approved by the party of the first part; nor at any time use or employ, cause or procure, permit or suffer to be used or employed by his lessees or tenants of said premises, or any part thereof or by any other person holding possession of said premises, or any part thereof, under his title, any buildings erected or which may hereafter be erected upon the said premises or any part thereof for any use or purpose other than a single family private dwelling house and a garage in connection with same, nor at any time let, cause, procure, or suffer to be erected or main-
- 20
- 30
- 40

*Exhibits.*

tained a fence upon any part of said premises other than a hedge or light ornamental fence of a design to be approved by the party of the first part, its successors or assigns. And it is expressly understood and agreed that the said several covenants on the part of the party of the second part shall attach to and run with the land and be inserted and made a part of the deed. 10

15—Stain the chestnut woodwork throughout house in color selected by purchaser.

16—Do the bedrooms on the second floor in white enamel.

17—Do the doors on the second floor in dull mahogany or in color selected by purchaser.

18—Put alabastine on the walls and ceilings throughout house in color selected by purchaser.

19—Guarantee the heating plant to heat the house at 70° in zero weather with proper care and attention. 20

20—The third floor to contain a bath and two or three rooms—designs of which are to be approved by the party of the second part.

21—Put the boiler in the cellar connected with the laundry stove.

22—Connect the boiler in the cellar with the steam heating plant.

23—Put a radiator in the kitchen, leaving out the kitchen range. 30

24—Put in an electric range the same as shown in the office, installed in the kitchen.

25—Put four radiators—two on the lower side porch and two on the upper side porch.

26—Enclose the kitchen porch in glass.

27—Put a door from the bathroom to Porte Cochere, the same as in house #278.

28—Building to be completed with all builders' 40

*Exhibits.*

hardware, including door knobs, locks and keys. (All details and instructions in regart to the above work to be given by the purchaser to the party of the first part promptly without delay on three days notice in writing.)

10 29—Stone wall of basement to be carried to height above highest present surface at front of house up to six (6) ft., according to desire of the party of the second part.

30—Two built-in bath tubs on second floor and leg tub on third floor.

31—If desired by the purchaser, a pr. of glass doors to the second floor sun parlor.

20 For the sum of Twenty-two thousand two hundred (\$22,200) Dollars, which the said party of the second part hereby agrees to pay to the said party of the first part as follows: Ten thousand Dollars on or before the signing of this agreement, the receipt whereof is hereby acknowledged... \$10,000. At the time of taking title by assuming and agreeing to pay a certain first mortgage of \$10,000.00, with ..... 10,000. interest @ 6% from July 1, 1920; said mortgage to run for at least three years subsequent to date of this agreement. At the time of taking title by paying the un-

30 paid balance ..... 2,200.

---

22,200.

Taxes to be paid by the party of the first part up to time of taking title.

40 And the said party of the first part, on receiving such payment at the time and in the manner above mentioned, shall at its own proper cost and expense execute, acknowledge and deliver to the said party of the second part, or to his heirs or assigns

*Exhibits.*

a proper deed for the conveying and assuring to him or them, the fee simple of said premises, free from all encumbrances except as herein provided: The final settlement to be made and the deed therefor to be delivered at the office of Mountain Lakes, Inc., at 170 Broadway, New York City, on the 1st day of July nineteen hundred and 20 at the hour of ten o'clock in the forenoon of said day which deed shall contain a general warranty and the usual full covenants. The risk of loss or damage by fire, prior to the completion of this contract, is hereby assumed by the party of the first part. Interest charges and cost of fire insurance, shall be adjusted, apportioned and allowed up to the time of taking title. Title to be closed as of July 1st, 1920. 10

This agreement covers all promises made by the party of the first part, or its representatives, to the party of the second part and the parties hereto hereby estop themselves from making any claims other than those covered by this agreement. And it is understood that the stipulations aforesaid are to apply to and bind the successors, the heirs, executors and administrators and assigns of the respective parties. 20

In Witness Whereof, the party of the first part has caused these presents to be signed by its President and the party of the second part has here- 30

*Exhibits.*

unto set his hand and seal the day and year first above written.

MOUNTAIN LAKES, INCORPORATED

H. J. HAPGOOD, President

FRANK HENDRICK

10 Sealed and Delivered  
in the presence of  
Frank Hill Erisman

MOUNTAIN LAKES, INCORPORATED

Incorporated New Jersey 1910

State of New Jersey }  
County of Morris } ss.:

20 Be it Remembered, That on this 2nd day of July in the year one thousand nine hundred and twenty before me, A Notary Public of N. J. personally appeared Frank Hendrick who I am satisfied is the purchaser in the within contract named, and I having first made known to him the contents thereof, he did acknowledge that he executed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

MICHEL J. MURRAY, JR.,

Notary Public of N. J.

30 Received & Recorded July 2, 1920, at 3:03 o'clock P. M.

E. BERTRAM MOTT,

Clerk.

*Exhibits.*

State of New Jersey, }  
 County of Morris, } ss. :

I, E. BERTRAM MOTT, Clerk of the County of Morris, do hereby Certify that the foregoing is a true copy of the record of a Contract given by Mountain Lakes, Inc. To Frank Hendrick as fully and entirely as the same remains of record in my office in Book X-25 of Deeds for said County, on pages 342, etc.

10

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said County, at Morristown, this 24th day of November A. D. nineteen hundred and twenty four.

(Seal) E. BERTRAM MOTT,  
 Clerk.

20

Endorsed:

## CERTIFIED COPY

Dated March 18, 1920  
 Recorded in Book X-25 of Deeds on  
 pages 342, &c.

ELIAS BERTRAM MOTT,  
 Clerk.

30

40

*Exhibits.***Exhibit C-12.**

(\$3 Stamps).

No. 1736.

Bond and Mortgage Insurance Policy.  
North Jersey Title Insurance Company,

10

In consideration of the premium and terms of contract named below, insures

20

J. MORGAN HOLLOWAY, his executors, or administrators and all subsequent owners of the Bond and Mortgage described in Schedule A, to whom the same shall be assigned with the consent of this Company: Payment of interest at the rate of six per cent. per annum, from November 23rd, 1920, as the same shall become due on the Bond and Mortgage described in Schedule A, within five days after the same shall become due; and payment of the principal, and every instalment thereof, within thirty days after the same shall have become due under the terms of the said Bond and Mortgage, or if payment is not demanded when due, then within thirty days after it shall have been demanded by the insured.

**PREMIUM AND TERMS OF INSURANCE:**

30

By the acceptance of this policy, the North Jersey Title Insurance Company is made the agent of the insured, with the exclusive right, but at its own expense, to collect the interest as it shall become due on the Bond and Mortgage hereby insured, until the Bond and Mortgage are paid; and out of the interest so collected, is authorized to retain the excess over the insured rate named above, as its premium for this policy.

40

This policy is subject to the conditions annexed hereto.

*Exhibits.*

IN WITNESS WHEREOF, the NORTH JERSEY TITLE INSURANCE COMPANY has caused this instrument to be signed by its President and Secretary, and its common seal to be hereto affixed, at Hackensack, New Jersey, this Twenty-third day of November, nineteen hundred and Twenty.

Wm. H. Zabriskie,  
President.

10

Attest:

Frederick E. Kaester  
Secretary

North Jersey Title  
SEAL  
Insurance Co.

## SCHEDULE A.

20

The bond covered by this policy is made by MOUNTAIN LAKES, INCORPORATED, a Corporation of the State of New Jersey, to the NORTH JERSEY TITLE INSURANCE COMPANY, and is dated April 29th, 1920. It is given for the payment of Fifteen Thousand Dollars, now reduced to Ten Thousand Dollars (\$10,000.00) on the Twenty-ninth day of April, 1923, with interest at the rate of six per cent. per annum, payable semi-annually; and the Mortgage given to secure said Bond is made by MOUNTAIN LAKES, INCORPORATED, a Corporation of the State of New Jersey, to the NORTH JERSEY TITLE INSURANCE COMPANY, bears the same date as said Bond, and is recorded in the office of the Clerk of Morris County, in Book of Mortgages, on pages

30

The owner of the real property described in said Mortgage has insured it against fire, with loss payable to the mortgagee, in the sum of Fifteen Thousand Dollars.

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*Exhibits.*

The real property described in said Mortgage is the following:

10 ALL THAT TRACT OF LAND AND PREMISES hereinafter particularly described, situate, lying and being in the TOWNSHIP OF HANOVER, COUNTY OF MORRIS, STATE OF NEW JERSEY, and known and described as lots #33, 34, 34, 36, 37, 38, 39, 40, 41, 42, 44, 46, Block T-1, as shown on, and in connection with, a map of the property of Mountain Lakes, Incorporated, C. O. Martindale, engineer, filed in the office of the Clerk of the County of Morris, July 15th, 1916, being more particularly bounded and described as follows:

20 BEGINNING at a stone monument set on the northerly side of Lookout Road at the irregular intersection with Tower Hill Road; thence (1) south 73 23' west along the northerly side of Lookout Road sixty and sixty-four one hundredths (60.64) feet to a stone monument; thence (2) still along the northerly side of Lookout Road south 71 19' west one hundred and seventy-eight and seventy-five one hundredths (178.75) feet to a stone monument set on the dividing line between lots #32 and #34 Block T-1; thence (3) along said dividing line and an extension thereof north 15 51' west three  
30 hundred and seventy and twenty-three one hundredths (370.23) feet to a stone monument set on the northerly side of a new Road known as Mountain Way; thence (4) along the southerly side of Mountain Way North 81 18' east twenty-four and six tenths (24.6) feet to a stone monument; thence (5) still along the southerly side of said Mountain Way south 87 49' east one hundred and eighty-eight and seventy-four one hundredths (188.74) feet to a stone monument; thence (6) along the  
40 westerly side of Tower Hill Road south 48 42' east

*Exhibits.*

one hundred and ninety-seven and eighty-nine one hundredths (197.89) feet to a stone monument; thence (7) still along the westerly side of Tower Hill Road south 34 03' east one hundred and nineteen and seventeen one hundredths (119.17) feet to a stone monument set at the intersection of Tower Hill Road and Lookout Road; thence (8) 10  
along said intersection south 19 40' east seventeen and seventy-four one hundredths (17.74) feet to the point or place of beginning, containing house known as house "HH".

This Company's liability shall be reduced by the amount of any depreciation in the mortgage security caused by fire or explosion, riot or war, or by tornado, earthquake or other act of God or the public enemies.

All notices required or given under this contract 20  
by the insured to this Company, or by this Company to the insured, shall be in writing.

All notice by the insured to this Company shall be delivered to an officer of the Company at the office of the Company.

Any notice by this Company to the insured shall be delivered or mailed to the insured, and the address of the insured to which such notice shall be sent, shall, until notice of change by the insured, be as follows: 30

J. Morgan Holloway, 539 Summit Avenue,  
Jersey City, N. J.

All payments of principal and interest by this Company to the insured are to be made at the principal office of this Company, in Hackensack, New Jersey.

*Exhibits.*

## CONDITIONS OF THIS POLICY.

THIS COMPANY IS BOUND:      THE INSURED IS BOUND:

10      1. To conduct in the name of, but without expense to the insured, all actions or proceedings that may be deemed necessary to enforce the performance of any and all covenants contained in the bond or mortgage, promptly notifying the insured of the commencement of any such action or proceeding; and all principal and interest at the rate guaranteed shall be paid to the insured, when collected.

20      2. To advance to the insured semi-annually, interest, at the rate guaranteed, on said bond and mortgage, pending the collection of the principal.

30

1. To notify this Company promptly, in writing, of any assignment of said bond and mortgage, which must be made subject to the terms of this contract and of any action or proceeding, of which the insured has knowledge, affecting said bond or mortgage or any rights or claims thereunder.

2. To allow this Company, in the name of the insured, to exercise any right or option secured to the insured by said bond and mortgage; and without further action on the part of the insured, this Company is authorized to enforce payment in the name of the insured, from time to time, of any sums which may be or become due under said bond and mortgage; and the insured is bound, on request of this Company to produce and deposit the bond and mortgage with it, for that purpose;

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*Exhibits.*

and to render such reasonable assistance to that end as this Company may require, but but not to incur any expense in so doing.

3. To continue this policy upon an extension of the mortgage, on payment of the same premium per annum as is charged for this policy, unless this Company shall elect to collect said mortgage.

3. To assign said bond and mortgage to this Company, if requested to do so, whenever entitled to require payment of the same, upon receipt of the full amount due the insured.

10

4. To keep the mortgaged premises insured against fire to the amount stated in Schedule A, by policies of fire insurance, having mortgagee clause attached, issued by companies authorized to do business in the State of New Jersey such policies to be left in the custody of this Company by the insured for that purpose; and to require the owner to pay all taxes, assessments, water rates and other governmental or municipal rates, charges and liens, as by the terms of the mortgage are required to be paid.

20

30

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*Exhibits.*

THIS POLICY IS TRANSFERRED AS FOLLOWS :  
DATE ASSIGNOR ASSIGNEE WITNESS APPROVED

POLICY OF MORTGAGE

---

10 INSURANCE.  
NORTH JERSEY  
TITLE INSURANCE CO.  
Hackensack, N. J.  
To  
J. MORGAN HOLLOWAY.

---

Covers Mortgage Made by  
MOUNTAIN LAKES,  
INCORPORATED.

---

20 Premises at Mountain Lakes, N. J.  
Amount  
\$15,000 now reduced to \$10,000.  
Dated April 29th ..... 1920  
Due April 29th ..... 1923  
No. 1723

---

30 Read the Conditions of This Policy.  
NORTH JERSEY TITLE  
INSURANCE COMPANY  
HACKENSACK, NEW JERSEY.

Chartered 1899

The Oldest Title Insurance Company  
in the State

40 "We Know or Discover All That  
Can be Known or Discovered About a  
Real Estate Title: All That is Un-  
knowable We Insure Against."

*Exhibits.***Exhibit C-13.**

120 Broadway,  
Manhattan, New York City.  
July 10th, 1920.

Mountain Lakes, Inc.,  
170 Broadway.

10

Dear Sirs: Kindly send me at once your check for five thousand (\$5000) dollars, being the amount received by you from a mortgage of fifteen thousand (\$15,000) dollars placed by you upon house H.H. at Mountain Lakes in excess of the amount of ten thousand (\$10,000) dollars provided to remain on the said house in my contract with you. I am sending this formal demand by registered mail and retaining a copy. I expect an immediate compliance with this demand.

20

Very truly yours,

FRANK HENDRICK.

ENVELOPE.

---

Frank Hendrick  
120 Broadway, 12c. in Stamps  
Manhattan,  
New York City. RETURN RECEIPT REQUESTED  
Ex C 13 (a)

30

Mountain Lakes, Inc.,  
REGISTERED  
No. 308569 170 Broadway,  
Attention of Manhattan,  
Mr. H. J. Hapgood New York City.

---

Stamped on back  
New York, N. J.  
7-12  
1920

40

*Exhibits.*

**Exhibit C-14.**

September 18, 1920.

H. J. Hapgood, Esq.,  
Mountain Lakes, Inc.  
170 Broadway,  
New York City.

10

Dear Sir:

I hereby demand that you immediately cause to be reduced from \$15,000 to \$10,000 the mortgage on house HH at Mountain Lakes, N. J.

Very truly yours,  
FRANK HENDRICK.

FH:B

20

---

**Exhibit C-15.**

Copy of Release  
Hapgood to  
MOUNTAIN LAKES, INC.  
Book 22 PP 76 &c

30

THIS INDENTURE made this 22nd day of November in the year nineteen hundred and twenty, between H. J. HAPGOOD, of Mountain Lakes, N. J., party of the first part, and MOUNTAIN LAKES, INC., a New Jersey Corporation, party of the second part:

40

WHEREAS Mountain Lakes, Incorporated, by mortgage dated the 29th of April, one thousand nine hundred and twenty, for the consideration therein mentioned and to secure the payment of the money therein specified, did convey certain lands and tenements of which the lands hereinafter described are part, unto North Jersey Title

*Exhibits.*

Insurance Co. and while said mortgage was recorded in office of the clerk of the County of Morris in the State of New Jersey in Book R 8 page 47 or elsewhere of mortgages to secure the sum of Fifteen Thousand (\$15,000) Dollars. And whereas, the said party of the first part at the request of the said party of the second part, has agreed to give up and surrender the lands hereinafter described unto the said party of the second part, and to hold and retain the residue of said mortgaged lands as security for the money remaining due on the said mortgage;

10

NOW THIS INDENTURE WITNESSETH That the said party of the first part in pursuance of the said agreement and in consideration of the sum of Five Thousand (\$5,000) Dollars to him paid at the time of the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, has released and by these presents does release, quit-claim, give, grant and convey unto the said party of the second part heirs and assigns, All that part of the said mortgaged lands, to wit:

20

All those certain lots, pieces, or parcels of land, lying and being in the Township of Hanover, County of Morris and State of New Jersey, and known and described as lots #33, 35, 37, 39, 40, 41, 42, 44, 46 Block T-1, as shown on and in connection with a map of the property of Mountain Lakes, Incorporated, C. O. Martindale, Engineer, filed in the office of the Clerk of the County of Morris July 15th, 1916 being more particularly bounded and described as follows:

30

BEGINNING at a stone monument set on the northerly side of Lookout Road at the irregular

40

*Exhibits.*

intersection with Tower Hill Road, thence (1) South  $73^{\circ} 23'$  West along the northerly side of Lookout Road sixty and sixty-four one hundredths (60.64) feet to a stone monument; thence (2) still along the northerly side of Lookout Road South  $71^{\circ} 19'$  West one hundred and twenty-eight and fifty-seven one hundredths (128.57) feet to a  
 10 stone monument set on the dividing line between lots #38 and 41 Block T-1: thence (3) along said dividing line and the lands of Hendrick, north  $15^{\circ} 51'$  West one hundred and eighty (180) feet to a stone monument; thence (4) along the land of Hendrick South  $71^{\circ} 19'$  West one hundred and fifty and eighteen one hundredths (150.18) feet to a stone monument set at the dividing line between lots #32 and 34 Block T-1; thence (5)  
 20 along the continuation of said dividing line north  $15^{\circ} 51'$  West one hundred and ninety and twenty-three one hundredths (190.23) feet to a stone monument set on the northerly side of a new road known as Mountain Way; thence (6) along the Southerly side of Mountain Way North  $81^{\circ} 18'$  East twenty-four and six tenths (24.6) feet to a stone monument; thence (7) still along the southerly side of said Mountain Way South  $87^{\circ} 49'$  East one hundred and eighty-eight and seventy-  
 30 four one hundredths (188.74) feet to a stone monument; thence (8) along the westerly side of Tower Hill Road South  $48^{\circ} 42'$  east one hundred and ninety-seven and eighty-nine one-hundredths (197.89) feet to a stone monument; thence (9) still along the westerly side of Tower Hill Road South  $34^{\circ} 03'$  east one hundred and nineteen and seventeen one hundredths (119.17) feet to a stone monument set at the intersection of Tower Hill Road and Lookout Road; thence (10) along said inter-  
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*Exhibits.*

section south 19° 40' East seventeen and seventy-four one hundredths (17.74) feet to the point or place of beginning, leaving lots No. 34, 36 & 38 Block T-1 conveyed to Frank Hendrick covered by the above mortgage which has this day been reduced to \$10,000 and interest from October 29th, 1920.

10

TOGETHER with the hereditaments and appurtenances thereunto belonging, and all the right, title and interest of the said party of the first part to the same, to the intent that the lands hereby conveyed may be discharged from the said mortgage, and that the rest of the land in the said mortgage contained may remain to the said party of the first part as heretofore. To have and to hold the lands and premises hereby released and conveyed to the said party of the second part, its successors, heirs and assigns, forever free from the encumbrance of the mortgage aforesaid.

20

IN WITNESS WHEREOF the said party of the first part has hereunto set his hand and seal upon the date first above written.

H. J. HAPGOOD L.S.

Signed, sealed and delivered  
in the presence of

30

Frank H. Erisman.

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

BE IT REMEMBERED that on this 22nd day of November, in the year nineteen hundred and twenty, before me, the subscriber, personally appeared H. J. Hapgood, who, I am satisfied the grantor in the within Indenture named and I having first made known to the contents

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*Exhibits.*

thereof, he did acknowledge that he signed, sealed and delivered the same as voluntary act and deed for the uses and purposes therein expressed.

FRANK HILL ERISMAN

Foreign Commissioner of Deeds

10 FOREIGN for New Jersey in and for  
COMMISSIONER'S New York City and in the  
SEAL. State of New York.

Received and recorded Nov. 24, 1920 at 9.21  
o'clock A. M.

E. Bertram Mott, Clerk

20 I hereby certify that the foregoing release from  
H. J. Hapgood to Mountain Lakes Inc, dated the  
22nd day of November, 1920, consisting of six  
pages, is a verbatim copy of the original Release  
as recorded in the Morris County Clerk's office  
on Nov. 24, 1920 in Book 22 of Releases on pages  
76, 77, 78 & 79, the same having been copied by  
me this 15th day of April, A. D., 1925.

Dated April 15, 1925.

LUTHER V. STRYKER,  
Attorney at Law.

30

40

*Exhibits.***Exhibit D-1 for Identification.**

NORTH JERSEY TITLE INSURANCE COMPANY

HACKENSACK, NEW JERSEY

October Twentieth,  
Nineteen Twenty.Mr. Frank Hendrick,  
120 Broadway, New York.

10

Dear Sir:

We have your letter of the 19th inst. in reference to interest due on mortgage covering house "HH" at Mountain Lakes.

As far as we are concerned there is \$450 interest due us, that is three per cent. on \$15,000, being six months interest.

If you have any arrangement with the Mountain Lakes people for the adjustment of this matter, we would suggest that you take it up with them.

20

The application for this loan is in our files, and is not subject to inspection.

Yours very truly,

NORTH JERSEY TITLE INSURANCE CO.

WILLIAM H. ZABRISKIE.

William H. Zabriskie  
MS.

30

President.

Z:S.

40

*Exhibits.*

**Exhibit D-3 for Identification.**

170 Broadway

March 1st

Dear Mr. Hendrick:

10     The transfer you saw in the was a resale, a  
little house in the hollow down near the station.  
Nothing like "W 505".

Sincerely

A. K. ALEXANDER

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EXHIBIT D-2.



EXHIBIT D-4.





*Exhibits.***Exhibit D-5.**

July 6th, 1920.

Mountain Lakes, Inc.,  
170 Broadway,  
New York City.

Dear Sirs:—

10

This is to make a record of the fact that on the 1st of July, 1920, at 10 o'clock A. M. I attended at your office for the purpose of closing the title to House HH at Mountain Lakes, in accordance with my contract therefor. I was told by the person in attendance that no title could be given because of the absence of your Mr. Hapgood. In the afternoon I again attended with your Mr. A. K. Alexander, the salesman with whom I dealt and had a talk with your Mr. Hapgood. I was then advised that it was impossible to give me title in accordance with the contract for the reason that you had taken a mortgage for \$15,000. on House HH and some adjoining lots. I then informed Mr. Hapgood that I desired a deed in my name and was ready to close the matter, and to sign a mortgage for \$10,000. in accordance with the terms of the contract. I was informed by Mr. Hapgood that it was impossible to close on those terms and at that time.

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I send herewith my check for \$2300. being the amount, so far as I can learn of extras contracted for with you, on House HH. I send this check without prejudice to the assertion of a default on your part in the completion of your contract with me for the building of this house as to the time of giving title and your imposing a mortgage for \$15,000. secured by House HH, as to your failure to complete the house at the day fixed in the contract, as to your failure to grade the ground in

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*Exhibits.*

accordance with the terms of the contract and as to other elements of your failure to perform the contract with me on your part.

10 I hereby demand that you deliver to me forthwith a warranty deed of House HH and the three lots on which it is built. You are to understand that the payment by me of the sum represented by the enclosed check is to be considered in no sense a waiver of any of my rights against you.

Yours very truly,

FH:MS

FRANK HENDRICK.

**Exhibit D-6 for Identification.**

September 22nd, 1920.

20 H. J. Hapgood, Esq.,  
Mountain Lakes, Inc.  
170 Broadway,  
New York City.

Dear Sirs:

30 Upon your repeated failure after many demands covering a period of months to perform your contract for the construction of house HH according to specifications, I hereby notify you that I shall have the work done and shall demand of you repayment of that portion of the money delivered to you for that purpose.

My contract with you was based upon a representation as to the price of house 278.

Will you kindly inform me on what date house 278 was sold, the price, and the amount of land included in the price.

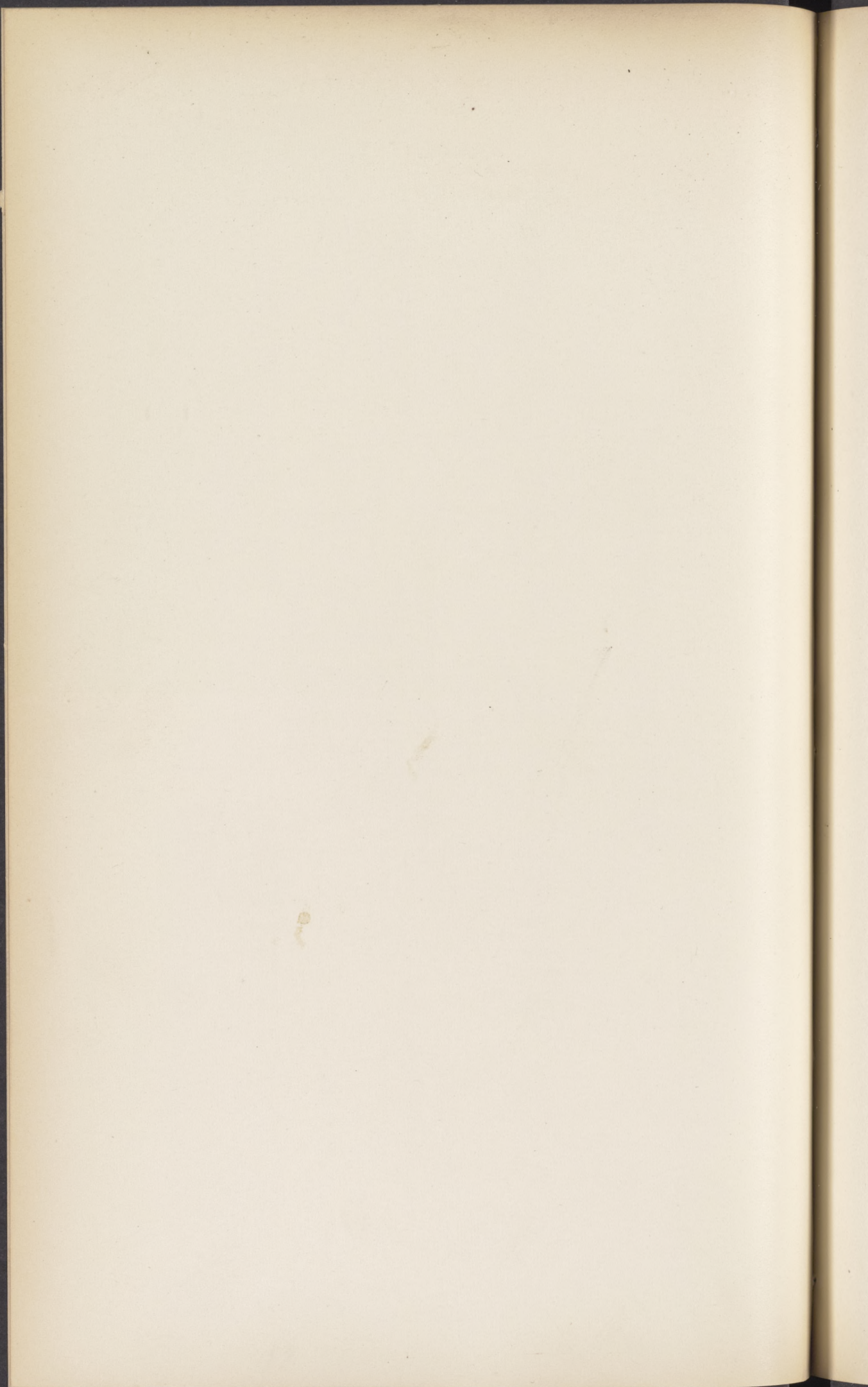
Very truly yours,

40 FH/B

FRANK HENDRICK.

Art D-1





*Exhibits.*

**Exhibit D-7.**

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*Exhibits.***Exhibit D-8 for Identification.**

FRANK HENDRICK,  
Attorney and Counsellor  
120 Broadway  
New York

Telephone Rector 3871

October 29th, 1920.

North Jersey Title Insurance Co.,  
Hackensack, N. J.

Dear Sirs:

Enclosed herewith I send you my check for \$450.00.

Mountain Lakes, Inc. on or about the 28th day of April, 1920 executed a mortgage upon several lots in plot T1 at Mountain Lakes, New Jersey. Three of the lots have been sold to me on or about March 18th. I had paid in cash an amount far in excess of the value of the lots. The value of the lots was represented to me as far in excess of the actual value placed upon them by Mountain Lakes, Inc. as determined by sales by them in the neighborhood. Shortly thereafter I gave Mountain Lakes, Inc., sums in cash aggregating about \$2500 which together with the original payment of \$10,000 made a payment of \$12,500. I made a contract in writing with Mountain Lakes, Inc., on which the payment was made by which a house H.H. was to be built on the three lots and to cost \$22,000; I was to assume or agree to pay a mortgage of \$10,000 at the time of taking title. It was agreed by Mountain Lakes, Inc. in my contract that house H.H. should be equal in every respect to house No. 278. It was represented to

*Exhibits.*

me before I signed the contract that house 278 had been sold for \$17,500. I learned only during the month of September that Mountain Lakes, Inc. had sold house 278 about six months earlier for \$12,500. This house, No. 278, was mentioned specifically in my contract and the representation as to the price of it was the inducement to me to sign the contract. 10

My contract with Mountain Lakes, Inc. called for the completion of house H.H. on or before July 1st. The house was not completed on July 1st and is today incomplete. It was impossible to move into the house before on or about August 1st. The house does not come up to the specifications with respect to house 278 in many particulars involving fundamental elements of construction as well as important items of detail. The construction is otherwise inferior and would disgrace any concern which pretended to any standard of efficiency in building. My contract called for grading. It took over \$600 outlaid by me to complete only a part of the grading agreed upon in my contract. The eaves and the roof of the house leak and every room is stained with rain water which has come through some of the rooms very badly. 20

On the day set for taking title in the contract, July 1st, 1920, I presented myself at the hour appointed at the office of Mountain Lakes, Inc., 170 Broadway, but was informed that the only person who could attend to the matters was absent. I returned later in the afternoon and was informed that it was impossible to give title in accordance with the terms of the contract for the reason that Mountain Lakes, Inc., had placed a mortgage of \$15,000 upon the premises and that it was impossible to have the mortgage reduced for the rea- 30

*Exhibits.*

son, among others, that money was tight and mortgage money unavailable.

10 At a subsequent date, upon a warning by a salesman with whom I had dealt that both Mr. Hapgood and Mountain Lakes, Inc. were in a bad way financially, I was induced to pay about \$2300 cash and accept a deed subject to the mortgage of \$15,000. The promise was made subsequently in writing that the mortgage would be straightened out and just before September 29th, 1920, I received a notice from Mountain Lakes, Inc. that my portion of the payment of the interest was \$300.

20 I wrote to you recently to inquire whether Mountain Lakes, Inc. had sent the same message to you but received a reply to the effect that as between you and me the sum to be paid was \$450. I communicated the message received from you to Mountain Lakes, Inc. and received a check for \$150 made out in my name, which check was enclosed in a letter reading as follows:

“We enclose herewith check for \$150. being our share of the interest on the \$15,000 mortgage covering your house and additional land.

30 “Payment being made subject to the adjustment of your purchase of said additional land without prejudice to either party.”

I returned the check in a letter saying that I declined to receive the check from Mountain Lakes, Inc. with any such limitation or to receive any check whatsoever in the premises.

I am uninformed whether Mountain Lakes, Inc. has sent you a check for \$150 or for any amount to be applied to this mortgage.

40 I take the position that the mortgage of \$15,000

*Exhibits.*

was placed on house H.H. without right or authority by Mountain Lakes, Inc. not only as to the total amount but as to any part of the said mortgage. I made inquiry of you in my recent letter concerning the application by Mountain Lakes, Inc. for this mortgage and you informed me that the said application was not subject to inspection. From one point of view this position on your part might be equivalent to an assertion that I am in no way a party to the transaction. That is, in effect, my position and I believe that apart from technicalities, you have something to straighten out with Mountain Lakes, Inc. In the meantime, however, I send you my check for \$450. without prejudice to any claim I may be entitled to make for any remedy I may have a ground to obtain in the premises.

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Very truly yours,

FRANK HENDRICK.

FH:B

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*Final Decree.***Exhibit D-9 for Identification.**

## STATE OF NEW JERSEY

## DEPARTMENT OF STATE

Trenton, November 29, 1924.

10 I, THOMAS F. MARTIN, Secretary of State of the State of New Jersey, do hereby certify that I have duly searched the record of Foreign Commissioners of Deeds and do not find that FRANK HILL ERISMAN has been such Foreign Commissioner of Deeds since May 31, 1918, and I further Certify that the said ERISMAN has not been a FOREIGN COMMISSIONER OF DEEDS from that period to this date.

20 (Seal) THOMAS F. MARTIN,  
Secretary of State.

**Final Decree.**

## IN CHANCERY OF NEW JERSEY.

30	Between J. MORGAN HOLLOWAY, Complainant, and FRANK HENDRICK and KATHARINE EDSON MUMFORD HENDRICK, Defendants.	}	On Bill, &c.
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This cause coming on to be heard in the presence of George R. Beach, Esq., and Thomas G. Haight, Esq., of counsel with the complainant, and Frank Hendrick, Esq., appearing *per se* and for Kath-

*Final Decree.*

arine Edson Mumford Hendrick, the two answering defendants, and oral hearing having been had on said Complainant's bill and the answer filed thereto, and the Court having considered such oral proof and all evidence offered and the briefs submitted by respective counsel, and the matter having been determined, and due notice having been given of the application to sign this decree, 10

IT IS on this 9th day of February, A. D., One thousand, nine hundred and twenty-five,

ORDERED, ADJUDGED AND DECREED, that all of the mortgaged premises, more particularly described in said Bill of Complaint and covered by the mortgage now held by J. Morgan Holloway, Complainant, against the property of Frank Hendrick and Katharine Edson Mumford Hendrick, Defendants, dated the 29th day of April, 1920, and assigned by various mean assignments to J. Morgan Holloway, the within complainant, on the 4th day of February, 1921, be sold to raise and satisfy the sum of Ten Thousand (\$10,000) Dollars, together with the lawful interest thereon from the 29th day of April, 1923, to the date of this decree, making a total sum of principal and interest on this date of Eleven Thousand and Seventy (\$11,070.00) Dollars, which is hereby adjudged to be due to the complainant on said mortgage, together with the complainant's costs to be taxed, and search fees. 20 30

IT IS FURTHER ORDERED that a writ of *feri facias* do issue for that purpose out of this Court, directed to the Sheriff of the County of Morris, commanding him to make sale, according to law, of the said mortgaged premises, and that out of 40

*Final Decree.*

the moneys arising from such sale he pay to the complainant, or his solicitor, the said debt with interest from the date of this decree together with his costs of this suit, and in case more money should be raised by the said sale than shall be sufficient to answer such payments, that such surplus be brought into this Court to abide the further order of the Court, unless otherwise previously disposed of by order of this court, and that the said Sheriff make return without delay of his proceedings by virtue of said writ; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, Frank Hendrick and Katharine Edson Mumford Hendrick, stand absolutely debarred and foreclosed of and from all equity of redemption, of, in and to the said mortgaged premises when sold as aforesaid by virtue of this decree; and

IT IS FURTHER ORDERED that the sum of \$750.00 be allowed and paid to the Solicitors of the Complainant as counsel fees and that the same be included in the tax bill of costs and collected with the other items of said bill.

Respectfully advised,

JAMES F. FIELDER,  
V. C.

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**Conclusions.**

(Not to be published in any report.)

January 23, 1925.

IN CHANCERY OF NEW JERSEY.

55—117.

Between

J. MORGAN HOLLOWAY,  
Complainant,  
and  
FRANK HENDRICK, *et al.*,  
Defendants.

On Bill to  
Foreclose.

10

Mr. GEORGE R. BEACH and Mr. THOMAS G.  
HAIGHT for Complainant.

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Mr. FRANK HENDRICK and Mrs. KATHERINE  
E. M. HENDRICK *pro sese.*

FIELDER, V. C.:

Mountain Lakes, Inc., entered into a contract with the defendant Frank Hendrick, dated March 18, 1920, whereby the former agreed to sell and the latter agreed to purchase, three lots of land upon which the seller, by the terms of the contract, was to erect a dwelling house. The consideration named in the contract for the land and building was \$22,200, of which \$12,200 was to be paid in cash and the balance, \$10,000, was to be paid at the time of taking title, by the purchaser "assuming and agreeing to pay a certain first mortgage of \$10,000." By the terms of the contract, title was to close on or before July 1, 1920. The contract was duly recorded July 2, 1920.

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*Conclusions.*

Subsequently to the date of the contract, Mountain Lakes, Inc., executed a mortgage, dated April 29, 1920, to the North Jersey Title Insurance Co., to secure the payment of \$15,000, covering the three lots agreed to be conveyed to Hendrick and nine other lots, which mortgage was recorded  
10 May 6, 1920. By deed dated July 1, 1920, recorded July 9, 1920, Mountain Lakes, Inc., conveyed to Hendrick the three lots in question, which conveyance was expressly made subject to the mortgage for \$15,000 and by deed dated July 14, 1920, recorded July 15, 1920, Hendrick conveyed two of said lots to Lillian E. Eason, who, by deed dated and recorded on the same dates, conveyed said two lots to the defendant Katherine E. M. Hendrick (wife of Frank Hendrick), both deeds being  
20 made expressly subject to said mortgage of \$15,000. By release of mortgage dated November 22, 1920, recorded November 24, 1920, H. J. Hapgood, who then owned the mortgage by assignment, released to Mountain Lakes, Inc., for the consideration of \$5,000, all lots covered by the mortgage except the three conveyed to the defendant Frank Hendrick, leaving said three lots subject to the balance of \$10,000 secured by said mortgage. The mortgage was thereafter assigned to the complainant,  
30 who by this suit seeks its foreclosure, claiming \$10,000 and interest due thereon. The complainant is a stranger to all the transactions herein mentioned and is bound only by such notice as the record gives.

The first defense presented is that the mortgage, the deed from Mountain Lakes, Inc., to Frank Hendrick and the release of mortgage, were not properly acknowledged because the person who,  
40 as a foreign commissioner for New Jersey in New

*Conclusions.*

York, certified such acknowledgments, was not such a commissioner and therefore these instruments were not properly recorded and are not notice to anyone. The only proof offered by the defendants to show that the certifying commissioner was not, in fact, such commissioner, was a certificate under the hand and seal of the Secretary of State of New Jersey, purporting to certify such fact. The offer of such certificate in evidence was rejected as not proper evidence of the fact sought to be proved. Even were the acknowledgments defective and were these instruments not proper, for that reason, to be recorded and therefore not constructive notice to anyone, the defendants had actual notice of the mortgage because it is recited in their deeds; and the deed from Mountain Lakes, Inc., to Hendrick is good as between the grantor and grantee, without any acknowledgment and it does not appear that anyone has questioned the defendants' title thereunder; and the release of mortgage is valid between the releasor and the mortgagor without an acknowledgment and it does not appear that anyone, other than the defendants, question its effect as a valid release of the mortgage lien. In his bill of complaint, the complainant admits notice of the deed and the release of mortgage.

The defendants claim that the instrument mentioned and the various assignments through which the mortgage came into the complainant's ownership, were not properly proved on the hearing of this cause, the basis of their contention being that they gave due notice to the complainant before the hearing, under Comp. Stat., page 1555, Section 56, that they would require the complainant to produce the original instruments, instead of the

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*Conclusions.*

record thereof. Why the record would not have been sufficient proof and the reason for the demand, is not apparent from anything in the case, but in compliance with the demand, the complainant did produce all the original instruments, except the release of mortgage, which release was  
10 executed and delivered to Mountain Lakes, Inc., and presumably was not in complainant's possession. This release was proved by the admission in evidence of a certified copy of the record, to which admission the defendants made no objection and it is impossible to perceive how such certified copy, rather than the original, could have been detrimental to any defense set up by the defendants.

20 The next defense presented is that the dwelling house erected upon the mortgaged premises is not subject to the mortgage because it was not in existence when the mortgage was executed and delivered. As between the owner of the land and the mortgagee, any improvement placed on the land as part of the freehold, becomes subject to the lien of the mortgage and in this case it is expressly stated in the mortgage that it is to cover a house on the lots in question. It does not appear that there were any equities in favor of the  
30 owner as against the holder of the mortgage at the time the house was erected, which would change or modify the rule, or if there were, that the complainant had notice of such equities.

The next defense interposed in that Hapgood, the owner of the \$15,000 mortgage at the time he executed and delivered the release to Mountain Lakes, Inc., had no right to release nine lots from the lien of the mortgage for a coconsideration of \$5,000 and subject to the defendants' three  
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*Conclusions.*

lots and the dwelling house thereon, to the lien of the balance of the mortgage. The contract between the defendant Frank Hendrick and Mountain Lakes, Inc., was that Hendrick should pay \$22,200 for a dwelling house and three lots, of which consideration \$10,000 was to be paid by assuming, or taking title subject to, a mortgage for that amount, which mortgage as appears from the wording of the contract, was to be a lien on the property prior to the conveyance to Hendrick. Between the date of the contract and the delivery of the deed to Hendrick, Mountain Lakes, Inc., created a mortgage lien on the house and lots and on nine other lots, of \$15,000 and Hendrick took title expressly subject to this mortgage and in the settlement of the purchase price under the terms of the contract, he was allowed credit for \$10,000 on account of this mortgage lien. From the evidence on the part of the defendants, it appears that title was so taken, rather than in strict accordance with the contract, because Hendrick feared that Mountain Lakes, Inc., was in financial straits and might go into the hands of a receiver, or be adjudged a bankrupt and Hendrick wanted title before either of these things occurred. Whether or not his fear was well founded does not appear, but he took title subject to the \$15,000 mortgage, after demanding a conveyance in accordance with the terms of his contract, as to the mortgage lien and protesting against a mortgage for \$15,000 which covered his lots and other property. It is my recollection that the evidence shows that his grantor then promised to have the mortgage released as to the other property and to make a payment on the mortgage which would reduce it to \$10,000, but however that may be,

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*Conclusions.*

while title to the three lots was in Hendrick and also after he had conveyed two of them to his wife, he continued his demand for himself and as agent for his wife, that the mortgage be reduced to a mortgage of \$10,000 on said three lots. Hapgood was president of Mountain Lakes, Inc., from the time the contract between the company and Hendrick was entered into, to the execution of the deed to Hendrick and he knew that Hendrick claimed to be entitled to a conveyance of his lots subject to a \$10,000 mortgage and when, in November, 1920, Hapgood became the owner of the mortgage by assignment, he complied with Hendrick's demand and by the execution and delivery of his release, Hapgood reduced the mortgage to \$10,000 and made it a lien only on the three lots in question. Thus Hendrick and his wife (the latter having notice of the terms of the original contract because it was recorded) were placed in the position with respect to the principal amount of the mortgage, in which they demanded they should be placed and thereafter they made payments of interest on a \$10,000 mortgage down to April, 1923. It is impossible to conceive how the release injuriously affected their rights. Rather it conceded and established their rights according to their contention.

Finally, the defendants claim that the house which Mountain Lakes, Inc., agreed to construct upon the land in question, does not conform to the house for which the defendant Frank Hendrick contracted and therefore the defendants owe nothing on the mortgage. This claim is stated in a nebulous fashion and the evidence does not support it. Had it been established that the house was not constructed according to the contract and

*Conclusions.*

had this been a purchase money mortgage, the defendants might be entitled to a set-off, or to an abatement, as against the mortgage debt, but this was not a purchase money mortgage. Under his contract the defendant Frank Hendrick was to take title subject to a mortgage which Mountain Lakes, Inc., was to secure on the property before conveying to Hendrick and this mortgage was executed by Mountain Lakes, Inc., to North Jersey Title Insurance Company, before the construction of the house was begun and the mortgage had passed, by assignment, to the Hackensack Trust Company before the deed to Hendrick was delivered. When Hendrick took title and made the balance of his cash payment under his contract, his right was to have such equities as he now claims arose under his contract with Mountain Lakes, Inc., adjusted with that company and such equities did not extend as against the mortgagee and the assignee of the mortgage, because they were strangers to said contract. The defendant, Mrs. Hendrick, has no equities arising under said contract, as against the complainant. She was not a party to the contract and she took title to two of the lots expressly subject to the mortgage. She must be deemed to have retained from the consideration which moved from her on the purchase of those lots, a sufficient sum to pay the principal of the mortgage. If she could make this defense and avoid the payment of the whole or part of the sum she retained, she would receive the benefit of the amount of the consideration money she retained, although she has sustained no damage.

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The voluminous brief and reply brief filed on behalf of the defendants, set up other matters of

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Notice.

defense which I do not consider of sufficient merit even to discuss.

There will be a decree in favor of the complainant for \$10,000, with interest from April 29, 1923.

Notice.

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IN CHANCERY OF NEW JERSEY.

Between

J. MORGAN HOLLOWAY,  
Complainant,

and

FRANK HENDRICK and KATHERINE  
EDSON MUMFORD HENDRICK,  
Defendants.

On Bill to  
Foreclose.

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TAKE NOTICE that upon the annexed affidavits and upon all the papers and the proceedings heretofore had herein we shall apply to the Chancellor at the Chancery Chambers, in the City of Jersey City, on the ninth day of February, A. D. 1925, at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard, for an order granting the defendants a new trial on the ground of newly discovered evidence and on other grounds and for such other and further relief as may be deemed proper by the Court.

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FRANK HENDRICK,  
Defendant Pro Se.

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**Affidavit.**

IN CHANCERY OF NEW JERSEY.

Between

J. MORGAN HOLLOWAY,  
Complainant,

and

FRANK HENDRICK and KATHERINE  
EDSON MUMFORD HENDRICK,  
Defendants.On Bill to  
Foreclose.

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City, County, and State of New York, ss.:

FRANK HENDRICK, being duly sworn, says:

FIRST.—I am one of the defendants above-named.

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SECOND.—Upon the final hearing herein there was admitted in evidence over the defendants' objection a letter from the defendant Frank Hendrick dated September 18th, 1920, to H. J. Hapgood, Mountain Lakes, Inc., reading as follows:

"I hereby demand that you immediately cause to be reduced from \$15,000 to \$10,000 the mortgage on house H. H. at Mountain Lakes, N. J."

30

This letter is made the basis of the decision of the Vice Chancellor. The opinion recites that the release of the nine lots did not injuriously affect the rights of the defendants. "Rather" the opinion says "it conceded and established their rights according to their contention."

THIRD.—The opinion also sets up that "The

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*Affidavit of Frank Hendrick.*

complainant is a stranger to all the transactions herein mentioned and is bound only by such notice as the record gives." The complaint alleges that "on or about the 4th day of February, 1921, by Deed of Assignment, said North Jersey Title Insurance Company, as aforesaid, assigned to J. Morgan Holloway, complainant herein, the said mortgage aforesaid."

FOURTH.—The opinion sets up, therefore, as material facts, the contention of the defendants as against Mountain Lakes, Inc., and H. J. Hapgood and notice to Mountain Lakes, Inc., and the complainant. The defendants desired to introduce evidence of these facts and to that end served a notice to produce the original of a letter dated November 26th, 1920, sent by the defendant Frank Hendrick to George R. Beach, Solicitor for the complainant and duly served a subpoena *duces tecum* calling upon William H. Zabriskie, President of North Jersey Title Insurance Company, to produce "All letters received from Frank Hendrick from July 1st, 1920, to date." Mr. Beach denied that he had received the letter dated November 26th, 1920, and Mr. Zabriskie, being present as a witness, informed the Vice Chancellor that he had failed to obey the subpoena. Counsel for the complainant also had in court the originals of letters sent by the defendant Frank Hendrick to Mountain Lakes, Inc., and to H. J. Hapgood, and refused to permit the defendant Frank Hendrick to make use of them or to see them. Defendant Frank Hendrick had been theretofore informed by Ralph L. Kilby, then an officer of Mountain Lakes, Inc., that their records had all been lost or destroyed.

FIFTH.—As a result of the foregoing, the Vice-

*Affidavit of Frank Hendrick.*

Chancellor was not informed either of the contention of the defendants or of the notice to the complainant. A ruling, moreover, of the Vice-Chancellor, excluding the letter dated October 20th, 1920, from North Jersey Title Insurance Company to the defendant Frank Hendrick, acknowledging the receipt of a letter from the defendant Frank Hendrick, completed the barrier to proof by the defendants with evidence then available to them of their true contention and the true state of notice. 10

SIXTH.—The true contention of the defendants before the date of the alleged release duly communicated in writing to Mountain Lakes, Inc., H. J. Hapgood, North Jersey Title Insurance Company, and the complaint was that the defendants claimed that there was and should be no mortgage in any amount upon the house and the three lots. 20

SEVENTH.—The defendants have ascertained since the trial the name of the person who mailed the letters communicating the contention of the defendants to the Solicitor for the complainant, to Mountain Lakes, Inc., H. J. Hapgood, and North Jersey Title Insurance Company. Defendants will be able upon a new trial to prove these communications. The opinion of the Vice-Chancellor asserts their materiality. 30

EIGHTH.—These communications are as follows:

*Affidavit of Frank Hendrick.*

(1)

November 26th, 1920.

George R. Beach, Esq.,  
75 Montgomery St.,  
Jersey City, N. J.

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Dear Sir:

This is to inform you that any mortgage said to be an obligation on House H. H. at Mountain Lakes, N. J., will be contested.

It will be maintained against you or any person that any such mortgage is not a valid obligation.

Yours truly,

FRANK HENDRICK.

20

FH:B.

This letter embodied a communication theretofore made over the telephone by me to Mr. Beach.

(2)

October 29, 1920.

North Jersey Title Insurance Co.,  
Hackensack, N. J.

Dear Sirs:

30

Enclosed herewith I send you my check for \$450.

Mountain Lakes, Inc., on or about the 28th day of April, 1920, executed a mortgage upon several lots in plot 1 at Mountain Lakes, New Jersey. Three of the lots have been sold to me on or about March 18th. I had paid in cash an amount far in excess of the value of the lots. The value of the lots was represented to me as far in excess

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*Affidavit of Frank Hendrick.*

of the actual value placed upon them by Mountain Lakes, Inc., as determined by sales by them in the neighborhood. Shortly thereafter I gave Mountain Lakes, Inc., sums in cash aggregating about \$2,500, which, together with the original payment of \$10,000, made a payment of \$12,500. I made a contract in writing with Mountain Lakes, Inc., on which the payment was made by which a house H. H. was to be built on the three lots and to cost \$22,000; I was to assume or agree to pay a mortgage of \$10,000 at the time of taking title. It was agreed by Mountain Lakes, Inc., in my contract that house H. H. should be equal in every respect to house No. 278. It was represented to me before I signed the contract the house 278 had been sold for \$17,500. This house, No. 278, was mentioned specifically in my contract and the representation as to the price of it was the inducement to me to sign the contract.

My contract with Mountain Lakes, Inc., called for the completion of house H. H. on or before July 1st. The house was not completed on July 1st and is today incomplete. It was impossible to move into the house before, on or about August 1st. The house does not come up to the specifications with respect to house 278 in many particulars involving fundamental elements of construction as well as important items of detail. The construction is otherwise inferior and would disgrace any concern which pretended to any standard of efficiency in building. My contract called for grading.

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*Affidavit of Frank Hendrick.*

It took over \$600 outlaid by me to complete only a part of the grading agreed upon in my contract. The eaves and the roof of the house leak and every room is stained with rain water which has come through, some of the rooms very badly.

10

On the day set for taking title in the contract, July 1st, 1920, I presented myself at the hour appointed at the office of Mountain Lakes, Inc., 170 Broadway, but was informed that the only person who could attend to the matter was absent. I returned later in the afternoon and was informed that it was impossible to give title in accordance with the terms of the contract for the reason that Mountain Lakes, Inc., had placed a mortgage of \$15,000 upon the premises and that it was impossible to have the mortgage reduced for the reason, among others, that money was tight and mortgage money un-

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available. At a subsequent date, upon a warning by a salesman with whom I had dealt, that both Mr. Hapgood and Mountain Lakes, Inc., were in a bad way financially, I was induced to pay about \$2300 cash and accept a deed subject to the mortgage of \$15,000. The promise was made subsequent in writing that the mortgage would be straightened out and just before September 29th, 1920, I received a notice from Mountain Lakes, Inc., that my portion of the payment of the interest was \$300.

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I wrote to you recently to inquire whether Mountain Lakes, Inc., had sent the same message to you but received a reply to the

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*Affidavit of Frank Hendrick.*

effect that as between you and me the sum to be paid was \$450. I communicated the message received from you to Mountain Lakes, Inc., and received a check for \$150 made out in my name, which check was enclosed in a letter reading as follows:

“We enclose herewith check for \$150, being our share of the interest on the \$15,000 mortgage covering your house and additional land.

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“Payment being made subject to the adjustment of your purchase of said additional land without prejudice to either party.”

I returned the check in a letter saying that I declined to receive the check from Mountain Lakes, Inc., with any such limitation or to receive any check whatsoever in the premises.

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I am uninformed whether Mountain Lakes, Inc., has sent you a check for \$150 or for any amount to be applied to this mortgage.

I take the position that the mortgage of \$15,000 was placed on house H. H. without right or authority by Mountain Lakes, Inc., not only as to the total amount but as to any part of the said mortgage. I made inquiry of you in my recent letter concerning the application by Mountain Lakes, Inc., for this mortgage and you informed me that the said application was not subject to inspection. From one point of view this position on your part might be equivalent to an assertion that I am in no way a party to the transaction. That is, in effect, my position

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*Affidavit of Frank Hendrick.*

and I believe that apart from technicalities,  
 you have something to straighten out with  
 Mountain Lakes, Inc. In the meantime,  
 however, I send you my check for \$450, with-  
 out prejudice to any claim I may be en-  
 titled to make for any remedy I may have  
 a ground to obtain in the premises.

Very truly yours,

FH:B

FRANK HENDRICK.

(3)

November 5th, 1920.

Wm. H. Zabriskie, Esq.,  
 President, North Jersey Title Insurance  
 Company,  
 Hackensack, New Jersey.

Dear Sir:

I acknowledged receipt of your letter of  
 November 1st, 1920, accompanying a receipt  
 for four hundred and fifty (\$450) dollars.

Each of the three elements which make up  
 your letter seems to me to call for an ex-  
 pression from me in order that an attitude  
 of assent on my part may not be assumed.

You say, in the first place, that the pay-  
 ment covers House H. H. My position is  
 that House H. H. was not in existence when  
 you lent the money you lent and you made  
 your loan either on the general credit of  
 Mountain Lakes, Inc., or on some other se-  
 curity than the house. The three lots on  
 which the house was to be built had been  
 sold to me some time before and I had paid  
 for them in full and more. I have also paid

*Affidavit of Frank Hendrick.*

in cash more than the full value of the house erected on those lots and I had paid before you loaned your money almost that entire amount. There were built into the structure of the house such botches as will prevent it, unless entirely rebuilt, ever being other than a source of chagrin and disgust to the owner. In other words, the house in a sense, destroys the value of the land by reason of not being an adequate improvement. The correspondence between Mountain Lakes, Inc., and me during the construction shows that I protested incessantly. I am informed that the workmen employed upon the walls were not stone masons but amateurs and that boys were employed as carpenters and floor layers. I am informed that Mr. Hapgood devotes most of his time to another business. Mountain Lakes, Inc., would require his entire time. Certain it is that he gave no direct supervision to the construction of House H. H. and took the position that I must accept whatever was produced and must bear all losses caused by his subordinates.

Now, the second element of your letter brings me to discuss the relevancy in a letter to you of what I have already said. It is inconceivable that your company should permit this course of conduct, if your company were secured by House H. H. While I cannot imagine your company relying upon the success of the strategy of Mountain Lakes, Inc., in obtaining from the purchaser the full value, as the basis of security for your loan to Mountain Lakes, Inc., of the excess over

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*Affidavit of Frank Hendrick.*

10 the purchase price for which the purchaser, who has already paid in full, is sought to be bound by a mortgage upon what he has bought and paid for, I am just as little able to admit that the permitting of such a procedure by a title company as lender does not both amount to privity and indicate consent. That is why I feel compelled to call to your attention that the denial of my request for a copy of the application of Mountain Lakes, Inc., and your sending of a copy of my letter to Mr. Hapgood seem to indicate that you do not feel called upon to deal with me openly and frankly. I know that your company is the chief source of mortgage money for Mountain Lakes, Inc., but I should  
20 be glad to have you deny the information which has been given me, that there is some community of interest, by reason of stock ownership or otherwise, between your company or its stockholders and Mountain Lakes, Inc., or its stockholders. I have as little intention of overreaching anybody as I have of evading the challenge which my discovery of the methods of Mountain Lakes, Inc., has brought to me.

30 This leads me to say something about the third element of your letter. I do not see how justice can be done without a payment by Mountain Lakes, Inc., of the mortgage. That position on my part, implies resistance to an attempt to make the mortgage money out of that for which I have already paid Mountain Lakes, Inc., in full. I should assume that you would be interested in this situation not only as the holder of the mort-  
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*Affidavit of Frank Hendrick.*

gage but as the head of a great institution intolerant of irregularity in those with whom you deal.

Very truly yours,

FH:B

FRANK HENDRICK.

(4)

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November 12th, 1920.

William H. Zabriskie, Esq.,  
North Jersey Title Insurance Company,  
Hackensack, New Jersey.

Dear Sir:

Please let me remove the impressions that you have, as I judge from your letter dated November 11th, 1920, received from my letter to you on November 10th.

20

You say you resent my insinuations. The fact is that I never insinuate. I only say what I know and I am careful to refrain from saying anything with malice or ulterior purpose. I have appreciated and do appreciate the consideration you have given my troubles and I realize that whatever you do or say with respect to them must be dictated by your own judgment. Please believe that I have no desire to investigate your Company. The greatest injustice Mountain Lakes, Inc., has done me is the making it necessary for me to bother about this affair of mine at all. I never invite a quarrel and certainly did not intend to pay fifteen thousand (\$15,000) dollars for one. The quarrel, it appears to me, is all I got for the money. I hope that you will conclude from a further con-

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*Affidavit of Frank Hendrick.*

sideration of my letters to you that I am only trying to get from the proper source information to which I am entitled.

10 That this is so appears from the second sentence of your letter. You speak of my mortgage. I signed no mortgage. You probably know that it is not any easy task to get a copy of a mortgage from the County Clerk at Morristown without great delay and after a personal visit and search of the records and that the Mountain Lakes, Inc., mortgages are not readily identified without the aid of prior information as to the details. Is it usual to refuse a copy of a paper to a man who is sought to be bound by the paper?

20 You challenge me to default in the payment of the interest. I trust that I have satisfied you that Mountain Lakes, Inc., acknowledges that interest on five thousand (\$5,000) dollars is payable by Mountain Lakes, Inc. Is it not pertinent to ask you, in view of your letter, just what you would do in case of default? Would you make all the mortgage money out of the lots of Mountain Lakes, Inc., to which Company you loaned the entire amount of the mortgage? Or would you apportion the amount? Or would you save Mountain Lakes, Inc., harmless? I ask these questions of you because you have not replied to my request for the name of the actual holder of the mortgage. Another reason is that I entertain some doubt as to the legal practice governing the situation. While attempting to induce me to purchase lots, Mr. Hapgood informed me that there is

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*Affidavit of Frank Hendrick.*

no such thing as a deficiency judgment in foreclosure in New Jersey. A reading of the law sometime later made me doubt the correctness of his assertion. You could, I know, resolve the doubt from your experience almost with the authority of a judicial determination. Without a great stretch of the imagination I might well fear that I should incur, by the default you refer to, not only the loss of the fifteen thousand (\$15,000) cash I paid to Mountain Lakes, Inc., but of the fifteen thousand (\$15,000) dollars you loaned Mountain Lakes, Inc. 10

Now, Mr. Zabriskie, is it really true that one must be so learned and experienced to deal safely in a matter of this kind? And must one remain so much in the dark? Or is it still the rule that the validity of an obligation depends upon a fair disclosure of all the elements and a meeting of the minds upon the true facts, circumstances, and conditions? 20

Very truly yours,

FH:B

FRANK HENDRICK

P. S. It occurs to me that if I had a copy of the application for the mortgage, I should not need the copy of the mortgage itself so urgently. The only way I know to get a copy of that application is by requesting your company to favor me with a copy. I have already made this request twice. 30

*Affidavit of Frank Hendrick.*

(5)

September 25th, 1920.

10 H. J. Hapgood, Esq.,  
Mountain Lakes, Inc.,  
170 Broadway,  
New York City.

Dear Sirs:

I have expended in partial completion of your contract with me to grade the grounds of house HH the amount of five hundred and eighty-eight dollars and fifteen cents (\$588.15), the items being as follows:

	Labor to Paul Gradini	\$105.35
		133.90
20		92.40
		107.80
	Grass Seed	10.50
	Wheelbarrow	6.50
	Cement	7.70
	Shrubs	61.—
	“	63.—
		<hr/>
		\$588.15

30 You will kindly note that I have not included labor performed by me, superintendence, or overhead. Nor have I charged brokerage, commissions, or profiteering items. This makes the account very moderate for the work done.

40 The money for this work you have received from me in cash and your refusal to complete your contract in respect to the grading while retaining the money received

*Affidavit of Frank Hendrick.*

for the work can have no justification. Kindly add to the amount you remit interest at six per cent, for the period during which you have had the use of my money.

I am trying to get together all the items against you but for your information at this time, I will give you the figures in round numbers. You have done three things to forfeit the right to keep one dollar of the money I entrusted to you. First, you misrepresented the fact of the price at which house #278 was sold in order to induce me to contract with you for house HH. The extent of this misrepresentation was \$5,000. My entire contract was framed upon that misrepresentation of fact. Second, you encumbered the property sold me beyond the amount stipulated in the contract. The extent of that excess was \$5,000. You have admitted your wrong, promised to make it good, and pleaded inability to do so, I was induced to take title subject to the actual mortgage by Mr. Alexander's representation that Mr. Hapgood and the Company were in a serious crisis and by the fear induced by that representation that I should be relegated to the position of a general creditor in bankruptcy for the \$15,000 entrusted to you if I did not take title. You will remember, however, that in taking title I reserved my rights and continued you as bailee by eliminating any element of debtor and creditor. I handed you \$2,300 to keep with which you were charged.

An examination of the house, however, and a revelation of circumstances concealed

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*Affidavit of Frank Hendrick.*

10 from me, including the true range of prices  
 in the neighborhood, convinced me that I  
 acquired nothing by taking title under the  
 conditions created by you. The third par-  
 ticular in which I was deceived by you was  
 in the construction of house HH and the  
 performance by you of the other details of  
 the contract. The default in performance  
 far exceeds \$5000. Thus three elements of  
 default on your part exceed \$15,000, the  
 approximate amount of money entrusted by  
 me to you. The property you deeded to me  
 was not worth the mortgage by which you  
 encumbered it for your own profit.

20 In my place, you would not rest until the  
 wrong done you had been remedied. Do  
 you expect others to submit where you  
 would not?

Very truly yours,

FH:B

FRANK HENDRICK.

(6)

October 4th, 1920.

30 H. J. Hapgood, Esqre.,  
 Mountain Lakes, Inc.,  
 170 Broadway,  
 New York City.

Dear Sir:

40 The eaves and roof of house HH leaked  
 so badly during the recent rain that the  
 walls of rooms on every floor are badly  
 stained. The small bathroom on the second  
 floor was drenched and the adjoining room  
 stained. The breakfast room roof continues

*Affidavit of Frank Hendrick.*

to leak and the walls are cracking. Unless these matters are remedied at once, serious damage will result to the furniture and the structure of the house. Mrs. Hendrick is leaving for the City Friday or Saturday and desires the house to be in a safe condition when she leaves.

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The foundation gives signs that by spring the defects will have disclosed themselves in no mistakable or agreeable manner.

Very truly yours,

FH:B

FRANK HENDRICK.

(7)

October 13th, 1920.

H. J. Hapgood, Esq.,  
Mountain Lakes, Inc.,  
170 Broadway,  
New York City.

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Dear Sir:

When you came to my office with Mr. Alexander to reveal to me for the first time the terms upon which you proposed to sell me the lots adjoining the three lots on which house H. H. was to be built, I charged you with planning to take away from me by trick and device before you built it and conveyed it to me the house for which I had already given you substantially the entire cash part of the purchase price in advance. I refused flatly to listen to any of your many plans and refused definitely to enter into the consideration of any contract with you for the purchase of the lots adjoining

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*Affidavit of Frank Hendrick.*

those on which house H. H. was to be built. This refusal I confirmed in writing the next day and you accepted that refusal.

10 In your chagrin, however, at overreaching yourself in your attempt to sell me lots at almost twice the price at which you held them, you have persisted in your endeavor to accomplish the plan I charged you with having. You could not resist the temptation involved in my turning over ten thousand (\$10,000) dollars to you on your bare promise to use it for me in a certain way. You have attempted to take advantage of that circumstance in every way and have cared to hold out from me both a marketable title to the house contracted for and five thousand (\$5,000) dollars in cash raised by you on that house for your own purposes. Your answer to my recent letter demanding that you set forth the terms of the contract of purchase which you intimate that you will set up if I push you to do it in order to defend yourself, which answer refuses to give me your understanding of the terms of any contract asserted by you, leaves you in the position of attempting to coerce me by preventing me from controverting any positive assertion by you in writing as to an alleged contract. By this extraordinary procedure, you admit in writing what I have recently discovered that your original purpose was to take every dollar you could squeeze out of me without giving or intending to give anything at all in return. The fact is that you got house H. H. away from me before you conveyed

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*Affidavit of Frank Hendrick.*

it to me. You have at all times offered for sale and are now selling the equivalent of house H. H. and the three lots on which it was built for the amount of the incumbrance of fifteen thousand (\$15,000) dollars you placed upon it for your own benefit. In other words, you sold the same property twice, once to the holder of the fifteen thousand (\$15,000) dollar mortgage and once to me for fifteen thousand (\$15,000) dollars with a provision for a ten thousand (\$10,000) dollar mortgage to you. But by reason of the price fixed upon your misrepresentation of the price of the house No. 278, upon which the price of house H. H. was based, house H. H. is admittedly worth less and was held by you at less by five thousand (\$5,000) dollars than the purchase price, and by reason of your wanton, deliberate, and wilful default in the construction of the house, according to contract, is worth less by five thousand (\$5,000) dollars more, or in all by ten thousand (\$10,000) less than the price fixed.

All you have given me, by reason of these circumstances and the placing of the extra five thousand (\$5,000) dollar mortgage for your own benefit, is the privilege of buying the house again from the holder of the mortgage at the full price. In other words, you have done precisely what I charged you with doing. You have taken the house away from me before you have given it to me.

It is obvious that if you had now any other intention than to keep, without giving me

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*Affidavit of Frank Hendrick.*

10 anything for it, the money I entrusted to you, you would clearly set out the terms of any contract you claim to have made with me and would answer frankly and plainly the questions I asked you in my letter. You do not even admit the possibility of my getting out of your clutches by settling with you for your imaginary contract, which you have never set up. What would you call your damages? Why didn't you set them forth in detail? Is it because your only use for your imaginary contract is to keep the fifteen thousand (\$15,000) dollars you got from me for nothing.

20 I apprehend that you may force me, among other remedies, to seek to have the mortgage you placed on house H. H. declared junior to your deed to me on the ground that the holder of the mortgage had notice of my contract with you. It will be necessary for me to inquire what notice you gave of my contract with you, I ask you to take the opportunity to advise me first of all the facts which I shall be at pains to get from some source in this matter. Whether you recede from your determination to keep my money without giving me anything for it, is a matter for you to consider. I shall seek my redress anywhere I can get it.

30 I received September 29th, 1920, a notice from North Jersey Title Insurance Company, of Hackensack, N. J., that on October 29th, 1920, there will be due four hundred and fifty (\$450) dollars interest on a mortgage. I received, also on September 24th, 1920, in an envelope marked the Oak Ridge

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*Affidavit of Frank Hendrick.*

Company, a notice dated Office of Mountain Lakes, Inc., 170 Broadway, New York, September 25th, 1920, as follows:

“Mr. Frank Hendrick.

“Interest on your first mortgage amounting to \$450 will be due on Oct. 29, 1920, and check to the order of Hackensack Trust Co. should be sent to Hackensack, N. J. Interest on \$10,000 mortgage, \$300 to be paid by you.” 10

I also received a letter from you in reply to my demand that you reduce the mortgage to \$10,000, in which you promised to straighten out the mortgage and you neither at that time or at any other time made any claim that you were not under a legal obligation to do so. Even if you had a contract with me do you mean to say that you would silently hold out five thousand (\$5,000) dollars against me, thus taking the law in your own hands and without telling me that you were doing so? If you were damaged by not selling the lots to me, what did you mean by your letters representing that you were offering them for less than their value? 20 30

Since my letter making that demand was written, I have been informed of facts that show that the contract with me was induced by a deliberate misrepresentation of the fact of the price of house No. 278 and the price of No. 277 and the price of lots in the block on which house H. H. was built. Why have you not answered my questions as to these matters? 40

*Affidavit of Frank Hendrick.*

10 You will observe that I am giving you opportunity to straighten out the tangle you have created. You may adjust separately, I assume, the part that involves the raising of the five thousand (\$5,000) dollars for your own benefit by burdening my property and failing to live up to the terms of the bailment of my money to you, and as separate matters the failure to perform your contract to build, and your misrepresentation to induce the signing of the contract. Whether these matters are merged in one claim to give color one to the other and to the entire transaction will depend on your prompt compliance with your several obligations to me.

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Very truly yours,

FRANK HENDRICK.

FH:B

(8)

October 21, 1920.

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H. J. Hapgood, Esq.,  
c/c Mountain Lakes, Inc.,  
170 Broadway,  
New York City.

Dear Sir:

Why should you find it necessary to consult Mr. Alexander about indisputable facts within your own knowledge?

Several persons associated with Mountain Lakes, Inc., informed me that they had told you that you were trying to put over a raw deal on me and that they had advised you

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*Affidavit of Frank Hendrick.*

to quit. They also advised me not to let you do it. Others associated with Mountain Lakes, Inc., narrated to me facts showing that your failure to complete the house by July 1st was a result of deliberate default on your part.

I have just received word from the North Jersey Title Insurance Company to the effect that you have not made any arrangements with regard to the adjustment of the interest, despite your notice to me showing that you had.

Very truly yours,

FH:B

FRANK HENDRICK.

(9)

October 23rd, 1920.

H. J. Hapgood, Esq.,  
Mountain Lakes, Inc.,  
170 Broadway,  
New York City.

Dear Sir:

Enclosed herewith I return to you your check for \$150. This check was received with a letter in which you say that payment of your share of the interest on the \$15,000 mortgage is made subject to the adjustment of the purchase of additional land without prejudice to either party. I decline to receive this check from you with any such limitation or to receive any check whatsoever in the premises. I consider the transaction on your part one which is of interest to the public in general, and you leave me

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*Affidavit of Frank Hendrick.*

no option but to take this matter up with the authorities.

Very truly yours,

FH:B

FRANK HENDRICK.

10 NINTH.—Defendants are now able to prove that the decision of the Vice-Chancellor is based upon misapprehensions as to the material facts.

In the first place, the letter of November 26th, 1920, proves that the complainant took with full actual notice of the contention of the defendants and was therefore not a stranger to all the transactions mentioned in the opinion but was bound by notice of them. In connection with this letter, the defendant Frank Hendrick can now testify that Mr. Beach told him that he didn't rely upon the realty as security but upon the guarantee of North Jersey Title Insurance Company. This was an admission both that the complainant was acting as a dummy so far as the mortgage was concerned and that he, Beach, regarded the realty security as a fiction.

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In the second place, although the Vice-Chancellor sets up a presumption in favor of the complainant to excuse the failure to produce the original release, the decision is rested on the fact that the defendants made no objection to the introduction of the certified copy. The defendants refer to the record to substantiate that they objected to the introduction of a certified copy. The defense set up by the defendants was that the transaction between Mountain Lakes, Inc., H. J. Hapgood, and North Jersey Title Insurance Company was fictitious. It is submitted that the record will show that the transactions constituting the com-

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*Affidavit of Frank Hendrick.*

plainant's case are not proved ever to have taken place as alleged at all. The Vice-Chancellor assumes that the unacknowledged instruments proved themselves. Defendants are now able to produce the opinion of Surrogate Pelletreau, of Suffolk County, New York, printed in *New York Law Journal*, Vol. 71, No. 127, August 28th, 1924, in which the issue was the execution of a mortgage with a collateral bond by Charles J. Tagliabue and Mountain Lakes, Inc. The purporting Foreign Commissioner was Frank H. Erisman, the same as here. The Tagliabue Estate used Erisman as a witness and by his admissions that a great part of his certificates made for Hapgood were false obtained a decision that the signatures he certified as genuine and as acknowledged before him were forgeries. Counsel for the Estate said:

"I don't make the objection that Erisman was not a Commissioner of Deeds for New Jersey, but I do object that an instrument not required to be recorded, purporting to be acknowledged in New York before a Foreign Commissioner, doesn't prove itself under the statute."

The complainant's counsel spared Erisman here as was done there. They were charged with notice under the statute that Erisman was not a Foreign Commissioner for New Jersey. Defendants may now give the Vice-Chancellor a solid basis for the inference that the alleged instruments were not actually executed at all and that Hapgood, Mountain Lakes, Inc., and North Jersey Title Insurance Company, used and accepted them as fictions. They did not attempt to prove the execu-

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*Affidavit of Frank Hendrick.*

tion here through Erisman; the right has always been retained to disprove through Erisman the purporting proof of the execution.

10 In the third place, that there were no equities in favor of the defendants of which the complainant had notice, is not the fact. The most definite actual notice was had by the complainant's grantor before the alleged release and by the complainant's solicitor.

20 In the fourth place, these equities, said in the opinion not to extend against the mortgage and the assignee of the mortgage, did so extend precisely because the mortgagee and the assignee came in under Hapgood against whom these equities existed, with notice to the mortgagee and assignee before the date of the alleged release by Hapgood, and the assignment to the complainant. Defendants are now able to prove by an original letter in the files of the Commissioner of Banking and Insurance at Trenton that the North Jersey Title Company now alleges that the mortgage negotiated April 29th, 1920, by Hapgood was based upon the understanding that there was already a finished dwelling on the land, as the mortgage recites. In other words North Jersey Title Insurance Company now says that Hapgood pointed out as 30 the premises land containing a finished residence. An example of the method of Hapgood was pointed out in the Surrogate's decision above referred to as follows:

On November 8, 1912, the claimant, through H. J. Hapgood, son-in-law of Charles J. Tagliabue, invested \$5,000 in a bond and mortgage of Mountain Lakes, Inc., on house 99, standing upon lots 24 and 26,

*Affidavit of Frank Hendrick.*

in Block S, on a map of Mountain Lakes, Inc., with a collateral bond of Oak Ridge Company, the said Hapgood and Charles J. Tagliabue, the decedent, conditioned for the payment of the principal and interest of the bond. This was a legitimate transaction, and the signature of Charles J. Tagliabue was actually made by him. Said house and lot were sold or contracted to be sold to one Jones. The obligation was extended October 18, 1915, and a similar collateral bond. On November 27, 1918, the obligation was again extended with a similar collateral bond. Less than a year thereafter the said Hapgood represented to Black that Mountain Lakes, Inc. was the owner of house number 330 on lots 56 and 58, Block G-2, of a map of Mountain Lakes; that it was worth \$12,000, and that Jones was unable to complete his purchase of the premises covered by the mortgage which Black already held, and requested Black to transfer his \$5,000 mortgage to house number 330, aforesaid, with a similar collateral bond executed by Oak Ridge Company, Hapgood and Tagliabue. Black was also shown a survey and title company's report. He, in good faith, accepted the exchange, and on September 3, 1919, did take a mortgage of \$5,000 on said substituted security with a collateral bond and surrendered the bond of 1912 and the mortgage on house number 99, located on lots 24 and 26. Black did not know it, but there was no house on lots 24 and 26. In my opinion, the collateral bonds of 1915, 1918 and 1919 were forgeries so far as the orig-

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*Affidavit of Frank Hendrick.*

inal signature of Charles J. Tagliabue was concerned and that is, apparently, now conceded."

10 That the North Jersey Title Insurance Company claims to have been the innocent victim of this sort of procedure is shown by the letter referred to above, of which a copy follows:

Law Offices  
Wakelee, Thornall & Wright  
Hudson Terminal Building  
50 Church St., New York.

20 Edmund W. Wakelee  
Clarance E. Thornall  
Wendell J. Wright  
Leroy Vanderburg  
Palisade Trust & Guaranty  
Co. Building  
Engelwood, N. J.

North Jersey Title Ins. Co.,  
Hackensack, N. J.

Sept. 12, 1923.

Gentlemen:

30 You have asked me to write you an opinion as to the liability of the Fidelity Union Trust Co. growing out of numerous transactions of which the following set of facts is a sample.

40 Some time prior to March 18th, 1920, Mr. Hapgood, president of Mountain Lakes, Inc. applied to you for a loan of \$5,000 upon a mortgage covering lots 9 and 10 in Block B-3, which property was represented to contain a building known as house #399. As I

*Affidavit of Frank Hendrick.*

understand it one of your officers went to Mountain Lakes with Mr. Hapgood and was shown a building which bore the house number 399, and thereupon you agreed to accept the loan on condition that a survey was furnished and the title was insured by the Fidelity Trust Company. My understanding is that, pursuant to this arrangement, Mr. Hapgood, on behalf of Mountain Lakes, Inc. made application to the Fidelity Trust Company for the survey and title insurance. Subsequently, under date of March 29, 1920 the Fidelity Trust Company furnished a report reciting an examination of the title of the lands in question for the purpose of guaranteeing the same to your company as mortgagee, in which report it was stated that the record title was in Mountain Lakes, Inc. and further stating under heading of "Description of land to be used in guaranty" the following: "Lots 9 and 10, Block B-3 on map or survey, by C. O. Martindale, C. E., and the report under the heading "Survey" states as follows: "By C. O. Martindale, C. E., O. K."

The survey above referred to, which accompanied the report, shows the lots in question and located upon the lots an outline of a building which bears the number 399.

Relying upon this report and survey you accepted the bond and mortgage for \$5,000, and paid over to Mountain Lakes, Inc. the money and thereupon forwarded to the Fidelity Trust Company the mortgage which was checked by them and, thereafter, re-

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*Affidavit of Frank Hendrick.*

10           corded by them. Some time later, to wit:  
Under date of April 8, 1920, the usual policy  
of insurance was issued by the Fidelity  
Trust Company which contained a descrip-  
tion of the property in question by the  
same description as that contained in the  
mortgage. The description as contained in  
the mortgage and in the policy, after de-  
scribing the property, contained the follow-  
ing: Containing house known as house  
#399.

20           Subsequently, within the past few months,  
you have learned that the premises referred  
to did not contain any building whatsoever.  
Upon the foregoing statement of facts there  
is no doubt in my mind but what the Fidel-  
ity Trust Company (now the Fidelity Union  
Trust Co.) is liable for the actual loss sus-  
tained by you by reason of the fact that the  
premises did not contain any building.

30           I do not understand that you wish me at  
this time to go into any extended statement  
as to the form of action which should be  
brought against the Fidelity Union Trust  
Company and, therefore, will not attempt  
to go into that subject, except to say that in  
my opinion there are at least two forms of  
action open to you.

40           As I have on several occasions stated to  
you I believe it will not be necessary to  
bring actions against the Fidelity Union  
Trust Company as, notwithstanding their  
formal denial of liability I feel quite certain  
that when the present tangle with respect to  
the property is settled—which I hope will  
be within the next week or ten days—the

*Affidavit of Frank Hendrick.*

Fidelity Union will be willing to make some satisfactory arrangement whereby your company will be protected against any loss by reason of this and other similar transactions.

Very truly yours,

(Signed) WENDELL J. WRIGHT.

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WJF/A1H.

Defendants will now be able to prove with the aid of this letter that North Jersey Title Insurance Company had actual notice from the letter of defendant Frank Hendrick, dated November 5th, 1920, or just prior to the alleged release and assignments, and prior to the date of many transactions with Hapgood aggregating a large sum of money, that Hapgood was creating mortgages pretended to be on improved property but actually on unimproved land and assigning them to North Jersey Title Insurance Company. In other words, it was the purpose of Hapgood and North Jersey Title Insurance Company to compound the acts of Hapgood by taking the mortgage money out of what was created by defendants' money. A similar composition was made with the Tagliabue Estate, as may be shown through the original of the compromise agreement with the Executors by North Jersey Title Insurance Company, which the witness Zabriskie failed to produce in obedience to the subpoena *duces tecum*, a copy being filed in the office of the Commissioner of Banking and Insurance.

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TENTH.—In the fifth place, the defendants will now be able to show that Mrs. Hendrick did not receive the property, which was not as the opin-

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*Affidavit of Frank Hendrick.*

ion recites, merely two lots, but the house and the  
lots "as conveyed by Mountain Lakes, Inc.," sub-  
ject to any equities in favor of the complainant  
but discharged by the release of the lien of the  
original mortgage with a right of set-off growing  
out of the equities against Hapgood or his gran-  
tees. There has been no day in court or due pro-  
cess of law upon the issue adverted to in the opin-  
ion as the defense that Mountain Lakes, Inc. did  
not perform its contract. If all the reasoning of  
the Vice-Chancellor were sound, there would still  
remain the question whether Mrs. Hendrick "re-  
tained \* \* \* on the purchase of those lots a  
sufficient sum to pay the principal of the mort-  
gage," in other words, whether she received prop-  
erty which it would, in the language of the deci-  
sions, be inequitable for her to retain. This lan-  
guage assumes that the mortgage was a purchase-  
money mortgage. It overlooks, moreover, the fact  
that Mrs. Hendrick took prior to the release and  
never consented to it. But even if she did, since  
it was by reason of the contract, she is entitled to  
consideration by this Court of the question  
whether the contract was performed. That, in-  
deed, the Court argues, for the opinion recites that  
the claim of non-performance is "stated in a nebu-  
lous fashion and the evidence does not support  
it." Defendants were not permitted to prove non-  
performance. The Vice-Chancellor ruled such  
evidence out. The opinion is based upon their  
right and duty to make such proof. Defendants  
are now able to prove that the claim made in 1920  
to Hapgood, Mountain Lakes, Inc., North Jersey  
Title Insurance Company, and the complainant's  
solicitor before the date of the alleged assignment  
to the complainant, was not nebulous, and that,

*Affidavit of Frank Hendrick.*

in fact, as the opinion puts it, "the house which Mountain Lakes, Inc. agreed to construct upon the land in question, does not conform to the house for which the defendant Frank Hendrick contracted and therefore the defendants owe nothing on the mortgage." The Vice-Chancellor has, obviously, not informed himself of the facts.

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ELEVENTH.—The evidence now made available to the Vice-Chancellor and to the defendants by reason of the ability of the defendants now to prove actual notice to the complainant was not available at the trial by reason of the denial by Mr. Beach of receipt of the letter of November 26th, 1920, from the defendant Frank Hendrick. I was unable to controvert the denial of Mr. Beach until I discovered by inquiry the identity of the stenographer who mailed the letter and the whereabouts of Dorothy Blakeley and was able to question her as to the fact. The same is true of the letters sent to North Jersey Title Insurance Company and to Hapgood and Mountain Lakes, Inc. Surrogate Pelletreau found facts which defendants may now prove despite the denials of Kilby. He said: "Hapgood, the son-in-law was the active man. I believe that Hapgood committed the forgeries and deceived Black as to the security. He, Hapgood, has departed for parts unknown." It is a matter of general knowledge that Hapgood is a fugitive from the justice of the State of New Jersey. Defendants are now able to prove that to enter a decree against them would be to consummate the crime by Hapgood otherwise unconsummated against the defendants, the same crime which he perpetrated many times upon North Jersey Title Insurance Company, according to their counsel's letter, and their compromise, and on others, ac-

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*Telegram Telephone to Western Union.*

10 cording to the decision of Surrogate Pelletreau. Defendants are now able to prove that the North Jersey Title Insurance Company has recouped itself by dealings with Hapgood during his absence through his attorney-in-fact. It may be said that Surrogate Pelletreau reversed his earlier opinion upon an application to him for a reargument and a rehearing.

FRANK HENDRICK.

Sworn to before me this 4th }  
day of February, 1925. }

(Seal) John F. McCarthy,  
Notary Public,  
Kings County.

20 Kings Co. Clerk's No. 11, Register's No. 6014.  
Certified filed in New York County.  
N. Y. Co. Clerk's No. 14, Register's No. 6054.  
Certificate filed in Bronx County.  
Bronx Co. Clerk's No. 3, Register's No. 2602.  
Commission expires March 30, 1926.  
County Clerk's Certificate Attached to Original.

**Telegram Telephone to Western Union.**

30 MISS RUTH THORNBURY,  
care OHIO BELL TELEPHONE COMPANY,  
4300 Euclid Avenue  
CLEVELAND, OHIO.

Kindly wire immediately collect home and business address Dorothy Blakely.

FRANK HENDRICK  
120 BROADWAY  
NEW YORK CITY.

**Copy of Answer to the Above Telegram.**

143H XY 22 COLLECT

EA CLEVELAND OHIO 147P FEB 2 1925

FRANK HENDRICK

C 56 87

120 BROADWAY NEW YORK NY

DOROTHY BLAKELEY'S BUSINESS ADDRESS  
 CARE TRAUMAN H. BALDWIN AND SONS 41  
 PARK ROW HOME 272 CLINTON PLACE HACK-  
 ENSACK

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RUTH THORNBURY

158P

**Affidavit.**

IN CHANCERY OF NEW JERSEY.

Between

J. MORGAN HOLLOWAY,  
 Complainant,

and

FRANK HENDRICK and KATHARINE  
 EDSON MUMFORD HENDRICK,  
 Defendants.

On Bill to  
 Foreclose.

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City County, and State of New York, ss.:

Dorothy W. Blakely, being duly sworn, says:

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First.—I was employed in the office of Frank  
 Hendrick, 120 Broadway, New York City, from be-  
 fore August 1st, 1920 to after December 1st, 1920,  
 as stenographer.

Second.—I have examined the copies of letters

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*Affidavit of Dorothy W. Blakely.*

set forth in the annexed affidavit of Frank Hendrick. I transcribed those letters and mailed them by depositing them in securely sealed envelopes on the respective days of the dates thereof, with the respective addresses thereon inscribed, in the mail chute leading to a United States Letter Box at  
 10 120 Broadway, Borough of Manhattan, New York City.

DOROTHY W. BLAKELY.

Sworn to before me this 3rd }  
 day of February, 1925. }

Julia I. Banks,  
 Commissioner of Deeds,  
 City of New York.

20 New York County Clerk's No. 134.  
 Term expires April 8th, 1926.

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**Order Denying Application for New Trial.**

IN CHANCERY OF NEW JERSEY.

Between

J. MORGAN HOLLOWAY,  
Complainant,

and

FRANK HENDRICK, *et als.*,  
Defendants.

On Bill, &amp;c.

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Application having been made by the defendants, on notice, for a new trial, on the ground of newly discovered evidence, and the matter coming on to be heard February 9th, 1925, and having heard Frank Hendrick, Esq., in his own behalf and in behalf of Katharine Edson Mumford Hendrick, the two defendants, and after hearing arguments and considering the matter,

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IT IS on this 16th day of February, A. D. 1925, on motion of George R. Beach, Solicitor for the complainant,

ORDERED that said application for a new trial be and the same is hereby denied.

E. R. WALKER,

C.

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Respectfully Advised,

JAMES F. FIELDER,

V. C.

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# New Jersey Court of Errors and Appeals

Between

J. MORGAN HOLLOWAY,  
Complainant-Respondent,

and

FRANK HENDRICK and KATHAR-  
INE EDSON MUMFORD HEN-  
DRICK,

Defendants-Appellants.

On Appeal  
from  
Chancery.

## ARGUMENT FOR DEFENDANTS- APPELLANTS.

### Statement.

This is an appeal from a decree of the Court of Chancery that premises described in the Bill of Complaint and covered by a mortgage held by the Complainant be sold to raise \$10,000 with interest and costs.

### The Bill of Complaint.

Reference to the Bill of Complaint and the mortgage identifies the property as 12 lots "containing house known as H. H." The amount of \$10,000 and the words "against the property of" the defendants indicate a purpose, not stated, that only three of the lots and a house thereon, be sold.

The Complainant alleged and attempted to prove that he became the holder by assignment from North Jersey Title Insurance Company, on or about the 4th day of February, 1921, of the said mortgage

“there being a covenant in said assignment that the principal sum on said mortgage has been reduced to \$10,000.” He also alleged that the defendant Frank Hendrick was given a deed recorded July 9th, 1920, by Mountain Lakes, Inc., the mortgagor in the said mortgage, “said deed reciting that the property was sold subject” to the said mortgage. He alleged that the said mortgage for \$15,000 on the 12 lots and house was given April 29th, 1920, by Mountain Lakes, Inc., to North Jersey Title Insurance Company, by it the same day assigned to H. J. Hapgood, by him the same day assigned to Hackensack Trust Company, by it November 22nd, 1920, reassigned to H. J. Hapgood, by him on November 23rd, 1920, reassigned to North Jersey Title Insurance Company, who on said February 4th, 1921, assigned it to the plaintiff.

The Complainant also alleged that “November 22nd, 1920, the said H. J. Hapgood, upon the payment to him of the sum of \$5,000.00 by Mountain Lakes, Incorporated, aforesaid, by instrument of release of mortgage, released” the 9 lots not sold to the defendant Frank Hendrick “from the lien of said mortgage.”

### **The Answer.**

The defendants answered denying specifically every allegation of the complaint and that the premises were conveyed to them subject to the alleged mortgage and they alleged that the alleged release operated, if it was made, and the said mortgage was a lien on their premises, as a release thereof.

### **Defendants Object to Jurisdiction.**

At the opening, defendants moved to dismiss the

bill for insufficiency, and, also, first, because of "a defect of parties defendant," in that Mountain Lakes, Inc., North Jersey Title Insurance Company, and H. J. Hapgood were not made parties defendant, second, that it appears upon the face of the complaint that the property retained and owned by the alleged mortgagor is primarily liable and no allegation is made of resort to that property or that it is insufficient to satisfy the alleged mortgage wholly or in part, third, that the alleged release removed the lien if any from premises of defendants, that complainant alleged an adequate remedy at law against North Jersey Title Insurance Company, that because of identity of Hapgood and Mountain Lakes, Inc., the assignment of the alleged mortgage to him cancelled it, and that the admission that the mortgage was a guaranteed one made the alleged assignor-guarantor a necessary complainant.

#### **No Mortgage Assumed by Defendants**

The complainant did not either plead or attempt to prove that either defendant signed, assumed, or agreed to pay any bond or mortgage in any amount or that either defendant ever agreed that any bond or mortgage in any amount should be satisfied out of property alleged to have been deeded to them.

#### **Complainant fell back on Contract Action.**

Abandoning the purported cause of action of the Bill of Complaint, the complainant sought to establish that a contract, not referred to in the Bill of Complaint, dated March 18th, 1920, by which Mountain Lakes, Inc., acknowledged the receipt of \$10,000 on account of its agreement to convey to the defendant Frank Hendrick 3 lots and a house

to be completed July 1st, 1920, at the price of \$22,200, of which the balance was to be paid, \$2,200 in cash and "at the time of taking title by assuming and agreeing to pay a certain mortgage of \$10,000.00" was the basis not for an action in contract by Mountain Lakes, Inc., or in specific performance to compel the assumption of a mortgage, or a suit in equity to decree a mortgage to exist on the premises, or to foreclose to avoid circuitry of action a purchase-money mortgage with set-off for inadequacy of consideration, but as sufficient basis in itself for a cause of action, by one not a party to the contract or offering to be bound by its terms, to foreclose a mortgage of \$10,000 against property referred to in the contract, without allegation or proof of performance of the contract by the seller or of the coming into being of the property specified in the contract.

#### **Rulings Uniformly Adverse to Defendants.**

The rulings of the Court, made upon urging of complainant's counsel, were uniformly that consideration through performance of the contract to give consideration for a mortgage of \$10,000 had nothing to do with this suit for the foreclosure of a mortgage.

Complainant offered the contract as a part of his case by a certified copy recorded July 2nd, 1920, and his counsel read: "The consideration is stated to be \$22,000, payable as follows: \$10,000 on or before the signing of this agreement, the receipt whereof is hereby acknowledged; at the time of taking title by assuming and agreeing to pay a certain mortgage of \$10,000 with interest at six per cent., from July 1st, 1920, said mortgage to run for at least three years subsequent to the date

of this agreement; at the time of taking title by paying the unpaid balance of \$2,200."

The witness for the Complainant, William H. Zabriskie, President of North Jersey Title Insurance Company, testified that he had received letters from the defendant Frank Hendrick, protesting there should be no mortgage whatsoever on his premises, but the Court struck out the answer on the ground of immateriality and irrelevancy. The Court also ruled that written protests to the witness from the defendant Frank Hendrick that at the date of the alleged mortgage for \$15,000 there was no house on the premises were immaterial and irrelevant. The Court also ruled that whether or not the witness knew at the date of the mortgage that there was no house on the three lots was immaterial. The Court also ruled that it was immaterial that the mortgagee had other security than the mortgaged premises for its guarantee of the mortgage and ruled out cross-examination as to the nature and amount and release of that security. The Court ruled that letters of the witness, written long before the alleged date of the assignment to the complainant, refusing to disclose to the defendant Frank Hendrick the name of the holder of the alleged mortgage were inadmissible. The Court also ruled that testimony by a qualified expert as to the value of the house on the 3 lots, the construction and character thereof, the comparison with house 278, to which, according to the terms of the contract, it was to be similar and equal in all respects, was immaterial and irrelevant. The Court also ruled that letters calling the attention of the witness to the contract and the failure to complete performance were irrelevant, immaterial, and incompetent. The Court also ruled that a letter dated September 22nd, 1920, from the defendant

Frank Hendrick to Mountain Lakes, Inc., protesting against non-performance was inadmissible. The Court also ruled, upon defendants' offer of testimony by the expert to prove non-performance and value, that the value had nothing to do with the case.

### **Decree a Judgment on a Contract.**

The Conclusions of the Vice-Chancellor were confined to the consequences not of the allegations of the complaint and the proofs thereon but of a contract, the obligations of which were not regarded as assumed by or binding on the complainant in the allegations of the complaint, in the proof, or in the conclusions of the Vice-Chancellor, entered into by the defendant Frank Hendrick with a corporation not made a party either complainant or defendant. The Vice-Chancellor's findings are upon supposed defenses of the defendants to a cause of action on this contract. The principal finding to which all the others are set up as corollaries is as follows:

"The contract between the defendant Frank Hendrick and Mountain Lakes, Inc., was that Hendrick should pay \$22,000 for a dwelling house and three lots, of which consideration \$10,000 was to be paid by assuming, or taking title subject to, a mortgage for that amount, which mortgage as appears from the wording of the contract, was to be a lien on the property prior to the conveyance to Hendrick \* \* \* but he took title subject to the \$15,000 mortgage, after demanding a conveyance in accordance with the terms of his contract, as to the mortgage lien and protesting against a mortgage for \$15,000 which covered his lots and other property. It is my recollection that the evidence shows that his grantor then prom-

ised to have the mortgage released as to the other property and to make a payment on the mortgage which would reduce it to \$10,000, but however that may be, while title to the three lots was in Hendrick and also after he conveyed two of them to his wife, he continued his demand for himself and as agent for his wife, that the mortgage be reduced to a mortgage of \$10,000 on said three lots. \* \* \* Thus Hendrick and his wife (the latter having notice of the terms of the original contract because it was recorded) were placed in the position with respect to the principal amount of the mortgage, in which they demanded they should be placed. \* \* \* Finally, the defendants claim that the house which Mountain Lakes, Inc., agreed (sic) to construct upon the land in question, does not conform to the house for which the defendant Frank Hendrick contracted and therefore the defendants owe nothing on the mortgage. This claim is stated in a nebulous fashion and the evidence does not support it. Had it been established that the house was not constructed according to the contract and had this been a purchase money mortgage, the defendants might be entitled to a set-off, or to an abatement, as against the mortgage debt, but this was not a purchase money mortgage. Under his contract the defendant Frank Hendrick was to take title subject to a mortgage which Mountain Lakes, Inc., was to secure on the property before conveying to Hendrick and this mortgage was executed by Mountain Lakes, Inc., to North Jersey Title Insurance Company, before the construction of the house was begun. \* \* \* The defendant, Mrs. Hendrick, has no equities arising under said contract, as against the complainant. She was not a party to the contract and she took title to two of the lots expressly subject to the mortgage. She must be deemed to have retained

from the consideration which moved from her on the purchase of these lots, a sufficient sum to pay the principal of the mortgage. If she could make this defense and avoid the payment of the whole or part of the sum she retained, she would receive the benefit of the amount of the consideration money she retained, although she has sustained no damage."

The first conclusion of the Vice-Chancellor after his recital of the contract and the various alleged transfers is as follows:

✓ "The complainant is a stranger to all the transactions herein mentioned and is bound only by such notice as the record gives."

The judgment is as follows:

"There will be a decree in favor of the complainant for \$10,000, with interest from April 29, 1923."

#### **A Money Judgment against Defendants.**

Since the Vice-Chancellor finds that the defendants have retained a sufficient sum to pay the principal of the mortgage, this judgment is a judgment against the defendants. Complainant's counsel has represented to this Court that the property would not bring more than \$9,000 and has threatened defendants with proceedings to collect a deficiency under this judgment. All this is in the face of the two circumstances, first, that neither defendant assumed or agreed to pay or signed any bond or mortgage, and, second, that the Vice-Chancellor found as a fact that the alleged mortgage was not a purchase money mortgage.

### The Court proceeded at Law.

The court of equity has clearly proceeded to a judgment upon a cause of action in contract not set forth in the complaint and has given judgment in favor of one not a party to the contract or, as the Vice-Chancellor finds, bound by it, against a defendant not a party to the contract, and has done this expressly without proof that any beneficiary under the contract performed the conditions thereof and through a refusal to permit the defendants to show that there was a failure to perform. The Vice-Chancellor ruled, in effect, that it was irrelevant and immaterial that the *res* contemplated in the contract as the security for a mortgage never came into existence. The effect of failure to take proof as to performance must be considered. In principle it may be assumed in the absence of proof that no performance was made and in fact the complainant has stipulated, as the basis for an order obtained from this Court upon an application for the execution of the decree, that absolutely no consideration ever existed for the making, assuming, or agreement to pay any mortgage and that no *res* ever was created for which the defendant party to the contract had not paid in full in advance.

The Vice-Chancellor, therefore, found, without proof, and by a refusal to consider either the defence to the action on the contract or the equities in favor of the defendants, that there was an adequate remedy at law in favor of the complainant against the defendants. Upon this finding he made a decree that the complainant should take away from the defendants by a sale in foreclosure what they had paid for in full and an additional sum to make up the contract debt. That such a result

could not be obtained in equity the mere statement of the proposition shows. It follows that the Vice-Chancellor was without jurisdiction either to try the action at law or to make the decree in equity. Defendants urged at the outset of the final hearing that the Vice-Chancellor was without jurisdiction under the Bill of Complaint and reserved the point in the Petition of Appeal that the Vice-Chancellor was without jurisdiction to make the decree appealed from. This point is made upon the assumption that the findings of the Vice-Chancellor are warranted by the proof and that no errors were committed prejudicial to the rights of the defendants. This assumption however may not be sustained.

#### **Complainant Defaulted in Proof.**

The defects in the proof of the Bill of Complaint amounted to a complete default.

The essential allegation that a bond and mortgage were outstanding at the time the action was commenced was not proved. No testimony was offered to show that Mountain Lakes, Inc., the alleged mortgagor, was, at the date of the alleged bond and mortgage, indebted to North Jersey Title Insurance Company or any assignee of the alleged bond and mortgage. The Bill of Complaint and the evidence both establish that no indebtedness existed. The bond and mortgage were immediately reassigned to H. J. Hapgood, who purports to have executed these instruments as President of Mountain Lakes, Inc. The President of North Jersey Title Insurance Company, William H. Zabriskie, who executed the reassignment, testified that when his Company took the mortgage, it was both mortgagee and guarantor, and that when he dealt with

Hapgood he always thought he was dealing practically with Mountain Lakes, Inc., and that Hapgood was the whole company.

The only evidence offered to show the execution of the alleged bond was by the testimony of Ralph L. Kilby. The best he could do to explain the absence of Mary Kelly, who purported to have signed the bond, was to say that he had never heard that she lived in New Jersey and that a long time before efforts had been made to locate her, but that no attempt had been made for two years. He admitted that he had never critically examined her signature or made any comparison. He made no pretensions to bring an expert.

#### **Purporting Commissioner not Qualified.**

The attempt to prove the execution of the alleged mortgage was by Kilby's identification of the signature of the subscribing witness, Frank H. Erisman, but the signature of Erisman on the mortgage was not shown to the witness. It appeared, moreover, that Erisman resides in Rockville Centre, Long Island, and that no effort had been made to obtain his attendance and testimony. It appears that defendant's counsel was not permitted to see exhibits and that one instrument was marked for identification and another offered in evidence as the alleged mortgage. The record, moreover, of the mortgage was offered despite the notice to produce the original, and defendant handed to the Vice-Chancellor a certificate under the seal of the Secretary of State of New Jersey that the purporting Foreign Commissioner Frank H. Erisman was not a Foreign Commissioner.

### No Chain to Complainant.

Proof of a release of 9 lots and payment of \$5,000 was attempted to be made by reading an endorsement on the bond. Attempt was made to prove the allegation that Hapgood, as holder of the alleged mortgage by subsequent mesne assignments received \$5,000 from Mountain Lakes, Inc., and released the 9 lots and recited in an assignment of the mortgage that the mortgage covered the 3 remaining lots and was reduced to \$10,000. This purported to be proved by an alleged assignment purporting to have been acknowledged before Erisman as Foreign Commissioner and was admitted over objection with the assurance of the Court that there was nothing binding on the defendants. With respect to the release complainant's counsel said that Hapgood made it but "Mr. Zabriskie said they gave him \$5,000." The witness Zabriskie testified that the payment of \$5,000 on account of the principal was made by Mountain Lakes, Inc., to North Jersey Title Insurance Company. The original of the release was not produced in accordance with the notice. The Vice-Chancellor finds that the defendants did not object. The record discloses that defendants' counsel said: "I understand that the paper is offered in accordance with the notice under the statute to produce the originals," and that complainant's counsel said: "It is offered in lieu of the original," whereupon defendants' counsel said: "I object to any offer of it which purports to be a proof of recording and I object to its being received in evidence on the ground that Frank H. Erisman has not been shown to be a commissioner of deeds of New Jersey and on other grounds." Objection was made to the offer of the alleged assignment of mortgage by North Jersey Title Insurance Com-

pany on the ground that being to the maker it was a cancellation. Objection was made to the offer of an alleged assignment of mortgage by H. J. Hapgood to Hackensack Trust Company on the date of the alleged mortgage and assignment, on the ground that original having been called for and not produced and a certificate that the purporting Foreign Commissioner was not qualified having been exhibited to the Vice-Chancellor, the execution of the alleged assignment was not proved. Objection was made to the offer of an alleged reassignment of mortgage by Hackensack Trust Company to H. J. Hapgood, November 22nd, 1920, on the ground that it was not binding on the defendants. Objection was also made to the offer of an alleged assignment of mortgage by H. J. Hapgood to North Jersey Title Insurance Company, November 23rd, 1920, on the ground that the original having been called for and the purporting Foreign Commissioner not having been shown not to be qualified, the alleged assignment was not properly proved, and on the ground that the consent of the defendants to the release of the other property was not proved. The Vice-Chancellor said that there was nothing binding on the defendants but admitted the alleged assignment. Objection was also made to the offer of an alleged assignment of mortgage by North Jersey Title Insurance Company, February 4th, 1921, to the complainant, on the ground that the alleged instrument appeared upon its face to have been changed and not thereafter reacknowledged and appeared to be in correction of another alleged assignment referred to therein and not produced. Objection was also made to the offer of an alleged deed to the defendant Frank Hendrick purporting to have been dated July 1st, 1920, on the ground that the purporting Foreign Com-

missioner having been shown not to be qualified, the alleged instrument was not properly proved. Objection was made to the offer of a deed from the defendant Frank Hendrick to Lilian Eason and to a deed from her to the other defendant, both dated July 14th, 1920, on the ground that the recital "subject to a mortgage of \$15,000 on the said lots and other lots adjoining" made the property retained, the other property, subject to the mortgage, from which principle the Vice-Chancellor did not dissent but admitted the deeds in evidence.

#### **Contract only Substantial Fact Proved.**

A certified copy of the contract of the defendant Frank Hendrick with Mountain Lakes, Inc., recorded July 2nd, 1920, was admitted in evidence.

#### **Complainant still Receiving Interest under Guarantee.**

Objection was overruled to the offer of a guarantee of principal and interest of the alleged mortgage for \$15,000 to the complainant by North Jersey Title Insurance Company dated April 29th, 1920, and testimony was admitted to show that the guarantor had continued paying interest although it had received none since April, 1923.

The proof was that whoever paid interest to North Jersey Title Insurance Company always did so under written protest but no proof was made who, if anybody, made payments. The only question complainants' counsel asked of the witness was whether he had received interest from anybody but North Jersey Title Insurance Company. He said he had not and didn't know what interest had been paid.

### **Notice to Guarantor Ruled Out.**

The witness Zabriskie was permitted to answer that he had received letters from the defendant Frank Hendrick protesting that there should be no mortgage on the premises but the answer was stricken out as immaterial and questions were ruled out bearing on the notice the witness had and letters he had received were ruled immaterial.

### **Examination on Payment Excluded.**

No proof was made that an indebtedness of \$10,000 was outstanding on the alleged bond and mortgage and questions asked to elicit admissions by North Jersey Title Insurance Company that payment of the alleged mortgage had been made were excluded.

In other words, the defendants were debarred from inquiry into the real relations existing, from the date of the contract between the defendant Frank Hendrick and Mountain Lakes, Inc., between Mountain Lakes, Inc., H. J. Hapgood, Charles J. Tagliabue, North Jersey Title Insurance Company, and the complainant. The suit was strictly limited to attempts to enforce the contract between the defendant Frank Hendrick and Mountain Lakes, Inc., in favor of the complainant, without regard to whether Mountain Lakes, Inc., could have enforced it against the defendants or whether the complainant had any right in equity against Mountain Lakes, Inc.

### **Complainant Rejects Issue of Consideration.**

The bald proposition maintained by the complainant and by the Vice-Chancellor is that when

a mortgage is placed on land, any owner of any part of the land and improvements must satisfy the face of any mortgage placed thereon whatever its amount, whatever the value of his premises, and whoever the mortgagor or the holder of the mortgage.

### **Defendants Contend no Mortgage Exists.**

As against this proposition, the defendants maintain, first, that the mortgage never became an obligation on their premises; second, that if it did, it was, by reason of the deed, which was not their act but that of the seller, subject to a mortgage on the premises and other property, which was to be satisfied first out of the other property, and that the other property having been released, the premises of the defendants were also released, and, third, that if the reduced mortgage became a lien on the premises of the defendant, it was by virtue solely of a contract for payment of the premises by a mortgage and only to the extent of the defendants' obligation under that contract.

### **This Court Informed of Lack of Consideration**

This Court being advised that defendants were debarred from any and all manner of proof of the equities between the parties to the several transactions attempted to be proved and being informed by the undisputed proof and by representations above referred to, made to this Court on behalf of the complainant, that the defendants paid before the performance of the contract was commenced more than ever became payable upon it, this Court should need no argument to convince it that no basis in law or in equity exists in favor of this complainant in this suit for the enforcement of the

guarantee of North Jersey Title Insurance Company to the complainant out of the premises of the defendants.

### **Guarantor had Knowledge.**

What is now being attempted therefore, by this suit to foreclose, was, of course, contemplated April 29th, 1920. The guarantee of North Jersey Title Insurance Company to the complainant eliminates the possibility that it did not know of the contract between Mountain Lakes, Inc. and the defendant Frank Hendrick. The physical condition of the premises indicated that a dwelling was to be constructed on a part of the 12 lots. The alleged mortgage assumed the building to have been completed. North Jersey Title Insurance Company knew that it was not a party to a construction contract. The claim is not that the mortgage was a building loan mortgage but that irrespective of the advancing of money the dwelling assumed by the mortgage to be in existence April 28th, 1920 would respond for the face of the mortgage of \$15,000.

### **Complainant had Notice.**

The complainant put in evidence a guarantee of bond and mortgage dated November 23rd, 1920. The testimony, however, was that there was a guarantee theretofore, the practice of the North Jersey Title Insurance Company being to become both mortgagee and guarantor. No earlier guarantee was, however, put in evidence. North Jersey Title Insurance Company was advised before November 23rd, 1920, of the existence of the contract filed July 2nd, 1920, and of the protest against the payment of any interest. North Jersey Title Insurance Company was, therefore, not only put upon

inquiry as to the claim by the defendants of non-performance by Mountain Lakes, Inc., but had actual notice. According to the record, thus, North Jersey Title Insurance Company received from the complainant \$10,000 upon its assurance that the 3 lots and the house would be security for the amount after it was fully apprised not only by the filing of the contract and the protest of the defendant but, it must be assumed, from an inspection of the premises, that the consideration for the payment of the \$10,000 out of the defendants' premises had not arisen.

### **Complainant Took Knowing Mortgage Extinguished.**

If the original transaction by which Mountain Lakes, Inc., and North Jersey Title Insurance Company caused a mortgage of \$15,000 to be placed on the 12 lots and the house and assigned through H. J. Hapgood to Hackensack Trust Company was for a consideration moving to Mountain Lakes, Inc., or North Jersey Title Insurance Company, the money was advanced either by the complainant or another. If the original money, if any, was advanced by the complainant, he was a party to the original transaction, if by another, then, when the complainant advanced the \$10,000, the prior holder of the mortgage was paid off. In any event the very nature of the transaction with the complainant put him on notice as to what had gone before and the transaction represented by the taking of \$10,000 from the complainant November 23rd, 1920, was a new transaction and obtained no vigor or validity from the alleged circumstance that a mortgage for \$15,000 had been contrived April 29th, 1920, between its assignor and guarantor, North

Jersey Title Insurance Company, April 29th, 1920, and Mountain Lakes, Inc., on 12 lots and a house without reference to the existence of the house or to the contract between Mountain Lakes, Inc., and the defendant Frank Hendrick for its construction.

### **Complainant had this Knowledge from Record.**

In other words, the complainant was not a purchaser of an existing mortgage. He merely alleges himself to have taken an alleged mortgage, directly from the original mortgagor through its President, Hapgood, and its original guarantor, North Jersey Title Insurance Company, with full notice in the assignment and the guarantee of all that had gone before.

The chief circumstance ascertainable by the complainant from those two instruments, in connection with the record of the contract and the deed to the defendant, Frank Hendrick, was that the seller of a part of the land under an agreement to construct a dwelling on that part had placed a mortgage thereafter on the dwelling and the entire tract of land, had failed to give title in accordance with the contract, and had thereafter released from the obligation of the mortgage the land retained.

### **Nothing Prevented Extinguishment of Mortgage.**

The complainant's position is that two circumstances operated to prevent the release of the house and land sold from the obligation of the original mortgage and the termination of the mortgage. Those two alleged circumstances are, first, that the deeds to the defendants, made and recorded prior to the alleged release, recited that they were made "subject however to a mortgage dated April 29, 1920, for \$15,000, covering the above and other

property," and, second, that the defendants expressly demanded that the mortgage be kept alive to the extent of \$10,000 on the 3 lots and the house.

The first alleged circumstance, namely, the recital in the deeds to the defendants, was notice to the complainant that the primary obligation of the alleged \$15,000 mortgage was on the 9 lots retained by the seller and that the release of all those lots from the lien of the mortgage extinguished the mortgage.

As to the attitude of the defendants the complainant had no notice whatever.

### **Complainant's Joining Conspiracy Proved.**

The intervention of the complainant was therefore, obviously, part of a conspiracy to enforce upon the defendants the payment of an amount mentioned in contract with Mountain Lakes, Inc.

But an innocent third party can have no right in equity to be made good out of property of an innocent party with whom he has no privity in the face of notice to the alleged innocent third party of the rights of the other innocent party. The record clearly shows that the complainant's reliance was upon the guarantee of North Jersey Title Insurance Company. That Company attempts to make the property of the defendants satisfy that guarantee. The record sufficiently shows that the suit of the complainant to foreclose was designed to effectuate the conspiracy of Mountain Lakes, Inc., with North Jersey Title Insurance Company.

### **Defendant's Proof of Conspiracy Curtailed.**

But if it does not show that it, at least, demonstrates that the defendants were prevented by erroneous rulings from proving the conspiracy and

fraudulent design of the complainant, Mountain Lakes, Inc., and North Jersey Title Insurance Company.

The objections of defendants to the introduction of instruments on the ground that there was no proof of their execution and that they were incompetent and immaterial were uniformly overruled. There were, at the very outset, twenty-three rulings against the defendants. Defendants contend that each such ruling was error.

The witness through whom documentary evidence was attempted to be proved was Ralph L. Kilby, a former officer of Mountain Lakes, Inc. Attempts by defendants to show by cross-examination that signatures to documents from Mountain Lakes, Inc., had been shown to be forgeries were frustrated by adverse rulings. But the witness's testimony as it was added nothing to the case.

What amounted at least to a "suggestion to the Court," worthy of serious judicial notice, namely, the offer of a certificate of the Secretary of State that Frank H. Erisman, the purporting Foreign Commissioner for many of the documents, was not qualified, was disregarded. Either the signatures, if any appeared, which defendants were not permitted to ascertain, of Erisman to these papers, were forged or he was guilty of criminal acts in taking acknowledgments.

It is, therefore, obvious, both that the execution of these papers was not proved and that defendants were prevented by adverse rulings from proving their fraudulent character.

In view of the fact that the interested party in these alleged transactions was a title insurance company, the failure of the Court to permit defendants to enter upon the character of these transactions was grossly prejudicial and was error.

### No Adequate Offer to Prove Release.

The Vice-Chancellor found that the defendants did not object to the offer of a certified copy of the alleged release. It was stated to be dated November 22nd, 1920. It was antecedent, therefore, both to the alleged guarantee and to the alleged assignment of mortgage to North Jersey Title Insurance Company and to the alleged assignment to the complainant. The record discloses objection by defendants to the proof attempted. With respect to this offer as to all the others in which the offer of proof by the original was demanded, defendants were not permitted to see the documents offered. As to the release, the proof of payment of the alleged consideration was not made but the allegation of the complainant and the statements of counsel and testimony varied, the allegation being that the payment was made by Mountain Lakes, Inc., to H. J. Hapgood, the statement and testimony being that it was made to North Jersey Title Insurance Company, which was stated not then to be the holder of the alleged mortgage. No explanation of the failure to produce the original of the release was made. Defendants were unable to serve a complete State of Case on the solicitor for complainants at first because of his failure to surrender exhibits in his possession for printing. He failed thereafter to surrender the missing originals and defendants have always been denied inspection of them. The alleged release printed in the State of Case bears the certificate of an attorney not that it is a copy of the original but that it is a copy of a record. This certificate is dated April 17th, 1925, and defendants first saw it some days later. That the alleged release by Hapgood to Mountain Lakes,

Inc., extinguished the alleged mortgage is the consequence of the claim of the complainant but that a transaction involving the release of the 9 lots and the creation or increase of an obligation on the defendants' premises in favor of the complainant was proved is absolutely negated by the evidence.

### **Cross-examination on Subject of Finding Denied Defendants.**

The complainant called William H. Zabriskie, President of North Jersey Title Insurance Company, as his witness. The Vice-Chancellor ruled on objections to questions and offers thirty-one times. Thirty of the rulings were adverse to the defendants. The defendants attempted to introduce a letter to impeach the witness. The Vice-Chancellor ruled with the complainant that it was not the proper time to offer the letter. Defendants called the witness later as their own witness and offered a letter to show that the witness had been notified in writing more than a month before the date of the alleged release that the defendants claimed that there was no mortgage on their premises. The complainant's objection that the letter was immaterial, irrelevant, and incompetent was sustained. The Vice-Chancellor struck out on the ground of immateriality and irrelevancy the admission by this witness that he had received letters from the defendant Frank Hendrick to the effect that there should be no mortgage whatsoever on his premises. Upon an objection to a question by complainant, the Vice-Chancellor ruled that as the complainant might have to recall the witness later, the proof might be put in at that time and overruled the objection. The subject matter was payment of interest to the complainant under a guarantee. But upon cross-

examination by defendants, the Vice-Chancellor ruled out questions directed to the identical subject on the ground that they were immaterial and not proper cross-examination. Having precluded proof by the defendants that they had insisted at all times that there should be no mortgage on their premises, the Vice-Chancellor admitted over the objection of the defendants a letter of one defendant after he had conveyed demanding a reduction of the mortgage as representing an estoppel to object and a failure to object to the release and a consent to the release and as proof that the defendants made no objection whatsoever to the mortgage for \$10,000 but, on the contrary, insisted that it be imposed on their premises. And the Vice-Chancellor found as a fact on this ruling that the defendants always insisted that the mortgage they were resisting be made an obligation on their premises.

#### **Complainant Defied Discovery.**

Almost all the rulings of the Vice-Chancellor were made upon the offers or objections of the complainant's counsel, who, from files controlled by them and refused to the defendants, selected and used for a purpose not justified by their contents, letters counsel knew to misrepresent the position of the defendants with respect to the obligation of the alleged mortgage. Their witness Zabriskie, the real complainant, omitted to comply with the *subpoena duces tecum* duly issued out of the Court of Chancery and duly served calling for papers necessary for the defendants and relevant and material to the issues. The Vice-Chancellor expressed agreement with defendants' statement that proof of payment by another person would exonerate defendants from liability, if any, they had been under. Yet the ruling was that defendants could not cross-

examine the witness Zabriskie, who had testified with respect to payments made on the mortgage, on the subject matter of guarantees, of the liability assumed by North Jersey Title Insurance Company under their guarantees of mortgages of Mountain Lakes, Inc., by C. J. Tagliabue, on the payment by the Tagliabue Estate of such liability, on the taking over by North Jersey Title Insurance Company of the assets of Mountain Lakes, Inc., of the relations of North Jersey Title Insurance Company with Bell Hall Company, of the relations of North Jersey Title Insurance Company with H. J. Hapgood, of the denials of information to the defendants with respect to the transaction by which they were attempted to be charged with the obligation of the alleged mortgage, or with respect to papers embodying the transaction. All these matters were fully and properly pleaded in the answer of defendants. They were entitled to make their proof and to discovery by the witnesses for the complainant. The complainant, moreover, could maintain no standing in the court of equity while he concealed the facts from the court.

#### **Attempt to Conceal Fraud Failed.**

The Bill of Complaint alleges, in effect, and the Vice-Chancellor found that the complainant was a stranger to all the transactions prior to the alleged assignment of the alleged mortgage to him February 4th, 1921, and was not charged with other than such notice as the record gave. The Vice-Chancellor, however, sustained the objection by complainant's counsel to the question asked of the complainant whether the complainant had notice of a letter sent, November 26th, 1920, by the defendant Frank Hendrick to the complainant's at-

torney, his solicitor herein, to the effect that no mortgage existed covering the defendants' premises and that any claim of a mortgage would be resisted. When defendants desired to offer a copy of such a letter, notice to produce the original having been given, the complainant's attorney and solicitor denied ever having received such a letter. He produced, however, a letter not signed by the defendant Frank Hendrick addressed to Mountain Lakes, Inc., \_\_\_\_\_, 1920, and, without proof that it was ever received or communicated to the complainant, his attorney, or anybody else, introduced it in evidence over defendants' objection. This letter demanded the reduction of the alleged mortgage on the house and three lots to \$10,000. The Vice-Chancellor found, in effect, that the defendants had by this letter assumed and agreed to pay a \$10,000 mortgage out of the premises. The proof, was, however, that this demand was not complied with. The demand was for a reduction and contained no waiver of a further demand. That such further demand was made for a removal of all obligation from the defendants' premises before, at the time of, and after this letter is the conceded evidence. Nor was there any evidence of a demand for or consent to a release of the nine lots. The evidence is, on the other hand, that the North Jersey Title Insurance Company, months after this alleged demand, on behalf of H. J. Hapgood and Mountain Lakes, Inc., (exceeding the mistake of law attributed to the defendant Frank Hendrick in charging him with demanding a reduction of an alleged mortgage on his premises by insisting upon a release of other premises upon which alone the lien of the mortgage primarily rested), asserted that the obligation of the entire \$15,000 rested upon defend-

ants' premises despite the fact that the defendants had no interest in the premises primarily liable. Months, therefore, after the alleged fatal demand by the defendants, the complainant's guarantor threatened defendants with the enforcement of payment, out of premises North Jersey Title Insurance Company, Mountain Lakes, Inc., through its officer, Claude V. Pallister, and the complainant now represent to be, with their boasted improvements through performance by Mountain Lakes, Inc., worth no more than \$12,000, of a mortgage of \$15,000 which the defendants had not assumed or agreed to pay and which did not constitute a primary obligation on the premises, despite the fact that the defendants had already paid for the premises \$14,500, or more than \$2,500 in excess of the value, to Mountain Lakes, Inc., and a considerable amount more by completing performance of the contract of construction upon which Mountain Lakes, Inc. had defaulted. The proof, therefore, is that the complainant's guarantor maintained, after full and actual notice of all the facts, that the defendants had no interest in the premises and that Mountain Lakes, Inc. had persisted in its default, as it has to the present time, in refusing to give the defendants title to the premises in accordance with the contract and the mutual performances thereof. Of this circumstance the complainant's attorney and the complainant were not only charged with the duty of inquiry but were put upon notice and must be assumed to have had actual knowledge. It was vain, therefore, for complainant's attorney and solicitor to deny that he had actual knowledge, by receipt of a letter, of the defendants' actual demands. In full possession of the evidence of those demands, he misrepresented them to the Court. Whether, therefore, the com-

plainant was a part of the conspiracy at the inception, April 29th, 1920, he joined it later, and being, just as North Jersey Title Insurance Company itself always was, guaranteed against loss by those upon whose assurance he advanced money, if he did advance any, lent himself, just as North Jersey Title Insurance Company did from the beginning, to the consummation of the purpose of Mountain Lakes, Inc. to retain money paid it by the defendant Frank Hendrick without giving title or property.

#### **Complainant a Dummy Accomplice.**

Neither complainant nor his attorney came into Court with clean hands. They obviously aimed to prevail by concealment of facts from the defendants and from the court. The complainant lent himself to the need of a dummy to pose as an innocent third person, a purchaser for value, who might put the rights of the conspirators Mountain Lakes, Inc., H. J. Hapgood, and North Jersey Title Insurance Company ahead of those of the innocent victims of their conspiracy. He lent himself, moreover, according to his claim, to the plan of reviving a mortgage against the intended innocent victim after it had been extinguished.

#### **Equity not Available to Complainant.**

If, therefore, this Court were ready to raise to the dignity of a rule of law that a blanket mortgage may be placed on land after it has been sold so as to make the purchaser responsible for the satisfaction of that mortgage or any part thereof at the option of the seller, this is not a case for the promulgation or application of that doctrine. The beneficiary of that doctrine would be a title insur-

ance company. In the instant case, the disregard by the title company concerned of safeguards to its own rights, those of its customers, and third persons, has been such that if it were sanctioned, the rights of property would be at the mercy of schemers of the class of the departed Hapgood and his Company and associates. The complainant is asking this Court to approve the carrying out of, and to give his guarantor, the ally of Hapgood, the fruits of, a scheme and artifice to defraud the defendants.

### POINT I.

**If the alleged mortgage ever became a lien on the three lots and house that lien was extinguished before assignment to the complainant.**

The alleged \$15,000 lien, if it ever attached to the three lots and the house, was extinguished in four ways.

#### A

**BY THE CANCELLATION OF THE ALLEGED MORTGAGE THROUGH REASSIGNMENT TO HAPGOOD.**

The complainant's witness Zabriskie testified that Hapgood was Mountain Lakes. The complaint alleged and attempted to prove that Hapgood twice became the holder of the alleged mortgage. North Jersey Title Insurance Company, of which the witness Zabriskie was President, knew of the identity of Hapgood and Mountain Lakes, Inc. By merger, the alleged mortgage became cancelled.

Shotwell v. Shotwell, 24 N. J. Eq. 278;  
Saling v. Saling, 124 Atl. 249;  
Andrus v. Vreeland, 24 N. J. Eq. 394.  
See also Point VIII.

## B

## BY THE FILING OF THE CONTRACT.

The contract was recorded July 2nd, 1920. It contained acknowledgment of payment, at a date prior to that of the alleged mortgage, of a substantial amount, obviously in excess of the value of the three lots and sufficient to give rise to a prior equitable mortgage in favor of the purchaser, if that principle were to be invoked, and contradicted the intention, and disclosed the lack of right, of Mountain Lakes, Inc. to place a \$15,000 obligation on the three lots and house and set forth the conditions precedent upon the performance of which alone by the seller the purchaser would be bound to assume and agree to pay a mortgage. The creation of a legal mortgage without the written promise of the party to be bound thereby to pay it is impossible.

Williston, Contracts, Sec. 494, p. 962;  
Browne, Statute of Frauds, Sec. 267;  
Robert v. Baghurst, 47 N. J. Eq. 201, 205;  
Brown v. Draw, 67 N. H. 569;  
Sleeth v. Sampson, 237 N. Y. 69.

## C

## BY THE FILING OF THE DEED OF MOUNTAIN LAKES, INC. TO THE PURCHASER.

The making of the deed by Mountain Lakes, Inc. "subject to a mortgage on this and other property" would not create any obligation on the part of the purchaser. If there were an obligation on the purchased premises, it would be by those words shifted to the other property. In the event that the other property was sufficient to satisfy the mortgage, the obligation would never return to the property purchased. If there were no obligation on the property purchased, none would return. If, moreover, there were an obligation, it would be relieved in the legal and equitable course, as against the seller and those claiming under the seller, and would not arise as to amount or obligation out of the words of the deed.

Pettingill v. Hubbell, 53 N. J. Eq. 589;  
 Harrison v. Guerin, 27 N. J. Eq. 219;  
 Cawley v. Weiner, 236 N. Y. 361;  
 Ewart on "Waiver Distributed," 191;  
 Walz v. Oser, 93 N. J. Eq. 284;  
 De Witt v. Van Sickle, 29 N. J. Eq. 212.

## D

## BY THE ALLEGED RELEASE OF THE NINE LOTS FROM THE OBLIGATION OF THE ALLEGED MORTGAGE.

The alleged release was made November 22nd, 1920, by H. J. Hapgood as the alleged holder of the alleged mortgage. Not only he but also Mountain Lakes, Inc. and North Jersey Title Insurance

Company had knowledge of the sale to the defendant Frank Hendrick. That release, if it was made, extinguished such lien as existed by virtue of the alleged mortgage on the three lots and house. But if it did not, it did not increase any existing lien, or fix the amount of any lien. Not only H. J. Hapgood but also Mountain Lakes, Inc. and North Jersey Title Insurance Company had knowledge of the equities of the defendants. The release did not wipe out the equities. It merely extinguished the obligation of the mortgage. When, therefore, the alleged assignment to the complainant was alleged to have been attempted to be made, there was no mortgage. Of that fact he had notice from the record. The recital in alleged assignment that the alleged mortgage was reduced had the same effect as the alleged guarantee of North Jersey Title Insurance Company, it defined the representations upon which North Jersey Title Insurance Company induced the complainant to advance the money, if any, he advanced and bound nobody but North Jersey Title Insurance Company and the complainant. North Jersey Title Insurance Company, according to complainant's attempted proof, first guaranteed the alleged mortgage after it was advised of the fraud being attempted upon the defendants. Just as Hapgood and Mountain Lakes could not hope to perpetrate the fraud without the help of North Jersey Title Insurance Company, so that Company could not hope to consummate it without the complainant. That the complainant did not know the part he was to play and accept it by reason of the alleged guarantee is unbelievable and is contradicted by complainant's own allegations and attempted proof. The lien, if any, upon defendants' premises was as appeared from the rec-

ord, extinguished long before the alleged assignment to the complainant.

- Pomeroy on Equity Jurisprudence, Secs. 1224, 1225, 1226;  
 Beardsley v. Empire Trust Co., 124 Atl. 457;  
 Wilbur v. Jones, 80 N. J. Eq. 523;  
 Wise v. Fuller, 29 N. J. Eq. 257, 261;  
 Arnaud v. Grigg, 29 N. J. Eq. 482, 485, 486;  
 Mutual Benefit Life Insurance Co. v. Rowan, 26 N. J. Eq. 389;  
 Van Winkle v. Earle, 26 N. J. Eq. 243;  
 Hoy v. Bramhall, 19 N. J. Eq. 563;  
 Mount v. Potts, 23 N. J. Eq. 188;  
 George v. Wood, 85 Am. Dec. 741, note 745;  
 Mutual Life Insurance Co. v. Burghram, 23 N. J. Eq. 47;  
 Pancoast v. Duval, 26 N. J. Eq. 449;  
 Hill v. McCarter, 27 N. J. Eq. 45;  
 Burr v. Beers, 80 Am. Dec. 327, note 329;  
 Klapworth v. Dressler, 78 Am. Dec. 69, note 72;  
 Crowell v. Hospital, 27 N. J. Eq. 655;  
 Youngs v. Trustees, 31 N. J. Eq. 299;  
 Chancellor v. Towell, 80 N. J. Eq. 223;  
 Stiger v. Bacon, 29 N. J. Eq. 442.

Since the alleged mortgage did not specify on which of the lots the house was and the house on the three lots was not in existence at the date of the alleged mortgage, the effect of the alleged release would not be limited to placing a lien on three lots and a house, for nothing appears to establish that the house contemplated in the alleged

mortgage was not on the 9 lots. In any event, nothing appears to support the attachment of the lien of the alleged mortgage to either the three lots or the house on them.

## POINT II.

**The lien of the alleged mortgage, if it ever attached to the three lots and the house, was junior to the rights of the purchaser under his payments.**

The alleged mortgage was dated after \$12,200 had been paid upon the contract. The purchase was not made with notice of the mortgage. There is no proof that the contract was performed. At the date of the alleged mortgage, all that the purchaser had received for \$12,200 was his right under the contract to the three lots. No mortgage was to be assumed without consideration. That the lots were worth the amount paid was not proved. The alleged mortgage falsely recited that there was a house on the 12 lots but did not specify on which of them. No mortgage was to be assumed unless and until a house was built in accordance with the terms of the contract. The proof is that there was no house on the three lots at the date of the alleged mortgage and that the defendants never have admitted that the contract was performed or consideration for any mortgage received. There could not have been a lien of the alleged mortgage prior to the defendants' rights, for the three reasons, first, that the purchaser, having made prior payment, was protected by an equitable mortgage, second, that there was no proof of consideration between the alleged mortgagor and mortgagee, and,

third, because no consideration for the alleged mortgage ever moved from the mortgagor to the purchaser.

The theory that Mountain Lakes, Inc. could make a contract, valid at the date thereof, with North Jersey Title Insurance Company, by which it could bind itself and its successors to furnish as subject of a subsisting mortgage a house not in existence and to be constructed for a third party as purchaser and bind the third party and the property contracted for by him, without the performance of the contract of construction or the consent of the purchaser and independently of such performance and consent, has no support in law. Jones, on Mortgages, at page 153, says:

“The mortgage lien upon after acquired property only attaches from the time of the acquisition thereof by the mortgagor, and is subject to all pre-existing liens. The mortgage only attaches to such interest as the mortgagor acquires.”

The money used for such construction as was done was that of the purchaser, since the mortgagee was stopped by his own mortgage to assert that a house was contracted to be constructed for it. So far as the proof goes, there was nothing created, which, with the value of the three (3) lots, equalled the amount paid by the purchaser. The rights of the holder of the alleged mortgage in the premises were subject to the prior rights of the purchaser.

“Until that decree was signed, the rights of the complainant in the lands of the Sea Shore company under his mortgage was a mere unexpected equity, to have the benefit of such equities as his mortgagor had in the premises without any legal title in himself

or in his mortgagor upon which his mortgage as a conveyance could operate.

“Where a mortgage attached to after acquired property, and additions are made to the premises, after the title becomes vested in the mortgagor, by the erection of buildings, or the construction of embankments, or the laying of rails for a track, such additions become part of the mortgaged premises, as they are made on the maxim *quicquid plantatur solo, solo cedit*, and enure to the benefit of the mortgagee. But where the after-acquired property comes into the hands of the mortgagor, subject to encumbrances or liable to liens, the mortgage attaches to the property in the condition in which it comes to the mortgagor’s possession, subject to such liens and encumbrances as are then on it. *Willink v. Morris Canal Co.*, 3 Gr. Ch. 377; *Dunham v. Railw. Co.*, 1 Wah. 254; *Galveston R. R. Co. v. Cowdrey*, 11 Watt. 359; *United States v. N. O. R. R. Co.*, 12 Watt. 362. When the decree of the Chancellor was signed, which established the lien of the complainant’s mortgage on the property of the Long Bank and Sea Shore Company, Berthoud & Co. had, by force of the provisions of the mechanics lien act, acquired a lien on the premises which related back to the commencement of the building, and was entitled to priority over all conveyances, mortgages or encumbrances subsequent thereto. This lien was not displaced by the chancellor’s decree, which, in the absence of fraud, could be effective only to bring under the complainant’s mortgage the lands of the Sea Shore Company, subject to such liens as were lawfully acquired while the estate was in that company. The chancellor’s decree, adjudging the validity and priority of the claim of Berthoud & Co., should be affirmed.”

*Williamson v. N. J. Southern R. R. Co.*,  
29 N. J. Eq. 311, 317, 318.

The Chancellor had said as follows:

“A mortgage is intended to cover after acquired property in the condition in which it comes into the mortgagor’s hands. If it is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior in point of time.”

Williamson v. N. J. Southern R. R. Co.,  
28 N. J. Eq. 298.

Both the contract itself and the evidence show that the defendant Frank Hendrick contributed toward the finishing of the house and the grading of the grounds in addition to the payment of twenty-three hundred (\$2300) dollars for extras in the construction of the house. There also attached from the beginning the purchaser’s right to the completion of the house the grounds in accordance with the terms of the contract and to assurance of the application thereto of his original payment of ten thousand (\$10,000) dollars and twenty-two (\$2200) dollars toward the purchase of three (3) lots and a house to be constructed subject only to the equities between Mountain Lakes, Inc. and the purchaser.

It seems to have been precisely in the contemplation of North Jersey Title Insurance Company and Mountain Lakes, Inc. to make these equities of the purchaser subject to their absolute will. So far as the evidence shows the alleged mortgage was a paper mortgage valid between the parties for no other purpose. Certainly no title insurance company could sell a mortgage purporting to be acknowledged before Frank Hill Erisman as a Foreign Commissioner of Deeds. Nor could any purchaser of a guaranteed mortgage take it under the

circumstances here shown with any reliance beyond that upon the guarantee of the title company.

Assuming the language of the alleged bond to have been true as of the time it was dated, the state of the proof does not justify the assumption that the bond was given for a valid present consideration. The three transactions the same day indicate a "wash" transaction or an accommodation mortgage. The lien of the purchaser of the land and house was not disturbed by this arrangement between Mountain Lakes, Inc., North Jersey Title Insurance Co., and H. J. Hapgood, and Hackensack Trust Company.

"The holder of an unrecorded equitable charge upon land given for full consideration moving at the date of its creation is entitled to priority over a subsequent legal mortgage given to secure a prior indebtedness."

Martin v. Bowen et al., 51 N. J. Eq. 452.

See

Lovett v. Demarest *et al.*, 5 N. J. Eq. 113;

Douredoure v. Humbert, 35 N. J. Eq. 92;

Jones v. Brogan, 29 N. J. Eq. 139;

Hoy v. Bramhall, 19 N. J. Eq. 563;

Perkins v. Trinity Realty Co., 69 N. J. Eq. 723.

The alleged mortgagee, subpoenaed to produce papers which would disclose the true transaction, appeared in court by its President, the officer subpoenaed. He exhibited the subpoena and declared it a physical impossibility to respond to it. This witness, William H. Zabriskie, not only renounced the opportunity to show that money had been advanced on the alleged mortgage, but also denied

than an amount of guarantees, the greater part of a million dollars, had been taken by the alleged mortgagee for mortgages, made to it as guarantor and mortgagee, on property of Mountain Lakes, Inc., and that an accord and satisfaction had been entered into upon these guarantees, only to the extent of denying that a guarantee had been obtained for this alleged mortgage. The complainant established through this witness that the transaction between the alleged mortgagor and mortgagee was without consideration.

In the case of *Shotwell v. Shotwell*, 24 N. J. Eq. 378, at page 385, Chancellor Runyon set forth very clearly the reasoning upon which it may be maintained that the alleged mortgage of North Jersey Title Insurance Company, if by reason of consideration moving to the defendants, it bound them, it did so only to the extent a debt was due from Mountain Lakes, Inc., and that, in any event, consideration moving to and privity with the defendants would have to be shown to support the claim of North Jersey Title Insurance Company to be made good for the default of Mountain Lakes, Inc., where the defendants had not assumed the mortgage, out of property purchased by the defendants. The Chancellor said:

“I shall only deal with that aspect of the question which concerns the foreclosure of mortgages given to secure bonds or notes where there is no evidence of any donative purposes in the giving of the bond or note, but the transaction must be viewed as one contract solely.

“In such cases I think that the mortgage may only be foreclosed or rights under it enforced where there was a debt to secure which it was given.

“Of course, the debt need not have been

due from the mortgagor. One owning property, either personal or real, may pledge it for the payment of the debt of another person.

"If there be no debt, then there is no right to enforce the mortgage, and the matter of consideration may be inquired into for the purpose of showing that there was no debt.

"Such confusion as exists with respect to the right to plead and prove no consideration arises, I think out of the failure to distinguish between the mortgage and the debt which the mortgage is given to secure.

"There need not be proven, and there need not exist, as I understand it, any consideration between the mortgagor and the mortgagee for the defeasible conveyance manifested by the mortgage itself. The owner of the land may, as has been before stated, make a defeasible conveyance of his property, the condition of the defeasance being that upon payment of a certain debt the conveyance is void. *But this fact does not relieve one who seeks to enforce such a defeasible conveyance from the necessity of showing that there was a debt, to secure which the mortgage was given.*

"The mortgage itself is an executed conveyance, defeasible upon the carrying out of an executory contract. This executory contract is subject to all the laws applicable to contracts, and must, of course, be supported by consideration.

"That consideration need not move to the mortgagor, and the debt to secure which the mortgage is given may be the debt of another person.

*"But this does not militate against the necessity of finding in each instance (excepting where the question is one of gift), that there was an executory contract, upon consideration, to secure which the executed defeasible conveyance was made.*

"In the case of *Bliss v. Cronk*, 62 N. J. Eq. (17 Dick.) 496 (Vice-Chancellor Pitney, 1901), the court, speaking with reference to a mortgage that contained within itself the promise to pay, said (at p. 499):

"The deed has a dual character—first, it contains a covenant to Mrs. Cronk to pay a sum of money to the complainants, stated to be a pre-existing debt due from her to them; second, a conveyance of land to secure that debt. The first is an executory contract by a married woman, and the second an *executed conveyance whose validity and liability to be enforced depends upon the enforceability of the executory contract.*"

"It is held in New York that the court will inquire into the consideration of a mortgage sought to be foreclosed, and that 'it is the debt which gives the mortgage vitality as a charge upon the land, and generally where there is no debt or obligation there is no mortgage.' *Baird v. Baird*, 145 N. Y. 659 (at p. 664).

"*Jones on Mortgages* (3d ed.), 660, says: 'A mortgage, like every other contract, must be founded upon a valuable consideration, or the failure of it is a good defense to an action upon a mortgage.'

"Our own courts, as has been heretofore shown, have always held that they would inquire into the consideration for the purpose of ascertaining what is due upon the mortgage, and it seems to me that such inquiry must necessarily lead to the same end, because if there was no debt there is nothing due.

"I shall not pursue this subject further, because I think it sufficiently appears that the matter of the consideration of executory contract which this mortgage was given to second must be inquired into in this case."

Taking, therefore, all the assumptions of the

complainant as valid, he occupies no stronger position than the mortgagor, since he stands in the mortgagor's shoes as against the defendants. The complainant would not be in a better position by showing that the defendants had assumed the alleged mortgage.

“Though the assumption of the mortgage debt by the subsequent purchaser is absolute and unqualified, it will be controlled by a collateral contract made between him and his grantor, which is not embodied in the deed. *Flagg v. Munger*, 5 Seld. 483.”

*Crowell v. Hospital of Saint Barnabas*, 27 N. J. Eq. (12 C. E. Gr.) 650, 651.

In his opinion supported by unanimous affirmance in the opinion just quoted in part, the Vice-Chancellor had said:

“So completely is the assumption of the purchaser regarded as a contract with the grantor alone, that unless the grantor is personally liable for the mortgage debt, the promise of the purchaser is held to be *nudum pactum*, and of course, without efficacy in favor of either of the grantee or mortgage. *King c. Whitely*, 10 Paige 465; *Trotter v. Hughes*, 12 N. Y. 74.

“It would seem to be clear, then, that in ordinary cases the mortgagee does not, by force of the contract, acquire a right of action against the purchaser, but the benefit flowing to him from the contract is limited to a right to be subrogated to rights of his debtor. He stands in his debtor's rights, and may appropriate, to the satisfaction of his mortgage, any security held by his debtor, for its payment; he can, therefore, only have a personal judgment against the purchaser for his debt, when the mortgagor holds an obligation that will support such judgment. His right is simply the right of

substitution, permitting a new creditor to take the place of an old one, and allowing the new to succeed to the rights of the old."

Crowell v. Currier, 27 N. J. Eq. (12 C. E. Gr.) 152, 155.

Since, as between the mortgagor and the defendant Frank Hendrick, the due and full performance of the contract of construction and the giving of good title to the purchaser in accordance with the contract were conditions precedent to the obligation of the purchaser to assume the mortgage, proof of these conditions is a prerequisite to a foreclosure of the alleged mortgage. To the extent that the purchaser paid for what he received, and there is no evidence that he got more than he paid for in advance, he had an equitable mortgage prior to the lien of the alleged mortgage.

"An equitable mortgage for a precedent debt has no equity superior to a subsequent judgment at law. Between such contestants, the first perfected legal lien should prevail. The rule is otherwise with regard to bona fide purchasers or equitable mortgagees, where the consideration of the mortgage is paid at the time it is given. Equity in the latter case regards the equitable mortgagee as a bona fide purchaser."

Wheeler and Green v. Kirtland, 24 N. J. Eq. 555.

The purchaser's *bona fides* is established. The conduct from the beginning, of Hapgood, who was permitted to re-enter the chain of title as late as November 22nd, 1920, taints the case of the complainant. His claim is, in effect, that, in order to exact payment from the defendants without

consideration, he gave consideration for a fictitious mortgage after it was extinguished.

“There is nothing in the complainant’s course in this business to make him strong in a court of equity. The statutes regulating the registry of deeds are statutes of notice. They are to prevent fraud and wrongful priorities, and not to encourage or to shield them. The reason why a subsequent incumbrance, who knows or ought to know that a prior encumbrance exists, or a concurrent legal encumbrancer, entitled to be a prior lien, will not be permitted by his act of registry to go ahead of the other for want of registry, is that it would be a fraud, an unfair transaction as between honest men, to permit him to get such a precedence. *It is the object of the law of registry to promote good faith, and applying this test of good or bad faith, I have no doubt as to the decision I have come to. I am satisfied from the evidence that the complainant perfectly well knew, before his mortgage was drawn, that the other two mortgages were executed, and only dependent for delivery of the deed; that they were meant to be and were the basis to the extent of their amount on which the title was to pass and the transaction to stand; that they were to be part of the essential to the completion of the purchase, for which completion he was bound as security, and which he had no right to circumvent; that standing in the relation he did to the commissioners and to Holcomb, with knowledge of their arrangements, and they without knowledge or suspicion of his, the scheme he planned and executed to protect himself, at their expense, was a fraud upon their rights.*”

Mathews v. Everitt, 23 N. J. Eq. 476.

In a learned discussion on "The 'Equitable Mortgage' in New York," Harlan F. Stone says:

"On settled principles of equity the equitable mortgage should be deemed valid and enforceable not only against the equitable mortgagor, but against all subsequent transferees of the mortgaged property except *bona fide* purchasers."

20 Columbia L. J. 522.

The contract was made in New York and under all the authorities including those of New Jersey rights in land arising out of that contract are to be determined according to the law of New York.

The defendants are also entitled to priority under the doctrine of relation. The defendant Frank Hendrick was obviously paying in advance or upon delivery for everything and the conduct of Hapgood, North Jersey Title Insurance Company, and Mountain Lakes, Inc. prevented the ascertainment of the amount payable, if any, and attempted to exact payment of money whether due or not. The witness Zabriskie admitted that the defendant Frank Hendrick paid under protest, the threat, of course, being foreclosure of an uncompleted dwelling, interest on the entire mortgage of fifteen thousand (\$15,000) dollars, which it is admitted he was not obliged to pay.

"The referee reported in favor of the plaintiff, \$1,300 and interest; that being the amount called for by the purchase-money mortgage, and unpaid at the commencement of the action. To this the defendant Guy objects. The plaintiff insists that the referee should also have allowed the above sum of \$1,006.61, paid by Guy, May 1, 1875. These claims present the only points in the case. Both were overruled by the General

Term. First, the plaintiff's appeal: The contract of sale was valid between Scribner and Guy at a time anterior to the plaintiff's mortgage. Guy, from the moment of its execution, held the equitable title to the land, subject only to the payment of the amount due on his contract, and was entitled, on paying or securing that amount according to its terms, to a conveyance free from any lien created by Scribner. If denied, it would have been compelled, on application to a court of equity, and when executed, would be good by relation from the time of the making the contract, so as to render the valid every intermediate act in pursuance of it, on the part of the vendee.

"In *Jackson v. Bull*, the doctrine of relation was applied to avoid the effect of an adverse possession intermediate the agreement and the deed, and it avails whenever it becomes necessary to promote the ends of justice. If this was a controversy between Guy and Scribner, it could not be questioned but that *the deed of May 1, 1875, would take effect as if executed at the time of the agreement*. In what respect is the position of the plaintiff better than that of Scribner? *The Recording Act protects only purchasers in good faith and for a valuable consideration, against an unrecorded conveyance; and the plaintiff is not one of that character, for, as we have seen, he parted with nothing on the strength of his mortgage*. It is true that he had no notice of the agreement, or the claim of Guy under it. But this is not material. If he had, it would only have furnished another reason for his defeat. As it is he parted with nothing on the strength of his debtor's title, and *although the consideration of an antecedent debt is sufficient to support the mortgage, it does not bring him within the meaning or the protection of the Recording Act, nor enable him to occupy*

*and different position in respect to the vendee under the agreement, than that held by Scribner. Dickerson v. Tillinghast, Weaver v. Barden. The case of Gouverneur v. Lynch, cited by the plaintiff's counsel, so far as it implies a contrary doctrine, or that the mere recording of the mortgage would affect the vendee, must be deemed overruled by Trustees of Union College v. Wheeler."*

Young v. Guy, 87 N. Y. 487.

The reason Hapgood set up for the giving of the alleged deed subject to the alleged mortgage was a misrepresentation of fact. Such a transaction would not disturb the equitable priority already existing or impose upon the defendants an obligation to satisfy unless consideration was given by completion of the contract. The witness Alexander testified that when Hapgood delivered the deed he said he would fix up anything that was wrong. The proof is that he did not do so.

In Wilbur v. Jones, 80 N. J. Eq. 523, the Court said:

"The defendant in the case at bar is not attempting to parol evidence to vary the terms of a written instrument, but is asserting a parol agreement made at the time the conveyances were executed, showing at the time that the mortgage sought to be foreclosed, although absolute in terms, was given as additional or collateral security for the payment of the chattel mortgage. And in this I think he has abundantly succeeded on the evidence. Another thing, the defendant sets up and proves that he has paid the chattel mortgage, and avers that there is nothing whatever due from him to the complainant on account of the mortgage sought to be foreclosed in this cause. This amounts to a defense of payment, and, upon familiar

principles the defendant is entitled to show that he has paid a mortgage sought to be enforced against him. Upon the question of payment, the evidence concerning the reason for the giving of the real estate mortgage, and the subsequent payment of the chattel mortgage (which, under the defendant's contention, operates as payment of the real estate mortgage), is receivable.

"A mortgage has a dual character—first, it is a covenant to pay a sum of money upon an expressed consideration, and second, it is a conveyance of land to secure the debt. The first is an executory contract, and the second an executed conveyance with a defeasance, and liable to be defeated if at the time it is sought to be enforced there is nothing due upon the executory contract it was given to secure. See *Perkins v. Trinity Realty Co.*, 69 N. J. Eq. (3 Robb) 723 affirmed S. C., 71 N. J. Eq. (1 Buch) 304."

In the case last cited in the above quotation, Garrison, Vice-Chancellor, said:

"It will be found that the court of chancery, in dealing with the question of the defence of want of consideration, has held that a 'bond and mortgage— is good if it is shown that none (consideration) was given. And neither courts of law or courts of equity will allow the consideration to be inquired into for want of consideration, but they will for the purpose of ascertaining what is due upon it.' *Farnum v. Burnett*, 21 N. J. Eq. (60 E. Gr.) 87, at p. 89 (Chancellor Zabriskie)."

*Perkins v. Trinity Realty Co.*, 69 N. J. Eq. 723.

When resort to land purchased is attempted by a stranger to the alleged mortgage, proof of con-

sideration to that stranger is a condition of success. The rule set forth by Vice-Chancellor Lewis, in *Hughes v. Hadley*, decided August 15th, 1924, absolutely justifies the position that the defendant Frank Hendrick was entitled on July 6th, 1920, to demand a Warranty Deed free from the obligation of the alleged mortgage in consideration of the payments made by him and by reason of the mortgagor's default and failure to perform or give a valid title in accordance with the contract. What he demanded, he got despite the reference to the alleged mortgage in the deed, and what he demanded a court of equity would have decreed to him. No other measure of the abatement to which he was entitled was set up by the seller and the seller relegated himself to proof of a different measure. Whatever the measure of abatement, it was not dependent upon the alleged mortgage or its payment and the mortgage never attached for any purpose to the lots purchased and paid for by the defendant Frank Hendrick.

“The rule is somewhat different in regard to whether the vendor brings a suit for specific performance, or whether the vendee brings the suit. It often happens that the vendor is unable to convey exactly what he contracted to convey, that the land is deficient in amount, or in quality, or is subject to an easement, or that the vendor has not a full estate in fee simple, etc. If, after making allowance for the defect, the vendee will get substantially what he contracted for, the court will compel the vendee to take the land, with a deduction from the purchase price. If, however, the defect concerns an important or essential matter—e. g., if title to the part of a farm on which the farm buildings stood was defective—specific performance would not be granted

to the vendor. But where the vendee, as in this case, is suing for specific performance, the rule is different. *If he entered into the contract in ignorance of the defect, he may compel conveyance of whatever the vendor has with a proportionate abatement from the price, even though the defect is very considerable, though the vendor owns but half the land, or owns a life estate merely instead of a fee simple. If, however, the vendee knew of the defect when he made the contract—if he entered into the contract with his eyes open—he has no claim to an abatement from the price, though he may, of course, if he sees fit to accept the land with its defects, and pay the full price, compel a conveyance of whatever the vendor is able to convey."*

### POINT III.

**The bill of complaint does not set forth a cause of action.**

The preliminary objection that the complaint was insufficient upon its face and did not set forth a cause of action was overruled. This was error.

The complaint was not amended.

One of the grounds of the objection was that it appeared upon the face of the bill of complaint that the property retained and owned by the alleged mortgagor was primarily liable for the alleged mortgage and that no allegation was contained in the bill of complaint that resort had been had to that property or that it was insufficient to satisfy the alleged mortgage wholly or in part, and that the complaint does not aim at resort to

that property. It follows that the omissions constitute a fatal defect.

Pettingill v. Hubbell, 53 N. J. Eq. 584, 586.

Another of the grounds was that complaint showed upon its face that the property primarily liable had been released from the obligation of the mortgage with knowledge of the sale of the part sought to be made to respond. It follows that the obligation, if any, on that part was extinguished.

Beardsley v. Empire Trust Co., 124 Atl. 457;

Pomeroy on Equity Jurisprudence, Secs. 1224, 1225, 1226.

#### POINT IV.

**There was absolutely no proof to support the allegations of the bill of complaint.**

It was necessary for the complainant to establish by competent evidence not that on April 29th, 1920, there were relations between Mountain Lakes, Inc., North Jersey Title Insurance Company, H. J. Hapgood, and Hackensack Trust Company fixed by instruments in writing duly executed, made, and delivered, but that certain relations existed of such notoriety and legal effect that the rights of third parties were controlled thereby. The trial of this suit presents a striking example of a complainant's success in preventing discovery of the true nature of the relations upon which he bases his attempt to recover and complete failure to establish them in any way.

The circumstance that the defendant Frank Hendrick was told in July, 1920, that a certain mortgage existed would not, if established, prove the fact. The added circumstance that that defendant believed the representation, would not, if established, prove the fact. The statute provides strict rules for the proof of a mortgage. The production of the original having been called for by due notice, not even proof of recording is sufficient to establish the due making, execution, or delivery. In fact such proof is then not permitted, "until satisfactory proof by the oath or affirmation of the party offering the said record in evidence, or of other persons, shall be made to the court or officer before whom such record may be offered, that the original hath been lost, or that having made diligent search and inquiry, such party hath been unable to find said original." No such proof was offered of the loss of any instrument.

The complainant was relegated, therefore, to proof apart from the record of the due making, execution, and delivery of the instruments upon which he relied.

Apart from the abortive attempt to prove the alleged bond in evidence by testimony as to the signature of Mary Kelly and failure to produce her as a witness, and a reference to a signature of one Erisman as a subscribing witness to a document not offered with reliance on that signature, the offer of no instrument recited in the bill of complaint was supported by a word of testimony. They all were all, except the alleged bond, alleged to be instruments of the character required to be recorded. The record of the trial does not show the offer of any original except that of the alleged assignment of mortgage to the complainant, dated February 4th, 1921, that of the contract, and those

of the deeds to the defendants. The proof of all other instruments, including that of the alleged assignment, appears as attempted to be made by reference to the recording. They do not appear to have been offered as instruments duly acknowledged. They do not appear to have been offered to defendants' counsel for inspection. With the offer with reference to the record, the proof of certain facts purporting to be evidenced by the instruments was taken for granted.

The proof the complainant was required to make was that the instruments upon which he relied had been duly recorded. Of this the record was not proof, notice having been given under the statute. Without due recording, the instruments were evidence only of their validity and operation between all but subsequent judgment creditors without notice, and all subsequent *bona fide* purchasers and mortgagees for valuable consideration, not having notice thereof, whose deed, or mortgage shall have been first duly recorded or lodged for record in the said clerk's office. The contract was made March 18th, 1920. The payments thereunder were made to the extent of \$12,200, or more than the value of the house and three lots, about April 1st, 1920, \$10,000 having been paid March 18th, 1920. The alleged mortgage was dated April 29th, 1920. The deed to the purchaser was delivered July 6th, 1920, when such notice as the alleged mortgage mentioned therein would give "subject to the legal and equitable course" was first had. The deed to the defendant Katharine E. M. Hendrick was recorded July 14th, 1920. The alleged release is alleged to have been recorded November 24th, 1920. The alleged assignment to the complainant is alleged to have been recorded February 4th, 1921. In order, therefore, for the respective alleged

instruments, namely the alleged mortgage and the alleged assignment and release be held to have been other than void at the respective dates of the recording of the contract and the conveyance from one defendant to the other, it was necessary for the complainant to prove that the alleged mortgage and assignments were duly recorded before July 2nd, 1920, and that the alleged release was duly recorded before July 14th, 1920. That is why the complainant needed to prove that the alleged mortgage, the alleged assignments, and the alleged release, were duly acknowledged.

Without, therefore, any suggestion to the Vice-Chancellor concerning the lack of qualification of the purporting Foreign Commissioner Erisman, the alleged mortgage and the alleged assignments should have been rejected. The alleged release, without proof of which, the alleged chain to the complainant would be broken, was admittedly not attempted to be proved by the original. The complainant's alleged chain was, therefore, apparently without a single link.

The defendants did, however, submit, at the outset, conclusive proof of the lack of qualification of the purporting Foreign Commissioner, absence of due acknowledgment of the alleged instruments, and evidence that they were not properly of record. The statute giving the right to demand the production of the original of a recorded instrument itself provides the right to challenge the proof of acknowledgment. If the purporting officer's certificate were conclusive, the statute would have no meaning. Such a certificate is not conclusive. The enactment of such a rule of conclusive evidence would substitute a notary's certificate for actual notice and would validate an expropriation of a right in real estate not otherwise valid, and would

be a violation of the fundamental Constitutional provisions.

Wigmore, Evidence, Vol. II, #1353, Page 1666.

The question presented is whether the Legislature can constitutionally oblige the Judiciary to forego its own investigation and accept some person's testimony as determining the fact.

“To this question the answer can hardly be doubtful. It is one thing for the Judiciary, while exercising in its own way its constitutional powers, to choose to accept the aid of an official certificate in reaching its determination; but it is quite a different thing for the Judiciary to be forbidden altogether to exercise its powers in a certain class of cases. The judicial function under the Constitution is to apply the law; to apply the law necessarily involves the determination of the facts; and to determine the facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigation is to forbid the exercise of an indestructible judicial function. To make a rule of conclusive evidence, compulsory upon the Judiciary, is to attempt an infringement upon their exclusive province.”

The assumption that a Foreign Commissioner has performed his official duty properly does not extend its validating effect to the question whether the purporting officer was such in fact. The pretended seal of an imposter is not clothed with any dignity by the statute. The question being whether a proffered instrument was properly recorded, the fact of the qualification of the purporting officer is fundamental and may be inquired into just as

any other facts. The issue having been tendered in the defendants' answer that that was no mortgage, and the Secretary of State's certificate having been presented, a trial of the fact of proper record, being the effective determination of title to property, was essential to due process of law.

*Wade on "The Law of Notice"* sets forth the principles governing the proof of want of acknowledgment of a deed and the effect of such want as follows:

"112. Acknowledgment.—The recording acts of the states of this Union almost uniformly require instruments offered for record to be duly acknowledged before an officer authorized by law to take acknowledgments. And though the officers designated by law to receive such instruments for record have no judicial authority to determine whether they are legally entitled to registry, and consequently receive and file such as are offered, regardless of legal defects in their execution or acknowledgment, yet a failure to comply with these formal prerequisites on the part of a grantee generally has the effect to validate the record as constructive notice to subsequent purchasers. It is not sufficient that the fact the execution was properly acknowledged can be established by evidence. All this must appear in the official certificate attached to the instrument, and be spread upon the records, in order that the record shall operate a constructive notice."

"124. Statute Must be Complied with.—The requirements of the statute, both in regard to the official character of the acknowledging officer and the contents of his certificate, must be complied with in every substantial particular, or the record of the instrument will be inoperative as constructive notice."

The New Jersey statute makes the qualification of a Foreign Commissioner a matter of notoriety and charges the County Clerk with communicating the true facts to every person presenting a deed for record.

The certificate of the Secretary of State was duly offered in evidence by the defendant to prove the want of authority in the pretended Foreign Commissioner and was, for purposes of identification, not only marked but read into the record. The mere suggestion of such a certificate counteracts the seal of the pretended Commissioner, since only through due registration by the Secretary of State and listing with the County Clerk has the Commissioner's purporting seal validity or effect. It was the duty of the Vice-Chancellor to take notice independently of the certificate of the Secretary of State that the purporting Foreign Commissioner was not qualified and to take as proof of that fact the certificate of the Secretary of State. *Wade on Notice* says:

“1413. *Official Signatures and Seals.*— Not only will courts take judicial notice of the officers of the county within which they are regularly held, but for many purposes they will take notice of their official signatures. Thus, the court will recognize, without allegation or proof, the signature of a clerk of a court of record to a transcript; the official signature of the register or recorder of deeds, the collector of levee taxes, and the signatures of attorneys of the court. *The signatures of state officers are judicially noticed, and in one instance, at least, that of the deputy auditor-general.* The seal and signature to a patent to public lands of the United States will be judicially noticed by all courts, both state and federal, without being pleaded or supported by evidence of

their genuineness. But the doctrine that courts will take notice of the signatures of officers, even of the county, is subject to certain qualifications. Thus, they will uniformly take notice of the signatures of clerks of courts, when such signatures are affixed to copies of the proceedings of the court, while it has been doubted whether the signature of the same officer, though affixed in the line of his duty, to a county bond, would be so recognized. Nevertheless, the signature of a county officer to a tax deed was judicially noticed in California. So, notwithstanding the notice taken by the courts of the signatures of attorneys, it is only when they are used in connection with their professional duties as officers of the court. The signature of a notary public is also noticed by the courts of Illinois, when he is authorized to certify to an oath without a seal. It goes without saying that a court will be presumed to know the signature of its own clerk. Official seals are more extensively noticed in this manner than the mere signatures. Thus the national seals of countries recognized by the United States are entitled to judicial recognition. So the seal of a notary public is entitled to notice when used to attest acts done under the law mercatoria, but not otherwise, except as provided by statute."

A legal consequence may only be based upon its proper premise. It was decided, for example, by the Court of Appeals in New York that a conviction for perjury must be set aside upon the ground that the offer to prove that the purporting notary before whom the oath was made had become disqualified by residence out of the State of New York in New Jersey.

Lambert v. People, 76 N. Y. 220;  
Throop on Public Officers, Secs. 646, 653.

What is proper evidence of the lack of qualification of an officer was decided February 2nd, 1925, by the Appellate Division of the Supreme Court of New York, for the First Department, in vacating a decree of divorce. The Court took the certificate of the clerk of the Court of Appeals, the equivalent in the premises of the Secretary of State of New Jersey, and declared that the fact it certified was thus sufficiently established, other jurisdictional matters (of which the lack of qualification of Erisman was herein certainly alone sufficient) being otherwise shown. The Court said:

“The facts sufficiently appear in the affidavits of Pierre Morachini, verified September 3, 1924, Howard C. Kelly, verified September 3, 1924, Leo Dibbern, verified August 26, 1924, and the certificate of the clerk of the Court of Appeals, certifying that Herbert F. Miller was never admitted to practice law in the state of New York. There are in addition certificates from the clerks of the Appellate Division of each department, as well as further affidavits of Pierre Moracchini, verified September 23, 1924, and Howard C. Kelly, verified September 24, 1924.”

Morrachini v. Morrachini, 208 N. Y. S.  
22.

The presence on an alleged original instrument of a purporting certificate establishes only that fact and must not be confused with evidence that it is a legal certificate or be mistaken for proof of the ultimate fact that the instrument was duly executed and acknowledged before a properly qualified officer, and duly recorded. The materiality, on the other hand, of proof of the facts of qualification is undoubted. That the Vice-Chancellor erred

doubly in admitting instruments when the Secretary of State's certificate that the purporting Foreign Commissioner was not qualified was submitted and in thereafter rejecting that certificate is evident.

Chamberlayne, Evidence, #1760, citing the opinion of this Court in American Process Co. v. Pensauken Brick Co., 75 Atl. 976.

Section 936 of the New York Code of Civil Procedure, which declares that the certificate of acknowledgment is not conclusive expresses a rule of evidence that is general. Mutual Life Insurance Company v. Corey, 135 N. Y. 326, 336. How much less must it be presumed in New Jersey, where the statutes make it remiss for anybody not to know who are qualified as Foreign Commissioners, that a person not qualified was qualified!

All that was attempted by complainant in the face of the challenge was the identification of one signature of Erisman as a subscribing witness not to one of the instruments for the production of the original of which demand had been made. No mention of the acknowledgment of the instruments offered was made by the complainant and they were withheld from inspection by the defendants. They were not even attempted to be proved by subscribing witness. That, of course, would not have availed the complainant, since what he needed to establish was that they were notice to the defendant Frank Hendrick prior to July 2nd, 1920. Unless some controlling legal fact contravened, the purchaser had the right to the adjustment of rights under the contract between the parties thereto. What was done by Mountain Lakes, Inc. with other parties was, until the purchaser was legally

charged with the consequences, *res inter alios acta*. The contract, recorded or unrecorded, gave no warrant for the placing of the alleged mortgage on the purchased property, for, first, the alleged mortgage did not conform to the contract, second, the supposedly innocent third party, North Jersey Title Insurance Company, disclaimed having notice of the contract April 29th, 1920, the alleged date of the mortgage, third, if it did have notice, the purchasers rights were also from that fact superior to the lien of the alleged mortgage, and, fourth, when the contract was filed, which was before the purchaser is alleged to have had notice of the alleged mortgage, the supposedly innocent third party, North Jersey Title Insurance Company, had already, according to complainant's claim, consummated its bargain with Mountain Lakes, Inc., and the contract could not have been any inducement to it. Anything that was told the purchaser, therefore, about an alleged mortgage could not validate the record, or destroy any property right or avoid any consequence of the absence of notice up to the time of the communication, whether the purchaser believe the communication or not or acted upon it or not. The proof is that the deed to the purchaser was the unilateral act of the seller and that the purchaser did not accept it as defining his rights or a waiver of the terms of the contract.

The complainant, however, by insisting, with North Jersey Title Insurance Company and Mountain Lakes, Inc., that the circumstance that the purchaser became aware, on July 6th, 1920, that a plan was being carried out, initiated by the filing of a fictitious mortgage to enforce upon the purchaser a waiver of his rights under the contract, gave the alleged lien of the mortgage priority to those rights, has accepted that plan as his own.

The principle that complainant must stand or fall on is that the device of recording a mortgage may be made the basis of expropriation through an administrative proceeding. The theory of complainant's counsel and the Vice-Chancellor set forth in the record, in argument, and in the conclusions, is that the piece of paper supplants the "final hearing" by the court of equity as well as trial by jury and makes the signing of a decree of foreclosure of a mortgage the last act in the performance of a purely administrative function. The piece of paper, the evidence though it be of a series of crimes, beginning with the alleged signature, through the alleged acknowledgment, recording, assignment, release, and reduction, and down to the use as evidence in a court of equity, may not, according to this theory, be questioned as to its competency, relevancy, materiality, or admissibility, and by its sanctity, outweighing the great seal of the State itself, precludes all inquiry into the justice of the consequences attending its acceptance in evidence and as valid and effective.

That this theory is false is fundamental. If the statute giving the Court of Chancery jurisdiction over the foreclosure of mortgages is susceptible of such a construction, application, or interpretation, it is itself void under the Constitution of the United States and the Constitution of the State of New Jersey. The defendants at all times preserved in pleading at the trial, and in their Petition of Appeal, the point that no cause of action was set forth in the Bill of Complaint or established in proof. They objected to the jurisdiction of the court over the subject matter of the alleged cause of action under the Bill of Complaint. The jury trial provided in the statute giving jurisdiction over suits to foreclose mortgages is not preserved

as a right of the parties but as an aid to the court, the verdict not being binding on the court. Although the defendants did not insist upon a trial by a jury, their objection was to the taking of their property without due process of law and included insistence upon that right. The defendants may now insist that the decree should be reversed for the double reason that the Vice-Chancellor erred in accepting the instruments of which production of the originals was demanded in evidence and in assuming, upon the theory that the production of these instruments precluded other inquiry, jurisdiction of an alleged cause of action based upon the bill of complaint reciting them.

#### POINT V.

**The act empowering the Court of Chancery to decree the sale of mortgaged premises is unconstitutional.**

The Act, Article X, Section 53, provides:

“When a bill shall be filed for the foreclosure or satisfaction of any mortgage, it shall be lawful for the court to decree a sale of the mortgaged premises, or such part thereof as shall be sufficient to discharge the said mortgage or incumbrances on the said mortgaged premises, besides costs.”

Sections 95 and 96 provide for the hearing of causes by Vice-Chancellors.

The statute by its terms empowers a Vice-Chancellor to determine whether there is a mortgage upon the premises.

It is obvious that the decision of the Vice-Chan-

cellor acting under the power attempted to be conferred by this act might determine title to real estate. This court said, in *Hutton v. City of Camden*, 39 N. J. Law, as follows:

“If a man’s property cannot be taken away from him except upon trial by jury, or by the exercise of the right of eminent domain upon compensation made, neither can he, in any other mode, be limited in the use of it.”

The Court also said:

“It is not within the competence of legislation of this state to authorize any tribunal to render a judgment against the person or property of a citizen without a notice, and an opportunity afforded him to be heard.”

The Supreme Court of the United States in *Boswell’s Lessee v. Otis*, 9 How. 336, held a decree of the Ohio State Court void on the ground that the Court exercised general power under a special statute and a special bill. In this case also, the Court decided an action of contract upon a bill and under a statute limiting jurisdiction to the foreclosure of a mortgage.

The defendants had no notice of an action of contract against them. The bill and the statute assured against such a proceeding. The Supreme Court said:

“It is said that the statute authorizes a decree for money. This may be admitted. Under the rescission of a contract the money paid may be decreed to be refunded, and the land covered by the contract, being within the special jurisdiction of the Court, may be ordered sold. But the power of the Court is limited to this. Under the assumption of a special power, it cannot be made general under any supposed necessity, be-

yond the provisions of the act. Such a construction would not only pervert the object of the legislature, but it would sacrifice the property of an individual without notice in fact, and who had no opportunity to make his defence."

The requirement of notice of the action relied upon is jurisdictional.

*Edwards v. Brownslow*, 271 Fed. 797, 798,  
citing *Boswell v. Otis*, 9 How. 336.

The bill of complaint does not allege either in words or by inference that the defendants recognized that the mortgage alleged in the complaint was ever an obligation on their premises. The answer, moreover, especially in the eleventh paragraph, sets up the right to hold the premises free and clear. The answer, further, alleges that the claim of a mortgage is in effect a claim of ownership. The issue is one of title to property claimed in hostility to the mortgagor.

"A foreclosure suit is not a proper proceeding in which to litigate the rights of a party claiming title to the mortgaged premises in hostility to the mortgagor. *Lewis v. Smith*, 9 N. Y. 502, 514; *Bogey v. Shute*, 4 Jones Eq. 174; *Jones v. St. John*, 4 Sandf. Ch. 208; *Wilkins v. Kirkbride*, 12 C. E. Gr. 93. This suit is not proper a proceeding for the establishment or vindication of their rights."

*Coe v. N. J. Midland Railway Co.*, 31  
N. J. Eq. 105, 116.

The foregoing decisions make it unnecessary to discuss the broad question of due process of law. It is sufficient to show that the principle now con-

tended for is accepted even where the jurisdiction of equity to act without a jury is not disputed. A case on all fours, except that an injunction was sought instead of a foreclosure decree and the petition was based not upon an allegation of a mortgage but upon a prior homestead entry, is *Black v. Jackson*, 177 U. S. 349, an appeal from the Supreme Court of the Territory of Oklahoma. The plaintiff there alleged that he had no adequate remedy at law. The Court held that the defendant could not be deprived of the right to a trial by jury. Under the Fourteenth Amendment, the principle applies to the State of New Jersey. The State Constitution moreover, provides for the right of trial by jury. The decisions of this Court hold that the application of the Constitutional provision may not be limited. All the cases permitting jurisdiction in equity to act without a jury hold that where, at the adoption of a constitution giving jury trial in common law cases, a matter was of such nature as demanded a common law action with jury trial, the legislature can not, by giving equity jurisdiction over it, deprive a party of jury trial.

Brannon, *The Fourteenth Amendment*, p. 286.

*Black v. Jackson*, 177 U. S. 349, was based on *Webster v. Reid*, 11 How. 437, in which case a statute providing for debarring of Indians of title to lands without the intervention of a jury, was condemned as "in violation of the Constitution of the United States, of the Ordinance of 1787, and the organic law of 1838, establishing the territorial government of Iowa."

Cases are cited from many States in *Lovings v. N. & W. Ry. Co.*, 47 W. Va. 582. The opinion

quotes from *Barlow v. Daniels*, 25 W. Va. 517, as follows:

“In what does the right of trial by jury consist? The Constitution furnishes no answer. It is spoken of as something already sufficiently understood and referred to as a matter already familiar to the public mind. It was unnecessary to define this great right. It there stood as the representative of an idea as certain and definite as any other in the whole range of legal learning.”

Brannon sums the matter up so far as it is applicable to the statute in question, as follows:

“The act giving such jurisdiction in equity would be void and inoperative *if the party objected*. A late case, *Black v. Jackson*, 177 U. S. 349, sustains the proposition that where the controversy is purely of a legal nature, there can not be jurisdiction in equity depriving a suitor of a jury—even a statute giving such equity jurisdiction in such case would be void. The case just cited holds that as there was a legal remedy for recovery of land, equity could not assume jurisdiction, and thus deny a jury trial. This doctrine is found in *Lovings v. Norfolk & Western Railroad Company*, holding that a statute providing for a trial of an appeal from a justice involving a purely common law matter, by a jury of six, when the Constitution simply calls for a jury trial at common law, was unconstitutional and void. The case required twelve jurors under the Constitution.”

Brannon, Fourteenth Amendment, 286-287.

The defendants set up that there was an adequate remedy at law. The right, if any, of the complainant was a legal one. He acquired what-

ever right he had from Mountain Lakes, Inc. His allegation of the taking of the deed subject to a mortgage did not avail himself and he relied in proof and in argument of the contract between Mountain Lakes, Inc., and the defendant Frank Hendrick. The Conclusions of the Vice-Chancellor are rested on the contract. The whole theory of the complainant is that the defendants should pay the complainant what they failed to pay Mountain Lakes, Inc. The concession is inferentially made as a justification of the result arrived at by the Vice-Chancellor that if the defendants had paid Mountain Lakes, Inc., there could be no recovery by the complainant. In any event, the defendants did object that there was no subject matter for equitable jurisdiction and that they had rights under a contract which could not be taken away in the suit in equity.

As Brannon says, and the opinion in *Coe v. N. J. Midland Railway Co.*, 31 N. J. Eq. 105, 116, holds, while a mortgage may be foreclosed in equity, if rights are set up which involve an interest in real estate, they may not be adjudicated in such a suit. The difficulty with the statute from the point of view of the Constitution is that it empowers the Vice-Chancellor to decree a sale upon the face of the bill of complaint in any case. Both the complainant and the Vice-Chancellor maintain that the statute gives jurisdiction in equity over the issue of title and over the issue of contract. The issue of the qualification of Erisman, tendered in the answer by denial of the making of a mortgage, was a broad matter of law. The allegation of full payment by the defendants was another. A statute which empowers a Vice-Chancellor to decree a sale upon his determination of such issues is unconstitutional.

The statute also plainly impairs the obligation of contracts, abridges the privileges and immunities of citizens, and denies equal protection of the laws, all in violation of the Constitution of the United States. The Constitution of the State of New Jersey appears to limit the application of the inhibition against the impairment of contracts. If, of course, the Constitution of the United States prohibits the enactment of the statute, it is unnecessary to argue the scope of the State Constitution. But it happens that the State Constitution attempts to give expression to a narrow interpretation of the prohibition of the Constitution of the United States, which interpretation must be rejected for both clauses. Four circumstances control the application of the prohibition to this case: first, the contract was executed and delivered in New York and contemplated consummation in New York by the delivery of the deed to the completed house and grounds; second, the defendants are citizens of the State of New York; third, the prohibition is not limited to a contract entered into before a statute of continuing operation and recurrent application was enacted; and, fourth, the prohibition is not limited to a statute but applies also to judicial action under a statute or otherwise.

The impairment, abridgement, and denial involved in the application of the statute to the defendants consists of the reading into the contract after its execution and delivery provisions giving the seller through another grantee the right, first, to preclude the purchaser and his grantee of a trial by jury to determine issues arising out of the contract and performance, second, to abridge the exemption of the defendants from expropriation of their rights without due process of law, and to exercise a remedy in equity by summary foreclosure

while no equivalent, mutual, reciprocal, or compensating remedy is afforded to the defendants.

A contract need not be destroyed by the obnoxious statute to bring the statute with the prohibition of the Constitution. A judgment or decree of the Court of Chancery may be tested as to its validity by the principles of the Constitution. This element of possible jurisdictional objection is commented on in the opinion of the United States Supreme Court in the leading case on the enforcement of contracts made in one State in another said as follows:

“Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties *over whom that court has no jurisdiction* do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.”

Pennoyer v. Neff, 95 U. S. 714.

Jurisdiction to make the decree against the defendants could be based only upon a conveyance duly acknowledged by which such a sale was consented to upon the non-performance of conditions in favor of a holder whose ownership is evidenced by such a conveyance duly acknowledged.

Clark v. Graham, 6 Wheaton 577.

No such conveyance was proved in this case and it was the right of the defendants under the contract that the jurisdictional fact should be tried by a jury. To read into the New York contract the right of Mountain Lakes, Inc. to discharge itself of its obligation by making a mortgage to an innocent third party and to foreclose the purchaser in equity is precisely like construing a statute as a continuing menace to legal rights under a contract. Justice Holmes, in *Phoenix National Bank v. Bacheller*, 151 Mass. 589, met the argument that "a discharge in accordance with the law cannot be said to impair the obligation of a contract which contemplated it, or to deprive the contractee of property without due process of law when that property was created subject to destruction in that way" by the comment that "It does not follow, because the discharge if effective does not impair the obligation of the contract, that absolute liability to it is a part of the substantive obligation. The substantive promise and the obligation of the contract are different things." He then quoted the language from *Ogden v. Saunders*, 12 Wheat. 213, 369, illustrating the limitation upon the power of a State court to read conditions into the contract of a citizen of another State, as follows:

"But when, in the exercise of that power, the States pass beyond their own limits, and the rights of their own citizens, and act upon

the rights of citizens of other States, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other States and with the Constitution of the United States."

Justice Holmes then commented on this language as follows:

"This language certainly gives the impression that our decision would be regarded as subject to review, possibly on the ground of an implied restriction on the power to pass insolvent laws reserved to the States (*Denny v. Bennett*, 128 U. S. 489, 497); possibly on the ground that the discharge would impair the obligation of contracts with persons not within the jurisdiction (*Cook v. Moffat*, 5 How. 295, 308); possibly by reason of the Fourteenth Amendment (*Pennoyer v. Neff*, 95 U. S. 714); possibly on some vaguer ground. We feel the force of the reasoning quoted from *Stoddard v. Harrington*, 100 Mass. 87, 89, but that case did not profess to weaken the authority of *Kelley v. Drury*, and, moreover, the question which we are now considering is not what would be our own opinion, but what seems to be the opinion of the Supreme Court of the United States."

Provisions of State statutes to be read into contracts between citizens of the State must not alter the relations between the parties to the contract.

"The German Mutual Fire Insurance Company was organized under our general laws, in 1893, and the complainant became a member of it in 1898. As we have seen, the company had then no power to change itself into a joint stock company. The complainant's right to membership was one of the ben-

efits accruing to her from her contract of insurance in the company. Of this benefit the company had no power to deprive her, except in the mode provided by the contract itself. 'The act of March 6th, 1899, if enforced against the complainant, would impair the obligation of her contract by enabling the company to take from her a right derived from her contract with it, in a method not authorized by the contract. Such a law would be unconstitutional and void.' Although the act under which the company was organized is subject to amendment, alteration and repeal by the legislature, yet such amendment, alteration or repeal can be effected only by the legislative power of that body, and its legislative power does not extend to the enactment of a law which impairs the obligation of a legal contract previously made."

Schwarzwaelder v. German Mutual Insurance Co., 59 N. J. Eq. 589, 594.

The Chancery Act provision has the effect of a general statute reserving the right to reform a contract to conform it to the principles of equity. To give such general power is beyond the province of a State legislature.

"Besides this general law of the state, the charter of the defendants contains this provision that 'the legislature may, at any time, alter, modify, or repeal the same.'

"The object and purpose of these provisions are so plain, and so plainly expressed in the words, that it seems strange that any doubt could be raised concerning it. It was a reservation to the state, for the benefit of the public, to be exercised by the state only. The state was making what had been decided to be a contract, and it reserved the power of change, by altering, modifying, or repealing the contract. Neither the words

nor the circumstances, nor apparent objects for which this provision was made, can, by any fair construction, extend it so giving a power to one part of the incorporators as against the other, which they did not have before."

Zabriskie v. Hackensack & N. Y. R. R. Co.,  
18 N. J. Eq. 179, 185, 186;

Mills v. R. R. Company of N. J., 41 N. J.  
Eq.

In the application of the supreme law to a provision of law impairing the obligation of contracts, this Court will avoid if possible condemnation of more than the specific grant of power found objectionable.

Berger v. U. S. Steel Corporation, 63 N.  
J. Eq. 809, 828.

Here the provision is the grant of power to the Court of Chancery to decree a sale where an issue of fact is presented involving the existence of a mortgage and the determination of title.

It is no answer that the grant merely provides a remedy.

"Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution.

"This subject came before the Supreme Court in the case of Green v. Biddle, decided in 1823, and reported in 8 Wheat 1. It appears to have been twice elaborately argued by counsel on both sides, and deliberately considered by the court. On the

part of the defendant in that case, it was insisted that the laws of Kentucky passed in 1797 and 1812, concerning occupying claimants of land, impaired the obligation of the compact made with Virginia in 1789. On the other hand, it was contended that these laws only regulated the remedy, and did not operate on the right to the lands. In deciding the point, the court say, "It is no answer that the Acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these Acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests." And in the opinion delivered by the court after the second argument, the same rule is reiterated in language equally strong. (See pages 75, 76, and 84.) This judgment of the court is entitled to the more weight, because the opinion is stated in the report of the case to have been unanimous; and Judge Washington, who was the only member of the court absent at the first argument, delivered the opinion of the second."

Bronson v. Kinzie, 1 How. 311.

The distinction between mere remedy and substance has been clearly made.

"The principle, that what is apparently mere matter of remedy, in some circumstances, in others, where it touches the substance of the controversy, becomes matter of right, is familiar in our constitutional jurisprudence in the application of that provision of the Constitution which prohibits the passing by a State any law impairing the obligation of contracts. For it has been uniformly held that any law which in its

operation amounts to a denial or obstruction of the rights accruing to a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

McCracken v. Howard, 2 How. 608, 612;

Cooley, Const. Lim. 285;

Pritchard v. Norton, 106, U. S. 124, 132.

The question whether the statute may constitutionally apply to subsequent contracts presents the dilemma that if it may it denies due process of law and if it may not it offends by virtue of its extension to subsequent contracts against the prohibition of impairment of the obligation of contracts. The conflict of opinion was, it is true, resolved by the decision that the statute may constitutionally limit rights under subsequent contracts. But the limitation in the statute under consideration being of the right to trial by jury is a violation of the guarantee of due process of law.

"The obligation of a contract' is, therefore, the collective legal rights and duties which the existing law applicable to the contract raises or creates out of or from the stipulations of the parties; rights which it devolves upon one party, and corresponding duties which it lays upon the other.

"I have been thus particular in attempting to analyze and define the term 'obligation of a contract,' because some of our most eminent jurists have been greatly troubled by the phrase. I shall not refer to cases in which judges have examined the import of the words; their number is legion; their conflict is irreconcilable; a citation of them would unnecessarily consume time and space. A brief account of one leading case in the Supreme Court of the United States

will sufficiently indicate the difficulty and the opposition of views. In *Ogden v. Saunders* (1827) the effect of a discharge under a State insolvent law was considered. In a former case, *Sturges v. Crowninshield*, the same court had held that such a statute, so far as it applied to pre-existing contracts, was void. *Now, the indebtedness affected by the discharge had accrued subsequently to the passage of the State law.* It was urged on behalf of the creditor that the State legislation still impaired the obligation of a contract. On the other hand it was claimed that, the insolvent law having been in existence at the time when the contract was made, its provisions were to be taken as a part of the agreement; or, to express the thought better, that the obligation of the contract was only such a compulsive of binding efficacy as the whole existing municipal law applicable thereto gave to the stipulations; in other words, that the obligation flowing from the existing law, upon the occasion of the contract, was not absolute upon the debtor, requiring him to pay at all events, but was only qualified, requiring him to pay unless the contingencies should happen by which he might be discharged. The majority of the court adopted this view. Three judges, however, Chief Justice Marshall, and Justices Story and the Contract, *and that, no reference having been made in express terms by the parties to the existing insolvent law, as limiting the extent of the debtor's liability, he could not take advantage of that statute.* The majority of the court were plainly right; and they established a principle of interpretation which has been generally assented to by the national and State tribunals \* \* \*. Two persons enter into a contract; the law by its command obliges one of these parties to do the certain thing agreed upon; the law also says to this

*and Duvall were of the opinion that the obligation inhered in the very stipulations*

party, If you do not perform the thing commanded, you shall be subjected to a certain kind of punishment. This latter is the sanction, and this sanction or remedy as much forms a part of the obligation of the contract as does the very thing agreed to be done. In other words, the parties, by entering into a contract, create an occasion by which the commands of the law come into play; these commands give one party a right as against the other to have a certain thing done, and subject the other to the duty of doing that thing. But this is not all. The very same contract gives to the first party the right against the other to say, If you do not perform exactly what you agreed to do, you shall do something else by way of penalty or satisfaction; and a corresponding alternative duty rests upon this other party to do the thing which is required by way of penalty or satisfaction. In other words, the right to the remedy is included in the notion of the obligation of a contract. Were it otherwise, the obligation would be binding only upon those parties who should voluntarily submit to it, and the law, as a compulsive and restraining force, would become a mere nullity."

Pomeroy's Const. Law. (Bennett's ed.)

##592-597.—Ed.

The remedy is a continuing condition and may have a subsequent effect upon a contract not made when the statute providing the remedy was enacted. This may occur in two ways, first, by a novel judicial construction of the statute, and, second, by the enactment of an auxiliary statute subsequent to the execution of the contract. Both such changes occurred to affect the contract here, first, the interpretation by the Vice-Chancellor of the scope of his power under the statute was novel

and a departure from the authority of *Coe v. Midland Railway Company*, and, second, an act, Chapter 205 of the Laws of 1921, amended the law respecting foreclosures extending the scope of the decree and brought the statute to a date subsequent to that of the contract. It was just such a change which was made the basis of the decision in *Bronson v. Kinzie*, 1 How. 311. The decision in *Boswell's Lessee v. Otis*, 9 How. 336, was based on precisely the provision which was added to the statute by the amendment. The entire statute not only as amended but also as it may be amended constitutes a standing threat of determination in equity of legal rights, not only under New Jersey contracts between New Jersey citizens but also under contracts between citizens of another State and between a citizen of another State and a citizen of New Jersey.

The broad power conferred upon the Court of Chancery by the statute permits abridgment of the rights under the contract much more serious than may be made by statute and impairment thereby without due process of law constitutes a continuing menace to those rights. That these matters are important in their effect upon the rights under the contract is what makes the rule applicable.

Chief Justice Marshall, in *Ogden v. Saunders*, Duval and Story concurring, maintained in an elaborate and powerful opinion that, however an existing law may act upon contracts when they come to be enforced, it does not enter into them as part of the original agreement; and that an insolvent law which released the debtor upon conditions not, in fact, agreed to by the parties themselves, whether operating on past or future contracts, impaired their obligation. This argument

he characteristically enforced by pointing out that upon the opposite view the legislature need only pass a general law declaring all contracts subject to legislative control, and to be discharged as the legislature might prescribe, to enable the State thenceforward to completely nullify and evade the clause of the Constitution under consideration. **But it was also held by a divided court, Marshall concurring, that the State law, if a part of the contract, was such only as between citizens of that State.**

Ogden v. Saunders, 12 Wheat. 332, 339, 358, 369;

See quotation and comment by Justice Holmes above.

#### POINT VI.

**There was a defect of parties defendant and the complainant has an adequate remedy at law.**

The alleged bond purported to be that of Mountain Lakes, Inc., to North Jersey Title Insurance Company and the alleged release purported to be that of H. J. Hapgood, President of Mountain Lakes, Inc. The alleged assignment to the complainant purported to be that of North Jersey Title Insurance Company as guarantor of the alleged mortgage as reduced under conditions of a private contract. The taking of an alleged mortgage as mortgagee and the alleged assigning as guarantor put North Jersey Title Insurance Company into the position of the mortgagor. It is indeed strange that all those who covenanted with the complainant are omitted as parties defendant and precisely those

who never had any relations with the complainant with respect to the property should be made the only defendants.

“If a mortgagee has assigned the mortgage absolutely to a third person, the mortgagee is not a necessary or proper party to the foreclosure suit. But if the assignment is not absolute, then he is necessary party.”

Miller v. Henderson, 2 Stock. 320.

It is only by assuming that the complainant is without recourse to Mountain Lakes, Inc., H. J. Hapgood, and North Jersey Title Insurance Company, that the allegation of the bill that the complainant has no adequate remedy at law may be regarded seriously. It is patent that the complainant's true recourse is to Mountain Lakes, Inc., on its bond, to H. J. Hapgood as maker of the alleged release and assignment, and to North Jersey Title Insurance Company upon its guarantee. It is also patent that among the complainant's remedies are adequate remedies at law. The authorities all hold that, under any circumstances, the complainant would have recourse to that defendants only if he had no other recourse. North Jersey Title Insurance Company, Mountain Lakes, Inc., and H. J. Hapgood may not be in court merely to shift their obligations to the defendants. They should be in as parties wherever the complainant seeks a remedy or the complainant may not be heard against those whom he seeks to hold only through them.

“The reason is, by refusing to give the security any greater virtue in his hands than it had in the hands of the original mortgagee, he is put in no worse condition that he was before he obtained it; in the language of some of the judges, he is not hurt. The

mortgage in the hands of the fraudulent grantor was unquestionably void against creditors. To give it any greater force against creditors in the hands of his assignee, it must be shown to have acquired a new virtue or equity and this can only be imparted to it by the actual payment of money, the surrender of a valuable right, or the assumption of an irrevocable obligation. 2 Lead. Cas. in Eq. (4 Am. ed.) 82. *Such new equity can only arise when a third person has, by an innocent purchase of the security for value, placed himself in a position from which it is impossible to extricate himself without loss; but if, by declaring the paper still infected with its original infirmity, he is left just where he was when he took it, he suffers no hurt, and the court is bound to declare it invalid. Creditors may then give justice without injustice to him. Equity will give validity to that which would otherwise be invalid only when it is clearly necessary to prevent loss to an innocent person.* By passing to his creditor a security which he has created as part of the means to defraud his creditors, does not discharge it. The debt due to Mr. Garrison in this case has not been discharged.

De Witt v. Van Sickle, 29 N. J. Eq. 212.

Even if the defendant grantee had assumed to pay the alleged mortgage, North Jersey Title Insurance Company could not give to the complainant a right it had not itself acquired, the contractual basis and consideration for the assumption not existing.

“A mortgagee can derive no advantage from a covenant of assumption in a deed, if the covenant be invalid between the parties to the deed—e. g., where there was no agreement for the assumption, and though

the deed contained the covenant, the covenant escaped the notice of the grantee, it being inserted in an unusual place."

Bull v. Titsworth, 2 Stew. 73.

The complainant would have, without the guarantee of North Jersey Title Insurance Company, recourse to it on account of its patent complicity with Mountain Lakes, Inc., and H. J. Hapgood. The taking by a title company, in the course of its business of guaranteeing mortgages, of a mortgage purporting to be acknowledged an officer not qualified, can only be explained on the ground that the mortgage was accepted with eyes open in pursuance of an undertaking that it could not be sold to a stranger. So the bringing of H. J. Hapgood into the chain of title twice, once as assignee so that he might assign with the guarantee of North Jersey Title Insurance Company, and again to make a release to his own corporation so that the reduced mortgage might be assigned with the same guarantee to the complainant, points unmistakably to a plan of North Jersey Title Insurance Company as normally the original mortgagee to permit H. J. Hapgood to bring into existence a purported mortgage without legal obligation or security. The complainant asks the Court to give to this alleged mortgage a validity which Mountain Lakes, Inc., H. J. Hapgood and North Jersey Title Insurance Company could not give to it and to relieve the complainant of the disagreeable duty of insisting upon the true nature of the transaction between him and North Jersey Title Insurance Company.

"A bona fide assignee of a mortgage is entitled to hold it, as against the original owner, who, by placing it in her agent's hands assigned in blank or for a particular

purpose, gave him the opportunity to perpetrate a fraud upon her."

Putnam v. Clark, 2 Stew. 412.

If the defendants were under no obligation to Mountain Lakes, Inc., they are under no obligation to the complainant or his assignor by reason of the conveyance forced upon the defendant Frank Hendrick.

"If an involuntary grantee is under no obligation to indemnify his grantor against a mortgage on the premises, the mortgagee is not entitled to such indemnity."

Cordts v. Hargrave, 2 Stew. 446.

#### POINT VII.

**The decree should be reversed for errors in the admission and exclusion of evidence.**

The rulings of the Vice-Chancellor appear so plainly upon the face of the record to be not only erroneous but as indicating bias and prejudgment that argument in addition to what has already been made would be superfluous.

#### POINT VIII.

**The alleged mortgage would, if it had been duly made, executed, and delivered, have been cancelled by the assignment back to the president, of the alleged mortgagor.**

Mountain Lakes, Inc., provided the veil of corporate fiction behind which H. J. Hapgood operat-

ed. This court will, upon evidence that such operations were fraudulent, unhesitatingly pierce that veil.

“No citation of cases is necessary to establish the well settled doctrine that courts of equity will disregard the corporate form where justice requires it and its retention is not needed to protect some interest requiring protection.”

Shotwell v. Shotwell, 24 N. J. Eq. 378.

The witness Zabriskie testified that H. J. Hapgood was Mountain Lakes, Inc. In *Saling v. Saling*, 124 Atl. 249, the Court said:

“That a merger occurred when the fee and the charge thereon came into the possession of William Saling, appears to me to admit of no question.”

The pretense that H. J. Hapgood was a different person from the corporation will not suffice to avoid the cancellation of the alleged mortgage through a merger. As the Court said in *Saling v. Saling*, above-quoted:

“The prior mortgage became merged in the fee and therefore the cloud it casts upon the defendants' title will be removed.”

The execution of a mortgage of fifteen thousand dollars on premises including those contracted to be purchased by the defendant Frank Hendrick, the assignment thereof, and the release of the nine (9) lots from the obligation of the mortgage preliminary to the assignment of the mortgage as reduced to a mortgage of ten thousand dollars on the three (3) lots and the house, would, if really proved, constitute patent fraud upon the defendants sufficient to justify the Court in finding that

the alleged mortgage was cancelled by merger the moment it came into the hands of H. J. Hapgood, President of Mountain Lakes, Inc., the alleged mortgagor, which moment was, apparently, the very moment of the making, executing, and delivery of the alleged mortgage to the mortgagee who assigned it back.

“A court of equity will keep an encumbrance alive or consider it extinguished, as will best serve the purposes of justice and the actual and just intention of the party. The intention, however, must be innocent, and injurious to no one. *Starr v. Ellis*, 6 Johns. Ch. 393; *Clos v. Boppe*, 8 C. E. Gr. 270.”

*Andrus v. Vreeland*, 29 N. J. Eq. 394.

## POINT IX.

### **There has been no waiver by defendants.**

The controlling part of the proviso of the alleged deed and of the deeds to the defendant Katherine Edson Mumford Hendrick was in the words indicating that the alleged mortgage was secured by other property. There never was any claim that the three (3) lots and the uncompleted house should be “subject” to a mortgage of fifteen thousand (\$15,000) dollars, or in fact, of any ascertained part thereof. The testimony of the witness Alexander showed that the making of the alleged deed was to be regarded as an expedient to avoid the consequences for Mountain Lakes, Inc. of a declared default, for Alexander of the loss of his commission, and for the defendant Frank Hendrick, of the loss to general creditors of the money already paid. The purpose of the foreclosure

would appear to be to take the expedient of July 6th, 1920, as a forfeiture to North Jersey Title Insurance Company of the money paid by the defendant Frank Hendrick. But such an expedient is not fraught with such inequitable consequences. The contract was made in the State of New York. For that and other reasons the law expressed in a New York decision is relevant. The Court said:

“The contractor ought not to be paid for that which he has failed to furnish unless there be in fact a waiver which means an acceptance knowing of defects or else an estoppel, which means that the defendants are prevented from claiming the defects because it would be unfair to the plaintiff in view of their previous action. The plaintiff does not claim to have changed his position in any way. The whole doctrine of estoppel under the circumstances arising from specifying certain defects and omitting others is stated by Mr. Williston in his work on Contracts, at sections 743, 744. He there says: ‘On principle, however, it is always a question of fact whether the specification of a single reason operated as a deception which being relied on prevented the promisee from performing fully, as he would otherwise have done.’ And again: ‘But here, as always, where waiver is based on estoppel, it is essential that had there been no deception, the performance would have conformed to the requirements of the law. It is vital that the objections if stated could easily have been obviated. Otherwise it is clear that parties are not by their rejection of the tender on an insufficient ground, precluded from supporting the rejection on other grounds.’

“This is not a case of the sale of goods, (Spence v. Ham, 27 App. Div. 379.) The house was built upon the defendants’ prop-

erty. They could move into it, live in it and in this sense accept it without waiving any defects in construction. (Gray v. James, 128 Mass. 110.)”

Cawley v. Weiner, 236 N. Y. 361.

That there was understood to be no waiver involved in the taking of the alleged deed subject to the alleged mortgage is undisputed in evidence. The last word on this subject is the conclusion of Ewart's masterly analysis, in his "Waiver Distributed" published in 1917, at page 191, that "A stipulation in a contract for a good title cannot be eliminated by the unilateral act of the purchaser." Such a stipulation was contained in the contract between Mountain Lakes, Inc. and the defendant Frank Hendrick and it has never been performed. Of that North Jersey Title Insurance Company was well aware when, on October 29th, 1920, it exacted, over the protest, as always, theretofore and thereafter, of the defendant Frank Hendrick, payment by him of interest on a mortgage of fifteen thousand (\$15,000) dollars under the threat of foreclosing as against the defendants an alleged mortgage of fifteen thousand (\$15,000) dollars on lots and an uncompleted dwelling. That such a threat was serious, this suit shows. No mere letter had any weight with North Jersey Title Insurance Company, H. J. Hapgood, or Mountain Lakes, Inc. They were all intent on compelling payment without performance. That Mountain Lakes, Inc. could not recover in money without proof of performance is undoubted. That neither Mountain Lakes, Inc. nor its assignee could recover in foreclosure upon an alleged mortgage the entire consideration for which, if any, moving to the defendants, would be due and full performance of a construction con-

tract, is equally clear. As between the parties to this suit, therefore, the principle that land retained by the grantor is primarily liable upon a mortgage to which the part sold is taken "subject" sustains no impairment but is rendered more applicable by the proof.

"It is the well-settled rule in this state that the assignee of a mortgage takes it subject to existing equities between the parties to it; and it is the duty of the assignee to inquire of the mortgagor as to his liability thereon. 3 Comp. Stat. p. 3418 \* 31; *Magie vs. Reynolds*, 51 N. J. Eq. 120; *Cartun v. Myers*, 82 Atl. Rep. 14; *Gierth v. Fidelity Trust Co. et al.* (New Jersey Court of Errors and Appeals)."

*Walz v. Oser*, 93 N. J. Eq. 284.

The position of the complainant was not prejudiced by any action of either of the defendants. Neither of them ever agreed to pay the original alleged mortgage or any part thereof. The complainant's assignor, moreover, expressly assumed all defenses for the complainant. To take advantage from the proviso in the alleged deed to the defendant Frank Hendrick and in the deeds to the defendant Katherine Edson Mumford Hendrick, the complainant must show that he was prejudiced thereby. The bringing of this suit has concededly not arrested the payment of interest to the complainant on the money, if any, advanced by him to Mountain Lakes, Inc. or to North Jersey Title Insurance Company. Its determination will not, moreover, influence the payment to him of the principal sum. Upon the default of Mountain Lakes, Inc., the defendant Frank Hendrick became and was conceded by Hapgood, according to the witness Alexander, to be, a creditor, as to the property

sought to be foreclosed and otherwise. The property free and clear would not cover the damage of the breach. The making of the alleged mortgage had for its object to foreclose the defendant Frank Hendrick of his right to be made good for the breach and to take the property away from him before he got it. When the tax covenant of the alleged mortgage, precluding protest against tax valuation, the interest on the alleged mortgage, and the incompleteness of the house and grounds, are considered, it is clear that the rental or use value would not equal the charges, and that nothing passed by the alleged deed if the alleged mortgage was an obligation on the house and the three (3) lots. An examination as to the construction of the house would show the breach. Of this breach, both as to the amount of the alleged mortgage and as to the condition of the construction, Mountain Lakes, Inc., H. J. Hapgood, North Jersey Title Insurance Company, and the complainant were charged with notice by the filing of the contract. No mere demand of the defendant Frank Hendrick excused inquiry. The assignment of the alleged mortgage to the complainant did not give it any new vitality.

De Witt v. Van Sickle, 29 N. J. Eq. 212.

That Mountain Lakes, Inc. deliberately purposed not to perform its contract either as to title or as to construction and grading is the only conclusion possible to be drawn from the evidence. That North Jersey Title Insurance Company was aware of this purpose and aided and abetted its accomplishment is equally clear. The exaction of interest not payable even after due and full performance, the acceptance of muniments of title not acknowledged, the successive alleged assignments by which North

Jersey Title Insurance Company permitted H. J. Hapgood to come twice into the chain of title, once after protest to it by the defendant Frank Hendrick, the acceptance of an assignment and the making of an assignment thereafter with full knowledge of the controversy, the mass of transactions with Mountain Lakes, Inc., and the sale and guarantee of a mortgage the day after the alleged release of the nine (9) lots without notice of the controversy, if such was the fact, to the purchaser of its guarantee, are a few of the circumstances pointing unmistakably to privity between Mountain Lakes, Inc. and North Jersey Title Insurance Company. The record was open to the complainant, and he was charged with knowledge of the protests of the defendant Frank Hendrick, whether or not he was in fact warned by North Jersey Title Insurance Company. That he identified himself with his guarantor is conceded.

#### POINT X.

**The decree should be vacated.**

Respectfully submitted,

EUGENE M. GREGORY,  
Solicitor and of Counsel with Defendant.

FRANK HENDRICK,  
of New York City,  
Of Counsel with the Defendants.

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# New Jersey Court of Errors and Appeals

Between

J. MORGAN HOLLOWAY,  
Complainant-Respondent,

and

FRANK HENDRICK and KATHARINE  
EDSON MUMFORD HENDRICK,  
Defendants-Appellants.

On Appeal  
from  
Chancery.

## BRIEF FOR RESPONDENT.

### Statement of the Case.

This is an appeal from a decree of the Court of Chancery, advised by Vice-Chancellor Fielder. The suit is an ordinary one to foreclose a mortgage which, through mesne assignments, is held by the respondent (who will hereinafter be referred to as the complainant).

The decree is in the usual form, directing the property covered by the mortgage *at the time of the decree* to be sold to satisfy the sum of \$10,000, together with interest thereon at 6% per annum from April 29th, 1923, which was decreed to be due to the complainant on the mortgage.

The mortgage (Exh. C-2, C., p. 120) is dated April 29th, 1920, and was given by Mountain Lakes, Inc., to North Jersey Title Insurance Company to secure the payment of an indebtedness of \$15,000 evidenced by the mortgagor's bond of even date (Exh. C-1). The bond and mortgage are in the usual form, although the bond as printed in the State of the Case is not complete.

The North Jersey Title Insurance Company assigned the mortgage to H. J. Hapgood (Exh. C-3, C., p. 126), who in turn assigned it to Hackensack Trust Company (Exh. C-4, C., p. 130). The latter company subsequently assigned it to Hapgood (Exh. C-5, C., p. 133), who, on the following day, reassigned it to the North Jersey Title Insurance Company (Exh. C-6, C., p. 137). It was thereafter assigned to the complainant (Exh. C-7, C., p. 140).

The mortgage originally covered *twelve* lots on a map of property at Mountain Lakes, New Jersey. While it was held by Hapgood the second time, the principal was reduced to \$10,000, and *nine* of the lots were released under circumstances to be hereinafter detailed.

The property which the mortgage now covers—lots 34, 36 and 38—was, by deed dated July 1st, 1920, conveyed by Mountain Lakes, Inc., to defendant Frank Hendrick (Exh. C-8, C., p. 144). By deed dated July 14th, 1920 (Exh. C-9, C., p. 150), he conveyed lots 36 and 38 and purported to convey lot 40 (to which he had no title) to Lillian E. Eason, who, by deed dated the same day (Exh. C-10, C., p. 155), conveyed the same lots to Katharine Edson Mumford Hendrick, the other defendant in this action.

In all of these deeds *the property was conveyed subject to the mortgage in suit* (C., pp. 145, line 20; 151, line 9; 156, line 2). In each deed it was said that the mortgage was for \$15,000.

The conveyance to Frank Hendrick was made pursuant to a contract between him and Mountain Lakes, Inc., dated March 18th, 1920 (Exh. C-11, C., p. 159). The consideration stated in the contract was to be \$22,200, of which \$10,000 was to be paid on the signing of the agreement, \$2,200 at the time of taking title, and the balance of \$10,000

"by assuming and agreeing to pay a certain first mortgage of \$10,000.00, with interest @ 6% from July 1, 1920' (C., p. 164, line 20).

At the time fixed in the contract for closing title (July 1st, 1920), Mountain Lakes, Inc. was unable to convey the *three* lots which Hendrick had contracted to purchase subject to a mortgage for \$10,000, as \$15,000 was then due on the mortgage. Mountain Lakes, apparently, at that time was not in financial position to reduce it to \$10,000.

Mr. Hendrick was advised to and did take the title because Mountain Lakes, Inc. was then in a shaky financial condition (C., p. 93, lines 20 to 40).

At that time Hendrick complained that there was a mortgage of \$15,000 on the property while there should have been a mortgage for only \$10,000 (C., p. 104, lines 16 to 25), but notwithstanding that, he paid \$2,200 or \$2,300 remaining due on the contract, although he was told that he need not pay it until the mortgage had been reduced to \$10,000 (C., p. 105, lines 10 to 20). It was agreed at that time that the mortgage should be so reduced (C., p. 104).

At the time the title was closed, presumably in order to make a record, Hendrick delivered a letter to a representative of Mountain Lakes, Inc., detailing what he had done in an effort to close the title, objecting to the \$15,000 mortgage, and insisting that it should be for only \$10,000 (Exh. D-5, C., p. 177). He followed this up by a letter on July 10th, 1920 (Exh. C-13, C., p. 174a), demanding that Mountain Lakes, Inc. send him its check for \$5,000

"being the amount received by you (Mountain Lakes) from a mortgage of fifteen thousand (\$15,000) dollars, placed by you upon the house H.H. at Mountain Lakes in excess of the amount of ten thousand (\$10,000) dollars, provided to remain on the said house in my contract with you."

On September 18th, he made a further written demand for a reduction of the mortgage to \$10,000, stating in a letter written that day:

"I hereby demand that you immediately cause to be reduced from \$15,000 to \$10,000 the mortgage on house H.H. at Mountain Lakes, N. J." (Exh. C-14, C., p. 174b).

This letter was presumably written both on his own account and as agent for his wife, to whom he had conveyed two of the lots, for on October 29th, 1920 (Exh. D-8, C., p. 180), Hendrick sent his check to the North Jersey Title Insurance Company for \$450 to cover the six months' interest due on the mortgage of \$15,000. In the letter transmitting the check, he referred to his agreement "to assume or agree to pay a mortgage of \$10,000 at the time of taking title"; the fact that the property was at the closing of title encumbered by a mortgage of \$15,000; and that he was induced to accept the deed subject to a mortgage of \$15,000. He then went on to say (C., p. 181, &c.):

"The promise was made subsequently in writing that the mortgage would be straightened out and just before September 29th, 1920, I received a notice from Mountain Lakes, Inc., that my portion of the payment of the interest was \$300.

"I wrote to you recently to inquire whether Mountain Lakes, Inc. had sent the same message to you but received a reply to the effect that as between you and me the sum to be paid was \$450. I communicated the message received from you to Mountain Lakes, Inc., and *received a check for \$150 made out in my name.*"

This \$150 was the six months' interest on the \$5,000.

In compliance with the insistent demands of Hendrick as above detailed and in order to carry

out its contract with him, Mountain Lakes Inc., on November 22nd, paid off \$5,000 on the mortgage, and the then holder of the mortgage released the *nine* lots covered by the mortgage which were not included in the property sold to Hendrick (Exh. C-15, C., p. 174b).

Hendrick continued to pay interest on the mortgage up until April, 1923, when he defaulted in the interest which had become due at that time. Thereafter suit to foreclose the mortgage was begun by Dr. Holloway, the complainant.

The defendants (Mr. Hendrick and his wife), interposed an answer, which was stricken out. ~~He~~ <sup>they</sup> ~~was~~ <sup>were</sup> given leave to and filed an amended answer. Issue was joined and the case referred to Vice-Chancellor Fielder. After the hearing, pursuant to permission granted by the Vice-Chancellor, the defendants filed very voluminous main and reply briefs. The Vice-Chancellor's conclusions will be found on page 185 of the State of the Case.

#### Argument.

In their petition of appeal (C., p. 2) defendants have assigned *sixty-six* grounds of error, some of the shining lights of which are as follows:

"1. That the bill of complaint upon which said decree is made fails to set out an *equitable* cause of action."

"3. That the complainant had an adequate remedy at law."

"5. That the court had no jurisdiction to make said decree on the ground that by so doing it deprived the defendants of their right to a trial by jury."

"9. That there was no evidence before the Court upon which the Court could predicate a finding that a deed dated July 1st, 1920 conveying three lots to the defendant Frank Hendrick was ever executed."

This is the deed by which the defendants acquired title, yet this assignment of error would seem to indicate that they contend that they have no title.

“66. That the Court was without jurisdiction to try the case and to make a decree, in that Article X, Section 53, of an act respecting the Court of Chancery, Revision of 1902, empowering the Court of Chancery to decree the sale of mortgaged premises and Article XII, Sections 95 and 96 of an act respecting the Court of Chancery, Revision of 1902, are invalid and in violation of Article I, Part 7, of the Constitution of the State of New Jersey, guaranteeing the right of trial by jury, and in violation of Article IV, Section VIII, Part 3, of the Constitution of the State of New Jersey, guaranteeing,” &c.

The first twenty-eight pages of the defendants' brief are devoted to various comments and statements, some of which are immaterial, some incorrect, and none, so far as we can ascertain, directed to any particular reason why the decree of the Court below should be reversed. Because of these characteristics, we shall not attempt to answer these statements, but will answer only the “Points” made by the defendants. In doing so, we shall add very little to what the Vice-Chancellor has said in his conclusions.

#### **As to Point I.**

The proposition advanced under this point is that the mortgage was “extinguished” before it was assigned to the complainant in four ways:

(A) It is said first that it was “extinguished” because it was assigned to a man named Hapgood, who was the president of Mountain Lakes, Inc.

This proposition is based upon most violent assumptions and an utter disregard for the evidence.

There is no competent evidence that Mr. Hapgood was the same as Mountain Lakes, Inc. But if he had been, there are no equities in this case which would require a court of equity to disregard corporate form. When Mr. Hendrick agreed to purchase the property and as part of the purchase price to assume a mortgage thereon, there can be no conceivable equity that would require a court of equity to disregard the fact that Mr. Hapgood and the corporation were, in law, distinct persons, especially when to do so would invalidate that mortgage in the hands of a bona fide holder.

But even if the mortgage had, by any chance, been assigned to Mountain Lakes, Inc., it would not have been canceled by merger, in view of the fact that the property was owned by the defendants and payment of the mortgage had been assumed as part of the purchase price of the property.

(B) How a valid mortgage placed on the premises on April 29th, 1920, and recorded on May 6th, 1920, to which Hendrick was not a party could be canceled by the recording on July 2nd, 1920, of a contract between the mortgagor and Hendrick, is not pointed out or conceivable. Yet that is the second reason advanced for the proposition that the mortgage was "extinguished." It will be remembered that Hendrick in his contract of sale had agreed to assume as part of the purchase price a mortgage for \$10,000. At the time the contract was filed, the mortgage was held by the Hackensack Trust Company, a stranger, as was the original mortgagee North Jersey Title Insurance Company, to any of the transactions between Hendrick and the mortgagor.

(C) The third reason assigned under this point is quite as startling as the one just discussed. It

seems to be based on the idea that because Mountain Lakes, Inc., in the deed to Hendrick, had stated that the property conveyed thereby was subject to a mortgage covering that "and other property," that this shifted the mortgage to "the other property" and relieved the property conveyed, notwithstanding that a part of the consideration for the conveyance was this very mortgage.

We fear that these propositions are too abstruse to be comprehended by the ordinary mind.

(D) The fourth reason advanced under this point is that the release of the nine lots from the lien of the mortgage also released the three lots which Hendrick owned. The reason why the rule which defendants invoke is inapplicable to this case is clearly set forth in the opinion of the Vice-Chancellor (C., p. 188, line 35; p. 190, line 30).

Mr. Hendrick specifically agreed in his contract of purchase to assume as part of the purchase price a mortgage for \$10,000 covering the property which he agreed to purchase. When he took title he naturally objected to the fact that there was a mortgage of \$15,000 on the property and demanded that it be reduced or that the difference be returned to him, which demand he reiterated from time to time until the mortgage was finally reduced to \$10,000 (C., p. 104, lines 16 to 40; Exhs. C-13, C-14, D-5, D-8).

Manifestly, the doctrine which the defendants seek to invoke has no application to such a case. One who has agreed to purchase property and as part of the consideration to assume a mortgage for a given amount, cannot be heard to complain when the mortgage, covering the property purchased and other property, is reduced to the amount provided for in the contract, and is released as to other property than that which it was

agreed in the contract should be covered by the mortgage. Moreover, the deed from the mortgagor to Mr. Hendrick was made *subject* to the complainant's mortgage and in both the covenant against encumbrances and in the general warranty, *the mortgage was excepted*. In addition, the conveyance to Mrs. Hendrick was also made *subject* to the mortgage.

#### **As to Point II.**

The basis of the proposition advanced under this point seems to be that because at the time the mortgage was given \$12,200 had been paid to the mortgagor by Hendrick under his contract to purchase (\$10,000 on the contract and \$2,200 for extras), he acquired some equitable charge or lien upon the property superior to that of the subsequent mortgage, which lien is enforceable because, as he alleges, Mountain Lakes, Inc., did not build a house on the premises in accordance with the terms of the contract. There are at least three answers to this proposition.

1. Whatever lien Hendrick may have had at one time on the property for the money which he paid under the contract to purchase, became merged and extinguished when he acquired title to the property. It is, of course, impossible to conceive of a lien such as Mr. Hendrick asserts existing when the title to the property became vested in him.

2. There is no evidence that the contract between Mr. Hendrick and Mountain Lakes, Inc., was not fulfilled on the part of the latter except that the grading and house were not entirely completed at the time Mr. Hendrick took title. Yet it will be remembered that at that time he voluntarily paid some \$2,300, although Hapgood, the

President of Mountain Lakes, Inc., stated that he was willing that Mr. Hendrick should retain that money until such time as the mortgage was reduced to \$10,000. Hendrick's chief complaint at that time was that there was a mortgage for \$15,000 covering the property, whereas he had bargained for a mortgage of only \$10,000 (C., pp. 104-105).

There is no evidence that the grading and house were not subsequently completed and that defendants suffered any damage by reason thereof. There is evidence that Mr. Hendrick did do some of the grading himself, but for all that appears, he may have been compensated for this, or for that matter, the grading done by the company may not have suited him and yet been entirely within the terms of the contract.

3. In reality, what the defendants contend for, although garbed in other dress, is that they are entitled to an abatement of the mortgage to the extent of damages which Mr. Hendrick asserts in his brief he has sustained, *but which he has not proven*, by reason of an *alleged* breach of his contract with Mountain Lakes, Inc.

This point is very conclusively disposed of in the opinion of the Vice-Chancellor (C., p. 190, line 30; p. 191, line 38).

It is well settled in New Jersey that a *purchase money mortgage* in a suit to foreclose it is subject to reduction to the extent of the damages sustained by the mortgagor by reason of a breach of a covenant contained in the deed, such as a covenant against encumbrances or warranty, and that such a mortgage will also be reduced to the extent of the damage sustained when the mortgagor has received less property than he bargained for or has been defrauded as to the quantity of the land conveyed by the deed and covered by the mortgage.

The authorities for these propositions will be found collected in *Kuhnen v. Parker*, 56 N. J. Eq., 286. The propositions have again been restated and the authorities collected in the recent case of *Hawthorne v. Odenson*, 94 N. J. Eq., 588. To these cases should be added *Peterson v. Reid*, 80 N. J. Eq., 450.

It is also well settled in New Jersey that an assignee of a mortgage takes it subject to all of the equities existing between the parties to the mortgage (*Walz v. Oser*, 93 N. J. Eq., 280, 284, where some of the authorities are collected) up to the date of the assignment. (*Peterson v. Reid*, *supra*, 456.)

The right to abatement, however, is limited to *purchase money mortgages*—a mortgage given by the grantee to the grantor to secure a part of the purchase price—and cases where there has been a breach of a covenant in *the deed* or fraud or mistake (*Peterson v. Reid*, *supra*, 455).

Nor does the right pass to a subsequent owner of the equity of redemption unless the covenant which has been broken runs with the land or has been assigned to the subsequent owner (*Davis v. Clark*, 33 N. J. Eq., 579). In no case does the right pass where the property has been conveyed *subject* to the existing mortgage, because, as was stated by Justice Swayze in *Peterson v. Reid*, *supra* (457):

“He (the subsequent owner) does not stand in the shoes of the mortgagor; the latter owned the whole estate, the grantee only an equity of redemption. \* \* \* Having retained enough of the purchase money to pay the mortgage, under a promise that he would apply the money to the payment of the mortgage, he would if he could successfully make the defense, defraud both his grantor and the mortgagee.”

If the facts in this case be considered in the light of those rules, it becomes apparent that even had the defendants been able to prove that Mountain Lakes, Inc., broke its contract with Mr. Hendrick in respect to the kind of house that it was to build for him on the mortgaged premises, &c., it would not have entitled the defendants to any abatement of the mortgage by reason thereof.

In the first place, the *mortgage in suit was not a purchase money mortgage*. It was executed, delivered and recorded two months before the property was conveyed to Mr. Hendrick, and at the latter time constituted a valid and outstanding lien thereon. It was then held (July 6, 1920) by the Hackensack Trust Company, which was not a privy to or in any way connected with the contract between Mr. Hendrick and Mountain Lakes, Inc. The mortgage was originally given to the North Jersey Title Insurance Company, which likewise was not a party or privy to that contract.

The doctrine that a purchase money mortgage may be reduced to the extent of the damages sustained by the mortgagee as a result of a breach of a covenant in the deed rests upon the theory that circuity of action is thus avoided (*Peterson v. Reid, supra*, 455). In other words, equity says that if A, the mortgagor, has a claim against B, the mortgagee, growing out of B's misrepresentation or fraud connected with the purchase of the property by A, or breach of covenant in the deed, A shall not be required to assert his claim in an action at law but can have it adjudicated in a suit to foreclose the mortgage and offset against the amount found to be due on the latter. Mr. Hendrick, in this case, had no claim against the mortgagee—the North Jersey Title Insurance Company—nor against Hackensack Trust Company nor the complainant. He could not institute a suit at law against any of these parties for a breach on the

part of Mountain Lakes, Inc., of the contract between that corporation and Mr. Hendrick; nor, for that matter, against Hapgood. Nor has he any suit in equity against any of these parties. Consequently, it must follow that he would not be entitled to any reduction of the mortgage in suit by reason of a breach of the contract between him and Mountain Lakes, Inc. Of course, if he has no right, Mrs. Hendrick, the present owner of the equity of redemption of a part of the property, has no such right.

What has just been said applies equally to the right to setoff in foreclosure suits given in the act concerning setoffs (4 Comp. Stat., 4837, Sec. 5). Defendants have not shown that they have any setoffs or counterclaims against the North Jersey Title Insurance Company, the original mortgagee, or the complainant.

But there are two additional reasons why the mortgage is not subject to abatement, so far as Mrs. Hendrick is concerned:

(1) There is no privity of contract between her and Mountain Lakes, Inc., and there is no covenant in the deed from Mountain Lakes, Inc., to Mr. Hendrick running with the land, which it is claimed has been broken. In such a case, a person other than the original grantor could not have a reduction made in the amount due on the mortgage, even if it were a purchase money mortgage, because of the breach of the collateral contract between Mr. Hendrick and Mountain Lakes, Inc. (*Davis v. Clark, supra*, 579).

(2) She purchased the property subject to the mortgage (*Peterson v. Reid, supra*, 456, *et seq.*). There is no evidence in this case to show that she was not a purchaser for value, as there was in respect to the subsequent grantees in *Peterson v. Reid*.

**As to Point III.**

This seems to be based on the idea that because the bill of complaint alleged that the mortgage originally covered the twelve lots and that nine of them were subsequently released upon the payment of \$5,000, the bill conclusively showed that the complainant was not entitled to relief. This proposition has been answered—if indeed any answer is required—where we discussed defendants' fourth reason for Point I.

**As to Point IV.**

We are unable to understand this point. The bond was proven by proving the signature of the attesting or subscribing witness, it having been first established that this witness could not be found in and had not been a resident of New Jersey (C., 49-57). The mortgage and the various assignments having been duly acknowledged, proved themselves under the New Jersey statute (2 Comp. Stat., 1542, Sec. 22). We also proved the release of the mortgage and the deeds in the same way that the assignments were proven.

We also proved that no interest had been paid on the bond since April 29th, 1923 (C., p. 67, line 10; p. 82, line 35).

We do not know what other allegations of the bill of complaint it was necessary for us to prove. Defendants, in the jumble of words comprising the Point IV, suggest none, except that it was necessary to prove that the instruments had been duly recorded. They overlook that each instrument contained a certificate of the County Clerk of Morris County to the effect that they had been recorded.

It must not, however, be understood that we concede that there was any necessity for recording them, so far as the rights of the defendants are

concerned, because as pointed out by the Vice-Chancellor (C., p. 187, line 17), the defendants had actual notice of the existence of the mortgage at the time they took their deeds. Indeed, it was recited in the deeds.

Continuous reference is made throughout the brief to the fact that the original instruments were not produced. This is a direct misstatement. Defendants served notice under the statute (2 Compld. Stat., p. 1555, Sec. 20) that the complainant should produce the originals. As set forth in the opinion of the Vice-Chancellor, the complainant complied with the demand in all respects except that he did not produce the release, which was executed and delivered to Mountain Lakes, Inc., and was not in complainant's possession or under his control (C., p. 188, lines 1 to 12). The release was proved by a certified copy (C., p. 116, line 28; p. 188, line 12, &c.).

A large part of the discussion under this point is devoted to a claim that the person before whom the acknowledgment of the mortgage, of certain of the assignments, of the release, and even of the deed to Hendrick (Exh. C-8) were taken was not a commissioner at the time the acknowledgments were taken, his term having theretofore expired. As pointed out in the Vice-Chancellor's opinion, however, the only proof offered to show this fact was a certificate of the Secretary of State purporting to certify such fact. Of course, that was not satisfactory proof and was rejected by the Vice-Chancellor.

Moreover, ~~as pointed out further by the Vice-Chancellor,~~ such a certificate could not be evidence in the absence of a statute giving it evidentiary force. We have been unable to find any such statute. <sup>Such as was pointed out by the Vice Chancellor</sup> (C., p. 187, lines 14-30):

“Even were the acknowledgments defective and were these instruments not proper, for

that reason, to be recorded and therefore not constructive notice to anyone, the defendants had actual notice of the mortgage because it is recited in their deeds; and the deed from Mountain Lakes, Inc., to Hendrick is good as between the grantor and grantee, without any acknowledgment and it does not appear that anyone has questioned the defendants' title thereunder; and the release of mortgage is valid between the releasor and the mortgagor without an acknowledgment and it does not appear that anyone, other than the defendants, question its effect as a valid release of the mortgage lien. In his bill of complaint, the complainant admits notice of the deed and the release of mortgage."

It was not incumbent upon the complainant to prove that the term of the commissioner who took the acknowledgments had not expired when the acknowledgments were taken, because he was entitled to rely upon the fact that the instruments had been received by the County Clerk for record and that they would not have been received and recorded if the commissioner's term had expired. Section 34 of the Conveyance Act (2 Comp. Stat., 1546), provides:

"34. Foreign commissioners of deeds; lists to be sent to county clerks; duties of clerks.— It shall be the duty of the secretary of state, annually, within ten days after the adjournment of the legislature, to make out a list of all the commissioners for other states, duly appointed and sworn, together with appointments made during the recess of the legislature, with the dates of appointment and expiration of the terms, which list he shall cause to be printed and a copy thereof sent to the clerk of the court of common pleas of each county in this state; and it shall be the duty of every such county clerk, whenever any instrument of writing is presented for record, purporting to be acknowledged or proved be-

fore a commissioner residing in another state, to examine said list, and if the name of said person signing his name as a commissioner for New Jersey does not appear thereon, he shall immediately inform the person presenting such paper thereof."

Surely, in view of this statute, the complainant was justified in relying upon the fact that the instruments had been received by the County Clerk and recorded as sufficiently establishing that the person who took the acknowledgments was duly authorized to do so.

In defendants' brief it is stated that it was the duty of the Vice-Chancellor to take judicial notice that the foreign commissioner was not qualified. In support of this, he quotes from "*Wade on Notice*." A part of this quotation is in italics (Brief, p. 57), and presumably is that upon which defendants rely. This part states that the signatures of state officers are judicially noticed. There is manifestly a vast difference between taking judicial notice of the signature of a state officer and taking judicial notice that the term of office of a foreign commissioner of deeds had expired at the time he took an acknowledgment to a deed or other instrument which had been received by the recording officer and recorded.

#### **As to Points V and VI.**

The proposition that the Court of Chancery may not constitutionally decree the sale of mortgaged property, which is the subject matter of seventeen pages of the defendants' brief (63-80), needs no answer. The same applies also to the proposition advanced under Point VI that the complainant has an adequate remedy at law.

We are unable to ascertain from the brief the basis of the latter proposition. If it is that the

holder of a mortgage may not foreclose it because some third party (in this case the North Jersey Title Insurance Company) in no way connected with the owners of the equity, has guaranteed its payment, it is, we submit, ridiculous on its face. It might as well be argued that because a grantee has had a title guaranteed by a title company he cannot proceed against his grantor for breach of warranty.

Under Point VI the defendants also claim that there is a defect of parties defendant. We know of no rule of law—and the defendants have cited authority for none—that absolute prior assignees of a mortgage, or the mortgagor when he has parted with the equity of redemption, are necessary parties defendant to a bill to foreclose the mortgage. The basis of the defendants' contention in this respect seems to be found at the bottom of page 80 of the brief, in this clause:

"It is indeed strange that all those who covenanted with the complainant are omitted as parties defendant and precisely those who never had any relation with the complainant with respect to the property should be made the only defendants."

A case in 2 Stockton is <sup>then</sup> cited, which holds that if a mortgagee has assigned the mortgage *absolutely* to a third person, the mortgagee is not a necessary or *proper* party to the foreclosure suit.

#### As to Point VII.

As no argument is advanced to support this point, we shall not attempt to advance any to refute it.

**As to Point VIII.**

This seems to be a reiteration of the first reason urged in support of Point I. It has been sufficiently answered.

**As to Point IX.**

The relevancy of this point to the complainant's right to foreclose the mortgage is not perceived and the point is, therefore, not discussed.

**Conclusion.**

The defendants' contentions being so manifestly frivolous and the property being insufficient security for the amount due on the mortgage, and being continuously depreciating (as was shown in uncontradicted affidavits submitted at the time complainant made a motion to permit him to cause a writ of *feri facias* to issue notwithstanding the appeal), it is respectfully submitted that the appeal should be speedily dismissed, and the decree of the Court of Chancery affirmed.

Respectfully submitted,

GEORGE R. BEACH,  
Solicitor for and of Counsel  
with Complainant.

THOMAS G. HAIGHT,  
Of Counsel.

1871

Received of the Treasurer of the State of New York the sum of \$1000.00 for the purpose of the purchase of land for the State of New York.

Witness my hand and the seal of the State of New York at Albany this 1st day of January 1871.

John T. Hoffman, Treasurer of the State of New York.

1871

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