Index.

Subpoena.

NEW JERSEY, to wit: The State of New Jersey to JOE POMPEO, LEONARDO PERNA, and LEONARDA PERNA his wife, LINCOLN (L. S.) GUILES and MARGARET GUILES, his wife, and ANTHONY RODGUS, also known as TONY RODGUS.

GREETING: WHEREAS a bill of complaint has lately been exhibited against you in our Court of Chancery by George Wallace Lonsdale to be relieved touching the matters therein contained:

THEREFORE, we command you, if you intend to make a defense, that you file an answer to said bill in the office of the Clerk of our said court at Trenton, within twenty days after service upon you of this Writ, and in default thereof such order or decree will be made against you as the Court shall think equitable and just.

WITNESS, his Honor, Luther A. Campbell, our Chancellor, at Trenton, the twenty-third day of March, in the year of our Lord one thousand nine hundred and thirty-three.

FERD GARRETSON,
Clerk.

Alexander Schenck,
Sol'r.

Complaint.

IN CHANCERY OF NEW JERSEY.

To the Honorable Luther A. Campbell, Chancellor of the State of New Jersey:

The complainant, George Wallace Lonsdale, of Philadelphia, Pennsylvania, respectfully shows that:

1. On May 7th, 1926, Joe Pompeo being indebted to George Wallace Lonsdale in the sum of $12,800 executed to him a bond of that date to secure that sum, payable on May 7th, 1931, with interest at the rate of six per cent per annum half yearly from the date of the bond.

2. To secure the payment of the bond, said Joe Pompeo executed to George Wallace Lonsdale a mortgage of even date with the bond and thereby conveyed to him in fee the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage having been first duly acknowledged and the certificate of acknowledgment endorsed thereon was recorded in the Office of the Register of the County of Essex, New Jersey, on the 11th day of May, 1926, in Book K-57 of Mortgages on pages 543-544. Said mortgage was a purchase money mortgage given by said Joe Pompeo to secure part of the purchase price of said premises. The same having been conveyed to him by said George Wallace Lonsdale and Hetty N. Lonsdale by deed of even date with the mortgage.

3. Said Joe Pompeo is a widower.

4. On or about July 31st, 1928, said George

Wallace Lonsdale released from the lien of his said mortgage a part of the mortgaged premises hereinafter more particularly described. Said release was recorded on February 7th, 1933, in the Office of the Register of Essex County in Book 135 of Releases at page 588.

5. On or about November 5th, 1930, the Board of Chosen Freeholders of the County of Essex took for county road purposes part of the lands covered by complainant's said mortgage. The award of the Essex County Highway Right-of-Way Commission, relating to the taking of part of said lands for road purposes was recorded on December 21st, 1929, in the Register's Office of Essex County in Book M-80 of Deeds for said County at page 486 and a notice that the amount awarded for said lands so taken had been paid into the Court of Chancery, was recorded on July 10th, 1931, in the Register's Office of Essex County in Book Y-82 of Deeds at page 409. The part of the lands so taken by the Board of Chosen Freeholders of Essex County for county road purposes are hereinafter more particularly described.

6. The lands now covered by the complainant's mortgage are described as follows, said description being the original description shown in said mortgage excepting therefrom the land released by the complainant on or about July 31st, 1928, and the land taken by the Board of Chosen Freeholders of the County of Essex for county road purposes on or about November 5th, 1930.

Premises in the Township of Livingston, County of Essex and State of New Jersey.

Complaint

BEGINNING at a point in or near middle of road leading from Livingston to Caldwell thirty links distant Northwesterly from a stake by a post at intersection of the Easterly line of said road with Southerly line of McClellan Avenue said distance of thirty links being a continuation of said Southerly line of said Avenue until it intersects centre line of said road and runs thence South sixty-seven degrees thirty minutes East fifteen chains and sixty links to a large stone at the intersection of the fences in line of land formerly of William H. McCreary and William Courter South twenty-one degrees and forty-five minutes West six chains and forty links to a stake and stones for the Southeasterly corner of the lot hereby intended to be conveyed; thence with other lands of Moses E. Halsey and parallel with the Southerly line of McClellan Avenue aforesaid North sixty-seven degrees and thirty minutes West sixteen chains and seventy links to or near the middle of the aforesaid road; thence in said road North thirty-one degrees and thirty minutes East six chains and fifty links to the point of beginning. Containing ten acres and thirty-four hundredths of an acre, more or less.

Excepting therefrom the following described lands: BEGINNING at a point in the Southerly side of McClellan Avenue which is the Northeasterly corner of the above described tract of lands and is also the corner of Joseph H. Bedell; thence (1) Westerly along the said Southerly side of McClellan Avenue one hundred feet; thence (2) at right angles to McClellan Ave. one hundred and fifty feet thence (3) parallel with McClellan Avenue Easterly to the

Westerly line of said Bedell; thence (4) along the Westerly line of said Bedell Northerly to the place of BEGINNING.

And also excepting therefrom the following lands described in the release of mortgage recorded in Book 135 of Releases for Essex County at page 588: BEGINNING at a point in the southerly side of McClellan Avenue distant along the same one hundred feet northwesterly from line of land formerly of Joseph H. Bedell which said point of beginning is also the northwesterly corner of lands of Tranchine; thence (1) along said southerly side of McClellan Avenue in a northwesterly direction fifty feet; thence (2) at right angles to McClellan Avenue four hundred twenty two feet more or less to line of land now or formerly of Moses E. Halsey; thence (3) along said last mentioned line south sixty seven degrees thirty minutes east one hundred fifty feet more or less to line of land now or formerly of A. Brokaw, thence (4) along line of land of A. Brokaw and line of land of Bedell two hundred seventy-two feet and forty hundredths of a foot more or less to southerly line of said Tranchine; thence (5) along the same northwesterly one hundred feet; thence (6) still along the same northeasterly one hundred fifty feet to the southerly side of McClellan Avenue and place of BEGINNING.

And also excepting therefrom the following lands taken by the Board of Chosen Freeholders of the County of Essex for county road purposes on or about November 5th, 1930; BEGINNING at a point formed by the intersection of the present easterly line of Roseland Ave-

nue with the proposed new easterly line of the same, Roseland Avenue is now sixty-six feet wide; said point being distant as measured northerly along the said present easterly line ninety-five feet and fifty one hundredths of a foot more or less from the southwest corner of the property of Joe Pompeo; thence (1) northerly along the said proposed new easterly line on an arc of a curve, curving to the right on a radius of five thousand six hundred ninety-six feet and sixty-five hundredths of a foot for a distance of sixty-one feet and fifty-three hundredths of a foot more or less to its intersection with the present easterly line of the same, thence (2) southerly along the said present easterly line on its several courses, sixty-one feet and fifty-four hundredths of a foot more or less to the point and place of BEGINNING.

7. The complainant has been informed that during the month of September, 1932, said Joe Pompeo entered into a contract for the sale of the premises covered by complainant's mortgage to one Leonardo Perna and that said contract has been cancelled. The complainant charges that if such contract was made and if the same has not been cancelled any interest of the said Leonardo Perna in said mortgaged premises is subject to complainant's mortgage.

8. Said Leonardo Perna is married and his wife's name is Leonarda Perna.

Any claim of interest which said Leonarda Perna may have by way of inchoate right of dower, or otherwise, in said mortgaged premises, is subject to complainant's mortgage.

9. On January 9th, 1933, said Joe Pompeo leased part of said mortgaged premises at the corner of McClellan Avenue and Livingston Avenue to Lincoln Guiles and Margaret Guiles, his wife, for a period of three years from February 1st, 1932, to February 1st, 1935.

Any claim or interest which said Lincoln Guiles and Margaret Guiles may have in said mortgaged premises, is subject to complainant's mortgage.

10. Anthony Rodgus, also known as Tony Rodgus, is in possession of the house on part of said premises as a tenant.

Any claim or interest which said Anthony Rodgus, also known as Tony Rodgus, may have in said mortgaged premises is subject to complainant's mortgage.

11. On or about October 17th, 1929, a decree in equity for an injunction was entered in the United States District Court for the District of New Jersey in a cause wherein the United States of America was plaintiff and T. Fred Steinhaus and Joseph Pompeo were defendants, in which costs were taxed in favor of the United States of America and against the defendants in the sum of Forty-four Dollars and forty-five cents ($44.45) which cause involved the said mortgaged premises.

Any claim or interest which the said United States of America may have in said mortgaged premises is subject to complainant's mortgage.

12. Said Joe Pompeo, Lincoln Guiles, and Margaret Guiles, his wife, and Anthony Rod-

gus, also known as Tony Rodgus, or one of them, has always been in possession of the said mortgaged premises.

13. The whole amount of principal with interest thereon from May 7th, 1932, is due upon complainant's bond and mortgage.

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

1. That Joe Pompeo, Leonardo Perna and Leonarda Perna, his wife, Lincoln Guiles and Margaret Guiles, his wife, Anthony Rodgus, also known as Tony Rodgus, and the United States of America, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

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

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

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

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

ALEXANDER T. SCHENCK,
Solicitor and Counsel with Complainant.

Answer and Counterclaim.

IN CHANCERY OF NEW JERSEY.

Between GEORGE WALLACE LONSDALE, Complainant, and JOE POMPEO, *et als.*, Defendants.	On Bill to Foreclose. Answer and Counterclaim.

The defendant, Joe Pompeo, answering the bill of complaint, says that:

1. Paragraphs 1, 2, 3, 4, 6, 8, 9 and 10 are admitted.

2. This defendant has no knowledge or information sufficient to form a belief, as to the statements in paragraphs 5 and 11.

3. Paragraphs 7, 12 and 13 are denied.

By way of counterclaim, against complainant the defendant Joe Pompeo, says that:

1. On May 7, 1926, the complainant in consideration of $20,300, sold to this defendant, by deed of warranty free from all encumbrances, the land and premises in the bill of complaint described.

2. Said sum of money was paid as follows: $1,000 upon the execution of the agreement, $6,500 upon delivery of the deed and $12,800 by the execution of a purchase money mortgage covering said premises and now being foreclosed.

3. The deed to this defendant contained a covenant that complainant was the true and lawful owner of said premises and would defend the same to this defendant, his heirs, and assigns forever.

4. On September 1, 1932, this defendant entered into an agreement with one Leonardo Perna, co-defendant in this suit, whereby this defendant, in consideration of $23,000 agreed to convey to him the said premises by deed of warranty. Said sum of money to be paid as follows: $1,000 upon the execution of the agreement which was paid, $8,000.00 on October 1, 1932, when the deed was to be delivered, and $14,000 by the execution of a purchase money mortgage on said premises.

5. On October 1, 1932, this defendant for the first time was informed that the title to said premises was defective, as hereinafter set forth, by reason whereof the said Leonardo Perna, refused to buy the property, and this defendant was obliged to return him the $1,000 paid as aforesaid.

6. The records in the Register's and Sheriff's offices of the County of Essex show that on April 4, 1892, a final decree was made in a foreclosure suit, for the sale of said premises, wherein Moses L. Gans, and Henry Gans, executors of the last will and testament of Isaac Gans, deceased were complainants, and Annie C. Gerow, *et al.*, were defendants. By said decree, the sum of $1,153.83 with interest from July 27, 1891, was to be paid to said executors, besides $123.70 costs of suit, and $539.02 with interest from March 7, 1892, to Amos W. Harrison.

7. On August 8, 1892, Jacob Housling, Sheriff of said County, by virtue of said decree sold the premises in question, to said Moses L. Gans, and Henry Gans, as executors aforesaid for the sum of $1,360. The sheriff's deed was made to Moses L. Gans, and Henry Gans, individually, and not as executors aforesaid.

8. By the will of said Isaac Gans, the following legacies were bequeathed, viz: to Jacob Gans, the testator's brother $500, Nellie Gans, niece $300; the rest of the estate was bequeathed to Amelia and Pauline Gans (daughters), Lena Mantel, daughter-in-law, and Moses and Henry Gans, sons and executors aforesaid. The record in the Surrogate's Office of said County, fails to show payment of said legacies, nor the distribution of said estate.

9. On March 16, 1893, Moses L. Gans, and Henry Gans, individually in consideration of $1,500 sold said premises by deed of warranty to Charles H. Minar.

10. On November 25, 1915, Charles H. Minar, and Ann E. Minar, his wife, in consideration of one dollar sold said premises by deed of warranty to John F. Lonsdale, Sr.

11. On March 20, 1919, John F. Lonsdale, Sr., widower, in consideration of one dollar sold said premises by deed of warranty to George Wallace Lonsdale, complainant, in this suit.

12. Upon discovering the defect in said title this defendant offered to return the property to complainant and demanded of him the return of $7,500 paid him as aforesaid, but the complainant refused and still refuses so to do.

This defendant therefore prays:

1. That the conveyance of said property by complainant to this defendant be declared void, and the purchase money mortgage, which is being foreclosed cancelled of record.

2. That the complainant may be decreed to pay this defendant $7,500 with interest thereon from May 7, 1926, upon delivery of the said property to him.

3. That the complainant may be decreed to pay the costs of this suit and a counsel fee to this defendant's solicitor.

That this defendant may have such further and other relief in the premises as the nature of this case may require.

G. M. BELFATTO,
Solicitor for Defendant Joe Pompeo.

Replication.

IN CHANCERY OF NEW JERSEY.

Docket #95-59.

Between GEORGE WALLACE LONSDALE, Complainant, and JOE POMPEO and others, Defendants.	Replication and Answer to Counterclaim of the defendant, Joe Pompeo.

The complainant joins issue on the answer of the defendant, Joe Pompeo.

As to the counterclaim contained in said answer the complainant says:

1. Paragraph 1 is admitted except that the complainant says that he sold to the said defendant for said consideration of $20,300, a tract of land which included the land now covered by complainant's mortgage and other and additional land.

2. Paragraph 2 is admitted except that the complainant says that he received $6,433.58 on delivery of the deed, certain credits having been given to said defendant, Joe Pompeo, which reduced the cash payment.

3. Paragraph 3 is admitted except that the complainant refers to said deed for the exact terms thereof.

4. The complainant has no knowledge or information sufficient to form a belief as to the truth of paragraph 4.

Replication

5. Paragraph 5 is denied.

6. Complainant has no knowledge or information sufficient to form a belief as to the truth of paragraphs 6, 7 and 8 except that the complainant says that there is recorded in the Register's Office of Essex County in Book G-27 of Deeds for said County at page 278 a certain sheriff's deed made by Jacob Haussling, Sheriff, to Moses L. Gans and Henry Gans, dated August 8th, 1892, and recorded December 5th, 1892, to which for greater certainty the complainant refers.

7. Paragraph 9 is admitted except that the complainant says that said deed conveyed premises in addition to those now covered by complainant's mortgage and that $1,000 of said consideration of $1,500 was secured by a mortgage made by said Charles H. Minor to said Moses L. Gans and Henry Gans, dated March 16th, 1893, and registered in the Register's Office of Essex County on March 23rd, 1893, in Book N-11 of Mortgages at page 71.

8. Paragraph 10 is admitted except that the complainant says that the consideration for said deed was approximately $3,600 of which $2,600 was secured by a mortgage recorded in the Register's Office of Essex County in Book B-35 of Mortgages at page 275 and that said deed covered premises in addition to those now covered by complainant's mortgage.

9. Paragraph 11 is admitted except that the complainant says that said deed was made subject to said mortgage for $2,600 which mortgage complainant has paid and that said deed

conveyed the same premises as the deed mentioned in paragraph 10 of the counterclaim.

10. Paragraph 12 is denied.

11. Said Moses L. Gans and said Henry Gans as executors of the last will and testament of Isaac Gans paid all the debts owed by the estate of said Isaac Gans and all the legacies provided for in his will. They included in their inventory of the estate of said Isaac Gans the bond and mortgage made by William Ward, dated August 12th, 1885, for $1,000 the foreclosure of which mortgage resulted in the Sheriff's deed mentioned in paragraph 7 of the counterclaim and included the amount of said inventory in their final account as such executors. Their said final account was duly allowed by the Essex County Orphans Court on April 14th, 1891, and the balance in their hands as shown by the order allowing their said account was duly disposed of according to law. They received and recorded in the Essex County Surogate's Court, releases and refunding bonds from Mollie Gans Tansy, a legatee and from the residuary beneficiaries, other than themselves.

12. For more than thirty years prior to May 7th, 1926, the date on which the complainant conveyed by deed to the defendant, Joe Pompeo, the lands covered by the complainant's mortgage, the complainant and his predecessors in title had been in actual possession of the lands described in said deed, which possession was uninterruptedly continued by conveyance or otherwise. Said lands described in said deed are and were at all times

mentioned in this paragraph cultivated farm lands and not woodlands or uncultivated tracts.

13. For more than thirty years prior to May 7th, 1926, the date on which the complainant conveyed by deed to the defendant, Joe Pompeo, the lands covered by the complainant's mortgage, the complainant and his predecessors in title had been in actual possession of the lands described in said deed which possession was uninterruptedly continued by conveyance or otherwise and which possession was obtained by a fair bona fide purchase of said lands and other lands by Charles H. Minor, one of the complainant's predecessors in title, who purchased said lands on March 16th, 1893, from Moses L. Gans and Henry Gans for the consideration of $1,500. Said Moses L. Gans and Henry Gans were at the time of said purchase in possession of said lands and were supposed to have a legal right and title thereto.

14. Since March 16th, 1893, and until the present time the defendant, Joe Pompeo, the complainant and their predecessors in title have been in actual peaceful and undisturbed possession of the lands covered by the complainant's mortgage, which possession has been uninterruptedly continued by conveyance or otherwise and was obtained by a fair bona fide purchase of said lands and other lands by Charles H. Minor, one of the complainant's predecessors in title who purchased said lands for the consideration of $1,500 on said 16th day of March, 1893, from Moses L. Gans and Henry Gans, who were then in possession of said lands and were supposed to have a legal right and title thereto.

ALEXANDER T. SCHENCK,
Solicitor of Complainant.

Order of Reference.

(Filed Mar. 29, 1934.)

IN CHANCERY OF NEW JERSEY.

Between GEORGE WALLACE LONSDALE, Complainant, and JOE POMPEO and others, Defendants.	On Bill, &c. Order of Reference.

This matter being opened to the court by Alexander T. Schenck, Solicitor of Complainant, and it appearing that the Solicitor of the defendant, Joe Pompeo, has consented hereto.

It is on this 29th day of March, A. D., 1934, on motion of Alexander T. Schenck, solicitor as aforesaid, Ordered that the above entitled cause be referred to Hon. M. G. Buchanan one of the Vice Chancellors of this court, to hear the same for the Chancellor and to report thereon and advise what order or decree should be made therein.

LUTHER A. CAMPBELL,
C.

Consent is hereby given to the making and entry of the foregoing order.

G. M. BELFATTO,
Solicitor of Defendant, Joe Pompeo.

A True Copy.

Ferd Garretson,
Clerk.

Notice of Hearing.

IN CHANCERY OF NEW JERSEY.

95-59.

Between GEORGE WALLACE LONSDALE, Complainant, and JOE POMPEO and others, Defendants.	On Bill, &c. Notice of Hearing.

To Gaetano M. Belfatto, Solicitor for Defendant, Joe Pompeo:

Take Notice of the hearing of this cause before the Honorable Malcolm G. Buchanan, the Vice Chancellor of this court to whom the said cause has been referred on the 22nd day of October, 1934, at the hour of ten o'clock in the forenoon at the Chancery Chambers in the City of Newark, the time and place designated by the order of said Vice Chancellor on the first day of May, 1934.

ALEXANDER T. SCHENCK,
Solicitor for Complainant.

Final Decree.

IN CHANCERY OF NEW JERSEY.

95-59.

Between GEORGE WALLACE LONSDALE, Complainant, and JOE POMPEO and others, Defendants.	On Bill, &c. Final Decree.

This cause coming on to be heard in the presence of Alexander T. Schenck, of Counsel with the Complainant, and of Gaetano M. Belfatto, of Counsel with the Defendant, Joe Pompeo, and it appearing that the complainant's bill has heretofore been taken as confessed against the defendants, Leonardo Perna, Leonarda Perna, his wife, and Margaret Guiles; and it further appearing that the defendant, United States of America, which holds a decree for costs which is a lien on the mortgaged premises described in the bill of complaint and which is subsequent to the complainant's mortgage has given notice to the complainant that it desires to have its said encumbrance reported upon; whereupon and upon reading the bill of complaint and all pleadings and proofs in the above cause and hearing and considering the arguments of counsel; and it appearing to the satisfaction of the court that there is due to the complainant for principal and interest on his mortgage the sum of $14,703 and that there is due to the defendant,

United States of America on its said decree for costs, the sum of $29.45, and that the said complainant's mortgage was made and recorded prior to the said decree for costs of the United States of America, and is entitled to priority of payment, and that the mortgaged premises should be sold to raise and pay the monies due to the complainant and to the said defendant, United States of America, respectively, together with the costs of this suit;

And it further appearing to the court that the defendant, Joe Pompeo, is not entitled to avail himself of the counterclaim set up in his answer in this cause.

It Is on this eleventh day of December, 1934, Ordered, Adjudged and Decreed that the said mortgaged premises be sold to raise and satisfy the money due to the said complainant and to the said defendant, United States of America; that is to say to pay and satisfy unto the complainant the sum of $14,703.00, together with lawful interest thereon to be computed from the date of this decree, with the complainant's costs to be taxed, which costs are to include no counsel fee, and to pay and satisfy unto the said defendant, United States of America, the sum of $29.45, together with lawful interest thereon from the date of this decree; and that a writ of fieri facias issue for that purpose out of this court directed to the Sheriff of the County of Essex, commanding him to make sale according to law of the said mortgaged premises, and that out of the monies arising from said sale he pay to the complainant or his Solicitor, his said debt, interest and costs and

to the defendant, United States of America, or its Solicitor, its said debt, interest and costs, and that in case more money shall be raised by said sale than shall be sufficient to satisfy such payments, that such surplus be brought into this court to abide the further order of the court, unless otherwise previously disposed of by this court; and that the Sheriff make return, without delay, of his proceedings by virtue of said writ.

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

Further ordered and decreed that the counterclaim be and the same is hereby dismissed.

Respectfully advised,

MALCOLM G. BUCHANAN,
V. C.

Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

Between GEORGE WALLACE LONSDALE, Complainant-Appellee, and JOE POMPEO, Defendant-Appellant.	On Bill to Foreclose. Notice of Appeal from Final Decree of the Court of Chancery.

The defendant, Joe Pompeo, hereby appeals to the Court of Errors and Appeals in the last Resort in all causes, from the final decree of the Court of Chancery of New Jersey, made in this cause on the 11th day of December, 1934, upon the advice of the Hon. Malcolm G. Buchanan, Vice Chancellor, striking out the answer of the said defendant, Joe Pompeo, and dismissing the counterclaim set up therein, after the said answer had been accepted by the complainant and after the complainant had joined issue thereon, both as to the answer and as to the said counterclaim, or cross-bill, and the questions of fact raised by the bill and answer, by complainant filing Replication and by the special defense set up therein; and the said defendant, Joe Pompeo, appeals from the Ruling of the Chancellor, on the advice of the said Vice Chancellor, refusing to take testimony and hear the evidence of the parties, at the trial and hearing of said suit; or to receive proof, offered by the said defendant that the title to the property, covered by the deed of conveyance, executed and delivered by the Complain-

ant, to the said defendant, purporting to convey the land, which was the subject-matter of the said suit to foreclose, did not convey a good and marketable title, and that the said mortgage sought to be foreclosed was a purchase-money mortgage and without consideration, void and for nothing holden, and from the further Ruling, of the said Court of Chancery, on the advice of the said Vice Chancellor, refusing to order and decree, the restoration by the complainant to the said defendant, Joe Pompeo, of the purchase money and other outlays, for interest, taxes and improvements, made by the said defendant-appellant, resulting from the purchase and sale of the said lands, subject to the said purchase-money mortgage, because of the total failure of the consideration therefor; and, also, because the said final decree, is contrary to the law and the established practice of the Court of Chancery and because the Court neglected and refused to consider the real merits and equities, of the contentions and controversies of the parties when they were regularly before the Court prepared for trial, without any exceptions having been filed by the complainant, to the said defendant's said answer or the counterclaim, or cross-bill set up therein, and without setting down said cause to be heard on bill and answer.

Dated, Newark, Dec. 27, 1934.

TERRY PARKER,
Solicitor for the Defendant-Appellant.

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

TERRY PARKER,
Of Counsel with the Appellant.

Petition of Appeal.

COURT OF CHANCERY OF N. J. TO N. J. COURT OF ERRORS AND APPEALS.

Between GEORGE WALLACE LONSDALE, Complainant-Appellee, and JOE POMPEO, Defendant-Appellant.	On Appeal from the Decree of the Court of Chancery. Petition of Appeal.

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

The petition of Joe Pompeo, defendant-appellant in the above stated cause, respectfully shows, that he finds himself aggrieved by the final decree, made in the above cause, by his Hon. Luther A. Campbell, Chancellor of the State of New Jersey on December 11, 1934, under the advice of the Hon. Malcolm J. Buchanan, Vice Chancellor, in this respect, to wit:

At the hearing of said suit, the Vice Chancellor erroneously struck out the answer of the defendant, Joe Pompeo, and dismissed his counterclaim, set up therein, after issue had been joined thereon by complainant.

At the hearing of said suit, the Vice Chancellor erroneously refused to take testimony and hear the evidence of the parties; or to receive proof, offered by said defendant, to the effect that the title to the property, conveyed by the complainant to said defendant, which was the subject-matter of the foreclosure suit, was not good and marketable, and that the purchase money mortgage, sought to be foreclosed, was without consideration.

By said decree, it is erroneously held that "there is due to complainant, for principal and interest on his said mortgage $14,703.00 and that the mortgaged premises should be sold to pay complainant the said sum of money, together with lawful interest thereon, to be computed from the date of said decree, with costs, to be taxed, which costs are to include no counsel fee.

And your petitioner, humbly appeals from said decree of the Court of Chancery, upon the ground that the same is erroneous, for that the said decree should have ordered and directed as follows:

The restoration by complainant to the defendant, Joe Pompeo, of the purchase money, and other outlays for interest, taxes and improvements, made by the said defendant, resulting from the purchase of said lands, because of the total failure of consideration therefor; and, also that the purchase money mortgage, was null and void and should be cancelled of record, and also the defendant to reconvey said property to complainant, free of all incumbrances, except those existing at the time of the sale to him by complainant.

The petitioner therefore prays, that the said decree be vacated and set aside, and that the suit be remanded to the Court of Chancery for formal hearing, at which the evidence of witnesses for petitioner shall be heard to prove the invalidity of the title to said property and also the defendant's counterclaim and defense of said suit.

TERRY PARKER,
Solicitor for and of counsel with
the Appellant.

Service of a copy hereof is hereby acknowledged this 5th day of January, 1935.

ALEXANDER T. SCHENCK,
Solicitor for Complainant-Appellee.

Testimony.

IN CHANCERY OF NEW JERSEY.

Between:

GEORGE WALLACE LONSDALE,
Complainant,
and
JOE POMPEO, *et als.*,
Defendants.

Transcript of stenographic notes of proceedings before his Honor, Malcolm G. Buchanan, Vice Chancellor, at Chancery Chambers, Newark, New Jersey, on November 1st, 1934; in the presence of Alexander T. Schenck, Esq., for the complainant; and G. M. Belfatto, Esq., for the defendant Joe Pompeo; Terry Parker, Esq., of counsel.

The Court: There is no statement of facts in any of these briefs.

Mr. Schenck: No, your Honor. I will state them. This is the foreclosure of a purchase money mortgage which is made on property in Livingston. Mr. Lonsdale sold the property to Mr. Pompeo and took back a purchase money mortgage. He now seeks to foreclose it. The defendant has filed an answer in which he sets up as a defense the fact that some forty years ago the property was owned by a family named Hood, who had given a mortgage on the property for $1,000 to a man named Isaac Gans. Isaac Gans' two sons, who were his executors, foreclosed the mortgage as executors. The case proceeded to final decree. I asked for those papers from Trenton. They are here.

The Sheriff sold the property. The report of sale and everything said that the title was to be made to the executors. However, they took title in their own names as individuals. They then, as individuals, sold the property for $1,500 in cash to Mr. Lonsdale's predecessor in title. Mr. Belfatto's contention is that the fact that they took title to themselves as individuals and not to themselves as executors raises a defense on the ground that there is a defect in the title. My answer to that is, (first, if there be a defect in the title, the cases are clear that they should bring a suit on their covenant in the deed; that they cannot set it up here in this foreclosure suit, because this is not a case of encumbrance or title but a possible defect they allege. That, I think, will immediately dispose of this case. In the second place, an examination of the record in the Surrogate's office, of Mr. Gans' estate, shows that this mortgage was inventoried, and inventoried at the full amount; that the balance of that inventory was carried into the final accounting of the executors. The accounting was passed. They made distribution. There are releases and refunding bonds on file from each one of the beneficiaries except these two executors, from whom there was no need of bonds. There was one small legacy of $500 given to a brother of the decedent, I think, in Germany. And our position with respect to that is that shows a satisfactory administration of the estate, and that certainly this one legacy of $500, after a lapse of forty years, must be presumed to be paid. The sale of the Sheriff to these men as individuals was subsequent to

the passing of their account, and quite possibly they considered that, having accounted for the mortgage, they were entitled to take this property as part of the estate. That is the situation with respect to the facts.

Then, in addition to that, ever since the Hoods had the property, the property—the farm and house—all that time has been in unquestioned and undisputed possession of Mr. Pompeo and his predecessors in title. So the statute of limitations, I believe, cannot be raised here, and that would immediately dispose of the case. On the second point, that I have put at the end of my memorandum of law, it seems to me, at most, these people might be considered to have received this purchase money as a trust, and to anyone who bought from them they would be under no obligation to show how they accounted for it. They have been discharged as executors.

The Court: How can a mortgagor challenge his mortgagee's title?

Mr. Parker: I don't think counsel has fully emphasized the matter of the accounting. You see, here the executors took the title in their individual names. There is a break in the chain of the title of record.

The Court: I am not concerned with that. Assuming that this title is imperfect—this is a bond and mortgage and this is a suit to foreclose, as I understand.

Mr. Parker: We maintain that there is a fatal defect as to the defendant, because of the points I am about to raise. The executors have received this property in their own name.

The Court: Let us dispose of the first one first. How, under the law, can a mortgagor raise a question as to title against a mortgagee, in a foreclosure suit?

Mr. Parker: Because of the warranty deed that was given to him.

The Court: That has nothing to do with the foreclosure suit.

Mr. Parker: It has if the foreclosure suit does not make the proper parties defendants.

The Court: I am speaking simply about the legal question: how can a mortgagor challenge his mortgagee's title in a foreclosure suit?

Mr. Parker: If the title is not good.

The Court: Whatever it is.

Mr. Parker: Yes, sir.

The Court (continuing): He has given it back to his mortgagee, and the mortgagee seeks to foreclose the mortgagor's rights, whatever they may be, in the property, by the foreclosure suit.

Mr. Parker: Yes.

The Court: Maybe there are defects, but whatever they are, what reason is that why a mortgagee should not get back from the mortgagor whatever he pledged to him?

Mr. Parker: We offer it back if he will pay back the down payment.

The Court: You are going to something else.

Mr. Parker: We contend that where the matter is before the Court, it should be finally disposed of by that general principle—where the parties have this dispute between themselves as to the title, and the circumstances which entered into this original transfer from the mortgagee to the mortgagor, that, it having

been transferred to him with a defective title—this man being an ignorant man—it comes before the Court with the endeavor to foreclose this man's rights under the deed, and he having tried to sell it and having found the title was rejected on him, it seems to me that, having conveyed by warranty deed with covenants of seizure and warranty to defend the title, that all of these things involved are exactly the same subject-matter and should be before the Court at this time.

The Court: Not at all. If your man has been harmed by getting a poor title under a deed of general warranty, he has a cause of action for breach of warranty.

Mr. Parker: Exactly, sir, but that cause of action only arises when he tries to transfer title or is ousted from possession. So long as he is in possession he has no cause of action. His cause of action only arises when he is dispossessed, or where there is an attempt to sell the property. If he attempts to sell and the title is rejected on him, then he can raise the question of that title in this Court in any proceeding involving the same subject-matter and the same parties, I believe.

The Court: It is my recollection that the cases are settled that such a cause of action as you recite cannot be raised as a defense in a foreclosure suit.

Mr. Parker: This is not a question of landlord and tenant. It is not that question.

The Court: I understand. Yours is a question of mortgagor and mortgagee.

Mr. Parker: The foreclosure of a mortgage here, it seems to me, will permit the defense

that a title was given and that the mortgagor —the party who was in possession—tried to sell and could not; he can go back of it and claim he was not given a proper deed, and that situation is a violation of the covenant of his deed of warranty, that deed having been given by this same mortgagee. It is not as though there were other parties involved. The defendant comes in and says, "Title was so defective that I could not sell the property." And I believe that is a substantial defense. He is ready here to show that title was defective. And for the reasons we have set forth in our brief, and will set forth in the testimony, that matter being involved and raised here, the question will arise as to whether in this foreclosure suit the rights of the parties would have been met. For instance, there is a question of whether the Gans people, who did not have title, and who have not properly receipted for these things—and the record will show that they have not filed refunding bonds; in all cases no receipts; in all cases that the property is subject to a lien. Let me present this matter clearly on that point. We claim a lien on the real estate by the persons who were entitled to a distribution of the proceeds of that sale in foreclosure back in 1892.

The Court: That is prior to the deed to your people.

Mr. Parker: It is prior to the deed to us.

The Court: How is that involved in the foreclosure suit? Parties holding antecedent liens are not either necessary or proper parties to a foreclosure suit.

Mr. Parker: In this case, however, where

there has been no transfer between the parties and this is litigation between the parties originally, and the subject-matter is the same, the Court, it seems to me, having taken charge even of the foreclosure suit, will go into the question of the merits of the defense set up here, which is affirmative. The affirmative defense is that there is a lien on this property; not a mere cloud, but a lien for unpaid legacies, unpaid distribution to the heirs.

The Court: That is the one we have been just discussing.

Mr. Parker: Yes. That being true, it seems to me that the matter should be raised and this Court settle the whole controversy between the parties. If it was a question merely of some other party that was not here, that would be another matter. For example, we have gone into the question frequently in the interest of showing that, where title has not been quieted, this man has a cloud upon his title and it is subject to litigation. They, I answer, should not be subject to such threats, and should have the matter determined. If he is going to be forced to take this property under the conditions here, he should have something for his money. He now shows that the title is so defective that, at least, he would have to litigate in order to clear it up. Consequently the parties are before the Court, under the general equities of the Court. To be sure, the action was started as a foreclosure suit, but immediately upon the answer the main issue is raised as to whether, as between the parties, there should not be a settlement of this question of the title, inasmuch as we allege we tried to sell

the property and could not; that the property was conveyed by this same complainant under the terms of a warranty deed. If your Honor will pardon me just a moment—I do not want to repeat, but in the accounting in this Gans estate, which seems to be the center of the question of fact, refunding bonds were filed by the sons or heirs, by the legatees who were entitled to part of the proceeds, and one of the heirs to whom a certain sum of money was not paid, is not made a party defendant, and consequently the matter cannot be disposed of by the Court because the complainant himself has not brought here the proper parties. Then, of course, as to the right of title by prescription—they have raised that question themselves, as to whether they can prove title by adverse possession. We claim it is not true in this case and could not be sustained. We have witnesses for that purpose.

The Court: I do not find in your brief citation of authorities contrary to the proposition that your defense cannot be raised in a foreclosure suit.

Mr. Parker: Well, your Honor, I think I have stated it so that your Honor understands our position. Of course, if there is a failure of consideration for the transfer of the property to this mortgagor, and then they come in and say, "We are going to foreclose the mortgage," it seems to me that this question is practically the same thing. He comes in here and says, "I haven't what you offered me. I found this out not knowing—"

The Court: What has that to do with the foreclosure suit? The complainant says, "I

want to foreclose your rights in this property."

Mr. Parker: Yes. And we say, "You have no right to foreclose because of the fact that you have come here—you have put us in this property by warranty deed which you have broken.

The Court: You say, "We have a claim against you. We want to offset that." That is practically what your claim is.

Mr. Parker: Even so, it seems to me that it would be an offset here, because it is in the Court of Chancery. The Court of Chancery having this foreclosure suit and having the issue raised between these same parties, can dispose of the whole matter, not only the question of strict foreclosure, but the contractual rights between the parties and settle all of these questions of title which have thrown upon this defendant a terrible burden. He wants them simply to take back the title and make it good. This title is probably curable, but it has not been cured. We are here with the man who conveyed the title, who wants to foreclose. We say, "We will give you back your title if you will return our money. If it is merely a question of clearing up the mortgage situation, give us back our money and you can have the title." They say, "You are not entitled to that." They say we must give up the money we gave them. We say that we are entitled to something. The result of that all is that we are in here at a terrible disadvantage in the foreclosure suit, because of the acts of the complainant. All of this litigation is between the same parties. If the foreclosure suit were on a straight bond and mortgage and there was nothing else be-

tween them, I can see perfectly clearly the importance of this, your Honor, obviously, but here the relations are far beyond that, and it seems to me that the question of the title is a vital question. You understand, of course, that our contention is that, as a result of this, the title is not marketable, and that is the reason for rejecting title and leaving the defendant in this position. Of course, your Honor is perfectly familiar with the legal principles that the mortgagor, the defendant here, could not have come into this court and asked for relief under his deed unless and until he had been dispossessed or had attempted to sell the property and could not do so on account of the defect in the title. So it seems to me that the question does involve such a question that the Court of Chancery naturally would take jurisdiction of, because of the complicated relations between the parties, and straighten this whole matter out for them. To admit foreclosure now would amount to this: they would get back the property they have given us—we will offer it back if they will give us our money. All we want is to be put back in the position where we were before. As a result of this failure of consideration, as a result of the breach of the covenants of the deed of warranty, and the parties being so interrelated, it seems to me, even on the question as to the technical sufficiency of a defense in a foreclosure suit, we could, nevertheless, raise the questions here, and have them determined by the Court, now that we are here. We have here the deeds and records, whenever your Honor may want to examine them, showing the covenants, but I think, perhaps, the

statement is not disputed by counsel anyway.

The Court: I notice a report filed on behalf of the United States.

Mr. Schenck: I have here an affidavit which Mr. Besson sent, and asked me if I would not present it to you. I understand Mr. Belfatto will have no objection. It is a judgment for costs and fees of the United States, $44.45. They were made parties defendant. And they have an affidavit of a balance due of $29.25.

The Court: This matter might well have been raised on motion to strike, and disposed of on the motion to strike.

Mr. Schenck: I think that is true, your Honor.

Mr. Parker: If counsel thinks we ought to make a motion to strike—

The Court: Oh, no. You are here. It could have been disposed of on motion to strike without bringing all of your witnesses here. You may proceed with the complainant's case.

GEORGE WALLACE LONSDALE is sworn.

Direct-examination by Mr. Schenck:

Q. Mr. Lonsdale, you are the complainant in this suit? A. I am.

Q. I show you a bond made by Joe Pompeo to George Wallace Lonsdale, dated May 7, 1926, conditioned for the payment of $12,800, and ask you if that is the bond which he gave you, that is in suit in this case? A. That is the bond.

Q. Have you trouble with your voice? A. Yes. I have laryngitis.

Q. I show you the mortgage dated May 7, 1926, made by Joe Pompeo to George Wallace

Lonsdale to secure $12,800 and recorded May 11, 1926, in the register's office of Essex County, book K-57 of mortgages, page 543. Is that the mortgage the Pompeos gave to you? A. Yes. That is the mortgage.

Q. Has any part been paid on account of this mortgage? A. No. It has not.

Q. From what date is interest due? A. From May 7, 1932.

Q. Then there is due on this mortgage $12,800, with interest from May 7th, 1932. A. That is right.

The Court: At what rate?

Mr. Schenck: The rate of interest is given in the bond at six per cent.

The Witness: That is right.

Q. That rate has not been changed? A. No, sir.

Mr. Schenck: I offer this bond and mortgage in evidence.

The bond is marked C-1.

The mortgage is marked C-2.

Mr. Schenck: I offer in evidence abstract of title which I have prepared since the date of the mortgage, and which Mr. Belfatto said I might offer.

Mr. Belfatto: That is the original?

Mr. Schenck: This is my original. This is just from the date of the mortgage.

The Court: To show your mortgage foreclosure search?

Mr. Schenck: To show the mortgage foreclosure search.

The abstract of title is marked Exhibit C-3.

Mr. Schenck: Then I offer in evidence an affidavit which I received from the United States District Attorney in which it shows that there is a balance of $29.45 due on the judgment for costs recovered by the United States of America against T. Fred Steinhauss and others. Is there any objection, Mr. Belfatto?

Mr. Belfatto: No.

The Court: How is that a lien here?

Mr. Schenck: It is a lien against one of the prior holders of title. I do not know that the name was Steinhauss. It is entered against T. Fred Steinhauss and Joseph Pompeo, shown by the foreclosure abstract.

The Court: October 7, 1929. What was the date of the mortgage?

Mr. Schenck: The date of the mortgage was May 7th, 1926.

The Court: $12,800. May 7, 1926.

Mr. Schenck: Interest paid to May 7, 1932.

Mr. Parker: I assume that is the same thing we have here. It is a copy. This is the original search.

Mr. Schenck: No. I have here a foreclosure abstract.

Mr. Parker: Yes.

Mr. Schenck: I am offering that now.

The affidavit regarding the claim of the United States Government is marked Exhibit C-4.

Mr. Schenck: We asked Mr. Belfatto if we might introduce this abstract of mine, and also an abstract of the back title, if that became material.

That is all, Mr. Lonsdale.

The Court: Any questions?

Mr. Schenck: The complainant rests.

The Court: What about this award?

Mr. Schenck: That does not affect the property in question. It is in connection with land along Livingston Avenue where they widened the street.

The Court: The allegation is that it did affect part of the lands covered by the mortgage.

Mr. Schenck: Well, that is true, but I have excepted that in the part that was foreclosed.

The Court: You also recite that the award in the Court of Chancery was originally made to the mortgagee.

Mr. Schenck: No.

The Court: Why not?

Mr. Schenck: There never was an application made for that money so far as I know. They widened Livingston Street and took perhaps 10 or 12 feet along the edge of the property.

Mr. Parker: We contend that is an important matter.

Mr. Schenck: The award was $1.86.

The Court: The total award?

Mr. Schenck: Yes. I have it here.

The Court: I think perhaps you had better make proof of it.

Mr. Schenck: Mr. Lonsdale said they took about 3 feet.

The Court: I think that is so small as to come within the rule.

Mr. Schenck: Your Honor, we were referring to the exhibit offered in evidence by the complainant.

Mr. Parker: I am more familiar with this particular document; therefore, as a first procedure on the part of the defendant, I am going to offer in evidence all of this abstract except the certificate on the back page, which seems to involve some of the issues here, which Mr. Schenck says are not binding on him.

Mr. Schenck: I am perfectly satisfied to have it go in.

Mr. Parker: The whole thing?

Mr. Schenck: Certainly.

The Court: I will hear what you have to say.

Mr. Parker: This is offered in evidence, your Honor and not objected to. It is an abstract of title, but in that portion I have just referred to you will see that the recitals in our answer are in conformity with the report and accepted as true.

The Court: You are offering here an abstract of title prior to the date of the mortgage.

Mr. Parker: That is to say, we are offering evidence of a transaction prior to the mortgage.

The Court: I have not come to that. Your answer sets up denial only of allegations which do not affect the complainant's right to foreclose.

Mr. Parker: I have only one suggestion —I do not want to interrupt—but this abstract was the abstract—

The Court: I am not talking about the abstract.

Mr. Parker (continuing): —that was used to close the transaction, although it

was not in the transaction that preceded it.

The Court: You do deny the amount of principal and interest due upon the complainant's bond and mortgage. Do I understand that you are offering any evidence at all under your answer? You are now asking to offer evidence under your counterclaim.

Mr. Parker: We are offering evidence now of the facts alleged in the answer.

The Court: What are you offering?

Mr. Parker: We are offering here an abstract which is admitted to be true.

The Court: If that is offered under your answer it will be denied.

Mr. Parker: Even though the statements are admitted by stipulation?

The Court: Where is the stipulation?

Mr. Parker: Counsel has agreed.

Mr. Schenck: If the Court please, I did not think we would get to the point of letting their—I propose to object to their offering proof of the counterclaim except this, that if the counterclaim is heard, then it is easier for both of us if that abstract be used, and I am perfectly agreeable.

Mr. Parker: That is for that purpose.

Mr. Schenck: If your Honor agrees that it cannot be used, that is another matter. This is the stipulation we have, and I want to offer this.

The Court: We have not come to that yet. I have not ruled upon your counterclaim.

Mr. Parker: We are now discussing

the question of pleading, as I understand it.

The Court: We are now discussing what proof you want to put in under your answer to the bill of complaint; not your counterclaim, but under your answer.

Mr. Parker: Of course, the reason that I am offering this paper here is that these statements—

The Court: I have ruled on that. You have offered it and I have ruled it out.

Mr. Parker: I want to state to the Court that we are depending on this statement, abstract, in lieu of the deeds.

The Court: That is under your counterclaim.

Mr. Parker: This is the allegation.

The Court: The allegation of your answer. Paragraph 3 of your answer? You hand me a deed, but what does it mean?

Mr. Parker: Mr. Schenck, have you objected to this deed? I will put a witness on if necessary.

The Court: What witness? How is this involved in Paragraphs 7, 12 or 13, of your answer?

Mr. Parker: The question is about the warranty of the deed.

The Court: Won't you be good enough to read your pleading—Paragraph 3 of the answer denies Paragraphs 7, 12 and 13 of the bill of complaint. Is there anything you want to offer in evidence under Paragraph 7?

Mr. Parker: We are prepared, of course, to offer evidence on that point.

The Court: Let me have it now.

Defendant's Witness, Joseph Pompeo, Direct

JOSEPH POMPEO is sworn.

Direct-examination by Mr. Parker:

Q. Mr. Pompeo, you are the defendant Pompeo in this action, are you not? A. Yes.

Q. And you are the person that purchased this property from Mr. Lonsdale? A. Yes, I did.

Q. And after you purchased the same, how long did you have the deed to that property before you did anything about it, do you remember? A. Well, I had the deed up to 1932, but I did not know anything about. When I sold the property to—

The Court: I am only concerned about Paragraph 7 of the bill of complaint. Did you enter into this contract for the sale of this property?

The Witness: Yes. I sold it to him.

The Court: Has that contract been cancelled?

The Witness: Because the man refused to take, yes. He cancelled. He refused to take; said he had certificate for development lots.

The Court: He cancelled?

The Witness: Yes. He refused to take, yes.

The Court: So he has no contract on it now?

The Witness: We made contract and had returned back, because he refused to take it.

The Court: He refused to take it?

The Witness: His lawyer told him. He would have to sell lots.

The Court: And took his money back?

The Witness: And took his money back. And I ruined my family, too.

The Court: Any questions?

Mr. Schenck: No questions.

By Mr. Parker:

Q. Is this the agreement that you signed for the sale of the property?

The Court: That is not material.

Mr. Schenck: I object to it.

Mr. Parker: All right.

The Witness: Yes. That is the one. Mr. Debano.

Mr. Parker: Your Honor does not care to examine this?

The Court: No.

Mr. Parker: We will offer it for what it may be worth.

The Court: It will be denied.

Mr. Parker: Under the stipulation, your Honor, there is admitted in evidence the fact alleged in Paragraph 7 of the answer, namely, that the sheriff, by virtue of a deed—

The Court: Where is Paragraph 7 of the answer?

Mr. Parker: It is in the counterclaim.

The Court: I am not dealing with the counterclaim. I am dealing only with the answer. I have tried to make that clear to counsel a number of times.

Mr. Parker: Paragraph 3 contains a reference to the deed.

The Court: Suppose you take the original answer. I do not know what you may have before you there. Here is the original answer, and there are all of the original pleadings.

Mr. Parker: You mean this Paragraph 1?

The Court: I mean exactly what I have just said. Your answer denies the allegations of

Paragraph 12 of the bill. Is there anything you want to offer on that?

Mr. Parker: I understand that Paragraph 12 is denied by mistake, and that is not now denied.

The Court: Then you do not want to offer anything on that?

Mr. Parker: No.

The Court: The remaining denial in the answer is of Paragraph 13. Is there anything you want to offer on that?

Mr. Parker: If the Court please, we are denying it because there was a failure of consideration. That is what we claim.

The Court: You do not claim any payment has been made on this bond and mortgage subsequent to May 7, 1932?

Mr. Parker: No. We do not claim any payment has been made on account.

The Court: Your only denial is based on the allegation of your counterclaim?

Mr. Parker: Yes.

The Court: I will recess for about fifteen minutes while I take up this matter of the counterclaim. It is my present impression that you are not entitled to have that tried here. Let me have the answer and counterclaim.

At this point a fifteen minute's recess is taken.

The Court: As I understand the defendant's contention—it certainly is that which is expressed by the counterclaim—it is that the title which was conveyed by the complainant by the deed, in partial payment of which the purchase money bond and mortgage was given, is defective. Is there any other contention on the part of the defendant than that?

Mr. Parker: It is the contention, as your Honor suggested, that the deed tendered a title which was defective, and therefore by reason of the fact that this transaction, including the mortgage, which is a purchase money mortgage —the purchase money being so much and the mortgage being so much—that the defect in title resulted in failure of consideration, so far as the defendant is concerned. We further contend that any question of law at this time to be raised in respect to the sufficiency of this defect in a foreclosure, in this mortgage foreclosure, has been waived by the complainant, because he joins issue on the facts and does not in any way in the pleadings raise a question of law as to the propriety of the defense at this time. We therefore, inasmuch as it is a purchase money mortgage, inasmuch as the whole transaction is between the original parties, and inasmuch as we propose to show to the Court the defect alleged in the answer and tender of the property back before the issues were joined in this suit—that is, that Mr. Pompeo tendered the property back to the complainant and asked for return of his money—that in view of those circumstances and the condition and state of the pleadings, regardless of any question of law which might ordinarily be raised on the question as to such

a defense in a foreclosure suit, we think that here we are entitled to interpose the defense that has been suggested in the answer, and in the replication they have joined. You see, the complainant comes in, instead of denying he says, "Even so, we are perfectly safe because of adverse possession." On all of those issues we are prepared to contend with them and to prove to the satisfaction of the Court that the title is defective, as we allege, and the mortgage foreclosure, being a purchase money mortgage, that that is a part of the case where the defense amounts to failure of consideration. Had this mortgage been assigned to the complainant in the foreclosure suit and no questions had been raised before the issues were joined, it might have been different, but these questions were all raised before the issue was joined in this foreclosure suit, and the situation in the pleadings is such that we think now the complainant is precluded by waiving the question of law.

The Court: The objection seems to be to the jurisdiction, and that question has been determined by the Court of Errors in the case of Emery v. Hansen, 107 N. J. E. 117. I will overrule the offer of proof on the counterclaim. The exception may be noted. The complainant is entitled to the decree prayed for in the foreclosure, but, in view of the fact that the issue might have been raised prior to the final hearing, but was not, there will be no costs other than the costs in an uncontested foreclosure suit. Is there anything further?

Mr. Parker: If the Court please, I do not want to go into a prolonged argument. I suppose the record is perfectly clear that we take

exception to that ruling in such a way that we might appeal.

The Court: Yes. Your objection may be noted.

Mr. Parker: I take it, further, that there is nothing further we can do under the condition of the pleadings and the record. I suppose we can offer no further testimony than we have already offered. Is that the situation?

The Court: That is what I said.

Mr. Parker: We prepared with great care to show all of the particulars in regard to the adverse possession. We are disappointed we cannot go into that.

The Court: That, under the decisions, is a matter for a court of law and not for this court.

Mr. Parker: I suppose that would leave us to decide what other proceeding we should take.

The Court: If there is nothing further court will stand adjourned.

New Jersey Court of Errors and Appeals

Between GEORGE WALLACE LONSDALE, Complainant-Appellee, and JOE POMPEO, Defendant-Appellant.	On Appeal From Final Decree of the Court of Chancery.

BRIEF OF APPELLANT.

The appellee filed a bill, to foreclose a purchase money mortgage, given in part payment of the purchase of the land in question, by the appellant (Case, p. 2).

It appeared that the deed, offered by the appellee, was one containing covenants of warranty; that the appellee had good title, the right to convey, was properly seized and would warrant and defend the title.

After the subpoena was issued and served, the appellant answered the bill and set up a denial of the appellee's right of action, failure of consideration, and a counterclaim, setting forth that the title is bad, specifying the defects, that he had tried to sell and convey the land, but that the title was rejected for cause, referring to fatal defects in grantor's title, and that, on offering to reconvey the premises to appellee, the

consideration for the deed, namely, the amount paid in cash for the purchase of the property, as well as the other outlays of the appellant should be repaid appellant, and that the purchase-money mortgage should be decreed to be cancelled and for nothing holden (Case, pp. 9-12).

To this answer of the appellant, the appellee filed a replication and added therein a special defense to the counterclaim (in effect an answer to the cross-bill) thereby joining issue on the counterclaim as well as the allegations in the bill (Case, pp. 14 and 16), and the facts set forth in the affirmative defense of the answer.

POINT I.

By joining issue with his replication, the appellee accepted the answer of the appellant, and put the case down for trial of the issues, as sufficient in law, and thereby demanded proof of *facts* in appellant's answer, and waived his right to except to the sufficiency of the appellant's allegations as to matters of law.

The only question before the Court then was, whether the defense and counterclaim of the appellant, were true in fact. The questions of law and jurisdiction, were not then before the Court. Had the appellee wished to raise a question, as to the legal sufficiency of the facts, as set up in appellant's answer and counterclaim, then the appellee ought to have raised that question, *before the trial,* either by excepting to the answer, amending his bill, or by setting the case down for hearing on bill and answer; and the

learned Vice Chancellor might then have considered the question of jurisdiction, Chancery Rules No. 75 and No. 79.

The appellee did not do any of these things, but accepted the answer, as being legally sufficient, if true, and the only issues before the Court at the hearing were the questions of fact. *Harris vs. Esperenza,* 91 N. J. Eq. 164, c. p. 167.

POINT II.

After the parties were in court with their witnesses and proof, the learned Vice Chancellor refused to hear the case on the ground that the Court was without jurisdiction (Case, pp. 46-48).

The learned Vice Chancellor fell into the error of assuming that the question being one of "*Jurisdiction,*" it could be raised at any time. This is not true in this case.

The question of *Jurisdiction* indicated by the Vice Chancellor, seems to be one of *necessary* limitations. Such jurisdictional facts as would deprive the Court of the right of entering a final decree on the issues as raised by the pleadings, and no such absolute jurisdictional limitation is here presented; because the whole matter, even from the viewpoint of the Court below, is one of "discretion."

"Adequate Remedy at Law."

The question whether a Court of Equity will take jurisdiction where there is "an Adequate Remedy at Law" is, as a matter of fact, seldom exercised where are involved in the same litigation other equitable principles.

Curtiss-Wright Corp. vs. Thirkettle, 99 N. J. Eq. 806 at pp. 813-816.

The Court has always exercised reasonable discretion in taking jurisdiction of matters involving legal remedies.

Dawson vs. Leschziner, 72 N. J. Eq. 1 (Magie-C).

Where the Court for any other reason has taken jurisdiction of the case, it will dispose of the whole matter in the event that equitable grounds for jurisdiction appear, and will dispose of the legal questions and damages, incidentally, whether there be adequate remedy at law, or not.

VanHorn vs. Demarest, 76 N. J. Eq. 386.
Freilie vs. Rudiger, 89 N. J. Eq. 91.
Commercial Trust Co. vs. Zunni, 108 N. J. Eq. 435.

The Court of Equity has even gone much further in a well settled line of decisions by holding that where the Court has been presented with issues involving purely legal questions, and can dispose of them so as to avoid the hardship involved for the parties by a circuity or multiplicity of actions, and where by sending them to another Court the litigation will be unnecessarily involved in delay and added expense, or where the security for an anticipated judgment at law may be lost by sending the parties from the Court of Chancery, it will do so. In such cases the Court usually assumes jurisdiction and disposes of the whole matter at the hearing before the Chancellor.

Dawson vs. Leschziner (*supra*).
Curtiss-Wright vs. Thirkettle (*supra*).
VanHorn vs. Demarest, 76 N. J. Eq. 386 (*supra*).

Smith vs. Commercial Cred. Corp., 113 N. J. Eq. 12; 165 A. 637, and cases there cited.
Varick vs. Hitt, 66 N. J. Eq. 442 at pp. 445-6.
Roe vs. Jersey City, 80 N. J. Eq. 35.

Cited in

Booth vs. Bayonne, 85 N. J. Eq. 286.

There seems to be the *practical* point of view, as distinguished from the purely *academic* point of view, and where issue has been joined on the allegations in the pleadings, the Court will seldom intervene *sua sponte* to send the parties away to seek their remedy in the Law Courts.

Breitman vs. Jaenal, 99 N. J. Eq. 243 at p. 248.

Citing among other cases

Grosman vs. Pfister, 80 N. J. Eq. 432.
Commercial Trust Co. vs. Zunni, 108 N. J. Eq. 435 (*supra*).
Varick vs. Hitt, 66 N. J. Eq., 442 at pp. 445-6 (*supra*).
Roe vs. Jersey City, 80 N. J. Eq. 35 (*supra*).

On the other hand, in a foreclosure suit where the motion to strike (in place of excepting to the answer under the old practice) is made in time by the complainant the Court would sometimes, in its discretion, send the parties to the Law Court.

A number of decisions formerly held that in a foreclosure suit based on a purchase money mortgage made by the defendant to the complainant and a defense based merely upon a covenant of warranty deed to defend, &c., given by the complainant to the defendant, the Court

would strike the defense of defective title, unless there was an actual eviction, or a constructive one; if such defense was tested by the complainant before filing of a replication; but such action was *discretionary.*

The Court of Equity has, however, not always given the same explanation for the old rule adopted in these foreclosure proceedings for compelling the defendant to go to law for a remedy for the failure of consideration. It has been really embarrassing to find a sound explanation.

In the case of *O'Brien vs. Hulfish,* 22 N. J. Eq., it is said (p. 476) that

> "Upon the argument counsel likened the case of fraud to that of an eviction where a warranty of title exists; and it was said that such eviction could be set up in the answer. But the two cases are not alike; for, on the occurrence of an eviction, the facts are of a simple character, and the right of a defendant is to have a return of the purchase money, or a deduction according to fixed standards; but, on the contrary, fraud gives rise to a counterclaim, the amount of damages being wholly unliquidated and dependent on the circumstances of the particular transaction."

But in the case of *Emery vs. Hanson,* this Court unanimously reversed the Vice Chancellor, who thought that covenants against encumbrances could not be set up in the answer to a foreclosure suit on a purchase money mortgage.

Emery vs. Hanson, 107 N. J. Eq. at p. 119.

Some Courts have declined to hold that a

breach of the covenant against encumbrances is broken at the time the deed is made, but that a covenant as to a good title is not broken when the title is bad at the time of the conveyance.

Webb vs. Wheeler, 114 N. W. (Neb.) 636 (Jan., 1908); 17 L. R. A. (N. S.) at p. 1178.
Delong vs. Spring Lake, 65 N. J. L. 1.
Kellogg vs. Platt, 33 N. J. L. 328.
Gerbert vs. Trustees, 59 N. J. L. at p. 180.

In the instant case the Court certainly had jurisdiction of the subject-matter set forth in the bill and the subject-matter set forth in the answer. The mere fact that there was another remedy at law either for the complainant or for the defendant did not oust the Chancellor of jurisdiction. The complainant might have brought an action at law on his bond, instead of foreclosing; and the defendant might have brought an action at law on the covenants in his deed; but nevertheless, all these matters, not only the subject-matter but the parties, were properly before the Chancellor on the pleadings, after replication filed.

Chancery Rule No. 75.

POINT III.

But the objection to the defendant's answer and cross-bill that the covenant of warranty is *in futuro* and not broken until eviction is, in any event, required to be taken by (a) an exception to the answer or (b) by putting the case down for argument on bill and answer; because that was the method of testing this sufficiency

of the answer, as a matter of law, in equity; and, in the event that the answer was not technically sufficient, to allow the defendant to answer over, if he could.

O'Brien vs. Hulfish, 22 N. J. Eq. 471 (*supra*).
Kocher's Chan. Pr. at p. 268.

Where, however, the objection was not taken in time, and the defective title, or other failure of consideration, was set up *not* in the *answer* merely but in the *cross bill* (counterclaim) and the issue was joined on the cross bill by the filing of a replication, or an answer to the cross bill (counterclaim), the objection that the issues might have been disposed of at law must be considered as having been waived and the case put down for hearing and issue joined on the *questions of fact,* putting the parties to their proof; and the Court of Chancery will then hear and determine the cause on the sufficiency of the evidence and proof submitted, and on the merits. The consideration of the legal sufficiency of the defendant's allegations will then be postponed till after the evidence is presented.

Goodbody vs. Delaney, 80 N. J. Eq. 417.
Roe vs. Jersey City, 80 N. J. Eq. 35 (*supra*).
Tipton vs. Randall, 87 N. J. Eq. 387.
Harris vs. Esperanza, 91 N. J. Eq. 163, at p. 167 (*supra*).
Wythe vs. Arthur, 17 N. J. Eq. 521.
Hunt vs. West Jersey Traction Co., 62 N. J. Eq. 225.
Mertens vs. Schlemme, 68 N. J. Eq. 544, at p. 548.
Breitman vs. Jaehnal, 99 N. J. Eq. at p. 248 (*supra*) (Case, p. 10, fol. 30 and p. 11).

POINT IV.

This is especially true under the present practice acts governing the practice in the Court of Chancery, passed during the years 1902, 1915.

Objection to the jurisdiction of the Court of Equity and other questions of law must be tested either by demurrer on the part of the defendant (motion to strike), or by an exception to the answer (motion to strike), by the complainant; and if complainant does not except to the answer, and files his answer to the cross bill, or joins issue on the facts by filing a replication, it is then too late (when the parties have come to Court and are all ready to present their witnesses and proof) to send the defendant away to the Law Courts to seek such remedies as he may there have for a breach of contract.

The Practice Act of 1915, Chapter 116, P. L. 1915, at pp. 184, *et seq.,* seems to have anticipated precisely such a situation as we have here, where it is provided by that act (which "shall be liberally construed").

> "9. Any question, ordinarily determinable at law arising in a suit of which the Court of Chancery has jurisdiction, other than a question requiring a jury trial or a determination upon *certiorari, mandamus* or *quo warranto,* shall be determined by the Court of Chancery *in that suit.*" (Italics mine.)

See also:

Reeve vs. Reeve, 102 N. J. Eq. 436, at p. 439.

Baird vs. South Orange, 108 N. J. Eq. 91, at p. 112 (citing P. L. 1915, p. 196 Rule

59), and Chancery Rule 75; and referring to the opinion of Chancellor Walker in *Tipton vs. Randall,* 87 N. J. Eq. 387. *Goodbody vs. Delaney,* 80 N. J. Eq. 417, at pp. 420-23 (*supra*) (Howell, V. C.).

POINT V.

In the case at bar, the defense of failure of consideration, and defective title were joined with a defense of rescission, and were set forth not merely as an *answer* but as affirmative defenses in a *counterclaim* (cross bill) and it is expressly alleged that the defendant, when he discovered the defective title after offering the property for sale, *made a tender of the deed* which had been given to him by the complainant, and *made a demand for the return of the cash consideration paid* on the closing of the contract of purchase (Case, fol. 40, p. 11). Foreclosure was entirely unnecessary, had complainant been fair.

Snyder vs. Czerminski, 108 N. J. Eq. 113.

POINT VI.

In addition to filing a replication, the complainant added to the replication a special and affirmative defense to the cross bill (counterclaim) (Case, pp. 15 and 16), and it will be going in the face not only of established procedure, but in defiance of the practice acts under which procedure is now regulated, to turn away the defendants from the Court of Chancery after issue has been thus joined, and both

parties are present with their witnesses and proof after the usual expense, suspense and anxiety, incident to that situation.

Hunt vs. West Jersey Traction Co., 62 N. J. Eq. 225 (*supra*).
Mayor vs. Roe, 80 N. J. Eq. 35, at pp. 36 and 37 (*supra*).

POINT VII.

The tendency of modern practice both in equity and at law is to relieve parties of the protracted burden of litigation by the most direct route and by the simplest practical means.

POINT VIII.

In such a case as we have here any reasonable amendment of the cross bill to conform to the facts established at the hearing might be anticipated, where the proof is reasonably consistent with the general allegations of the cross bill.

O'Brien vs. Hulfish, 22 N. J. Eq. 471.
Kellogg vs. Platt, 33 N. J. L. at p. 335 (*supra*).
Dayton vs. Melick, 27 N. J. Eq. 362.
Grosman vs. Pfister, 80 N. J. Eq. 432.

It will make for a real advance in the administration of justice to endeavor to follow and to support the efforts of the Legislature and the bar in preparation of practice acts, such as the Chancery Acts, and to establish a familiarity with those rules and to make a habit of following them.

POINT IX.

How prudent the provisions of the practice act are, is easily understood when we examine the allegations of the defendant's counterclaim (Case, pp. 9-11).

The defendant paid a large sum of money in cash, in addition to the purchase money mortgage, for the property, and, until he sold the property for a slight profit, he was not aware of the defect in the title, having, obviously, depended upon the assurances of the complainant and his attorney as to the title (Case, fol. 40, p. 11); for, had an exception been made to the answer by the complainant (to test the question of jurisdiction of the Court of Equity) the defendant would unquestionably have amplified his defense (had he been warned by an adverse ruling) by such proper additional allegations of fact as the situation would warrant; for, not having searched the title himself and relying on the report of the complainant's counsel, or such other equitable situation as may be warranted by the facts, might have been brought to the attention of the Court.

But the necessity for this was not pointed out, as the defendant assumed from the state of the pleadings, and the fact that the complainant joined issue, that the question of title would be litigated and determined before, and by, the Vice Chancellor on the pleadings as they stood, or as they might be amended to conform to the proof, after the evidence was fully developed before the Court.

O'Brien vs. Hulfish, 22 N. J. Eq. 471, at pp. 475-6 (*supra*).

Curtiss-Wright Corporation vs. Thirkettle, 99 Eq. 813, at p. 816 (*supra*).
Snyder vs. Czerminski, 108 N. J. Eq. 113, at pp. 114 and 115 (*supra*).
Bonded Building & Loan Assn. vs. Noll, 111 N. J. Eq. pp. 163-5.
Hawthorne vs. Odenson, 94 N. J. Eq. 588, at p. 601.
Brownback vs. Spangler, 101 N. J. Eq. 388.
Breitman vs. Joenal, 99 N. J. Eq. 243, at p. 248 (*supra*).
Grosman vs. Pfister, 80 N. J. Eq. 432 (*supra*).

Dated, East Orange, May 21st, 1935.

Respectfully submitted,

TERRY PARKER,
Solicitor for and of Counsel
with the Defendant-Appellant.

THE REPORTER CO., WALTON, N. Y.
New Jersey Representative:
F. W. Baker, 605 Valley Road, Upper Montclair
Telephone, MOntclair 2-0751

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between GEORGE WALLANCE LONSDALE, *Complainant-Respondent,* *and* JOE POMPEO, *Defendant-Appellant.*	*On Appeal from Chancery.*

BRIEF FOR COMPLAINANT-RESPONDENT.

Statement of Facts.

On or about May 7th, 1926, the complainant sold to the defendant, Joe Pompeo, a small farm in Livingston, Essex County, New Jersey, and took back a purchase money mortgage dated May 7th, 1926 for $12,800. payable May 7th, 1931 with interest at six per cent. On or about July 31st, 1928 the complainant released a part of the mortgaged premises to the defendant, Joe Pompeo. (Paragraph 4 of Bill, Case, p. 2, l. 40, admitted by the answer Case, p. 9). On or about November 5th, 1930 Essex County took a small strip of land from the mortgaged premises to widen Roseland avenue, also known as Livingston avenue (Case, p. 3, and p. 9). The amount of the award for the property, $1.86, was paid into the Court of Chancery (Case, p. 39, l. 29). The bill was filed to foreclose this mortgage against the remaining premises covered by it. There is due upon the mortgage the full amount of principal, $12,800. with interest at six per cent. from May 7th, 1932 (Case, p. 37, l. 13; p. 45, l. 20). The defendant, Joe Pompeo, and his tenants have been in possession of the mortgaged premises since the making of the mortgage (Case, p. 7, ll.

1 and 41, p. 45, l. 3). Most of the allegations of the bill were admitted by the answer of the defendant, Joe Pompeo. Those that were denied were proved or admitted at the hearing.

The defendant, Joe Pompeo, filed a counterclaim in which he alleged that the deed to him from the complainant was a warranty deed containing covenants that complainant was the true and lawful right owner of said premises and would defend the same to the defendant; that he contracted to sell the mortgaged premises to one Leonardo Perna who refused to take title on the ground that there was a defect in title to the premises; that on April 4th, 1892 a final decree for $1,153.83 was made in a foreclosure suit in which Moses L. Gans and Henry Gans executors of the last will and testament of Isaac Gans were complainants; that at the sheriff's sale on August 8th, 1892 the premises were sold to Moses L. Gans and Henry Gans as executors aforesaid for $1,360. but the sheriff's deed was made to Moses L. Gans and Henry Gans individually; that the records in the Surrogate's Office did not show the payment of certain legacies in the will of Isaac Gans nor the distribution of the estate; that on March 16th, 1893 Moses L. Gans and Henry Gans individually, conveyed the mortgaged premises by warranty deed for $1,580. to Charles H. Minar. The counterclaim then set out subsequent conveyances the last of which was to the complainant and continued that the defendant, Joe Pompeo, had offered to reconvey the property to the complainant upon receipt of $7,500. the cash he had paid complainant upon taking title, and prayed that the conveyance from the complainant to the defendant be declared void, the purchase money mortgage cancelled and that the complainant be decreed to

pay the defendant $7,500. with interest from May 7th, 1926.

This counterclaim was dismissed by the Vice-Chancellor and from that dismissal the defendant, Joe Pompeo, appeals.

The appellant has failed to print the Vice-Chancellor's opinion and the exhibits. That opinion, the mortgage and an extract from the foreclosure search, are printed as an appendix to this brief.

The sole question in this case is whether there was error in dismissing the counterclaim. The position of the complainant-respondent is that there was no error.

I.

The complainant-respondent was entitled to a decree for the foreclosure of his mortgage, whether the title was defective or not.

A defective title cannot be used to defeat the foreclosure of a purchase money mortgage. There was in the present case no allegation of any eviction and in fact it was admitted at the hearing that the defendant and his tenants had been in possession since the making of the mortgage, nor was there any allegation of any action pending at law to determine the issue of the alleged defective title. Under these circumstances it is settled that there is no defense or ground for refusing to enter a final decree in a foreclosure suit. *Hawthorne* v. *Odenson,* 94 N. J. Eq. 588, at page 591 Vice-Chancellor Leaming says:

> "But in the absence of actual eviction or a pending action to try an adverse title the foreclosure will not be arrested by a defense

> of want of title in the vendor. In such cases the covenants of title must be relied upon by the vendee for recovery of damages in a court of law. Price *v.* Lawton, *supra* (27 N. J. Eq. 325)."
>
> "* * * The general rule appears to be that in the absence of fraud, when a sale of real estate has been consummated by the execution and delivery of a deed of conveyance, the purchaser's measure of protection in matters of title to the land is to be found in the covenants which he exacts from his vendor, and such covenants are not to be deemed as broken until eviction."

Price Executors v. *Lawton*, 27 N. J. Eq. 325 (aff'd. 28 N. J. Eq. 274), was a suit to foreclose a purchase money mortgage. At page 327 Vice-Chancellor Van Fleet says:

> "An allegation that there is an outstanding paramount title will not enable the owner of the equity of redemption to arrest the enforcement of a purchase money mortgage."

See also *Hulfish* v. *Obrien*, 20 N. J. Eq. 230, (aff'd. 22 N. J. Eq. 471) *Security Trust Co.* v. *Read*, 101 N. J. Eq. 53 and *Emery* v. *Hansen*, 107 N. J. Eq. 117, where at page 119 the Court of Errors cites the following language of Vice-Chancellor Leaming with approval:

> "When the deed contains a covenant of title, this court will not undertake to adjudicate an issue of title to determine whether the covenant has been broken, but will leave that issue for the courts of law. This is because the primary jurisdiction for adjudication of legal title rests in courts of law."

II.

The Court of Chancery may of its own motion, where it appears that there is an adequate remedy at law, refuse to hear the parties and send them to the Law Court even though the parties are willing that the Court of Chancery should hear the matter.

The appellant contends that objection to the insufficiency of the counterclaim was not made soon enough. Conceding this for the sake of argument, it is well settled that the Court of Chancery, as was done in the present case, may at any time send the parties to a Court of Law even though no objection is made by the parties to the jurisdiction of the Court of Chancery.

Roe v. *Jersey City,* 80 N. J. Eq. 35.

Coast Co. v. *Spring Lake,* 56 N. J. Eq. 615, (aff'd. 58 N. J. Eq. 586) where at page 627 Vice-Chancellor Emery says:

> "The general rule is that a court may, of its own motion, dismiss a bill at any stage of the cause, on the ground that the complainant has an adequate remedy at law. But where the defendant has not raised the objection until after testimony on the merits has been taken, the court, in its discretion, will retain the case if the court is competent to grant the relief prayed and has jurisdiction over the subject-matter."

See also *Martens* v. *Schlemme,* 68 N. J. Eq. 544, at page 548; *Lehigh Zinc and Iron Co.* v. *Trotter,* 43 N. J. Eq. 185, at page 204.

In the present case objection was made to the counter-claim immediately upon the opening of the case to the Vice-Chancellor and he dismissed the counter-claim before any testimony was taken. Under these cases he could have

followed this course even if no objection had been made.

III.

The complainant-respondent was not required to move to strike out the answer and counter-claim.

Rule 67 of the Court of Chancery provides:

> "Any pleading may be objected to, on motion on the ground that it discloses no cause of action, defense, or counter-claim, respectively.
>
> "On the hearing of such motion, the court, in its discretion, may order the application to stand over until the hearing, and if the objection be to the bill or counter-claim, may require the same to be answered on such terms and conditions as may be ordered."

Rule 1 of the Court of Chancery provides:

> "The word 'may' as used in these rules, is not mandatory."

It is obvious that under these rules it would have been permissible to move to strike out the counterclaim but that such course was not mandatory. Rule 67 contemplates that the sufficiency of a pleading may be passed upon at the hearing. There is nothing in the rules of the Court of Chancery or the Chancery Act of 1915 which provides for the use of "objections in point of law," similar to those used in pleadings at law.

Chancery Rule No. 75 refers to defects in pleading and, of course, if such defects are not taken advantage of by motion, they are waived. The cases cited by the counsel for the appellant under this rule have no bearing upon a situation where the pleading is itself insufficient because it does not state a cause of action.

IV.

Failure to state a cause of action in the counter-claim or lack of jurisdiction in the Court of Chancery may be taken advantage of at any time.

In the present case the counter-claim presented nothing but an issue of title which the Court of Chancery was without jurisdiction to entertain in the absence of other facts giving equitable jurisdiction. The same situation presented itself in *Gihon* v. *Morris,* 90 N. J. Eq. 230 where the Court of Errors and Appeals reversed the Court of Chancery after a complete hearing on the ground that the Court of Chancery was without jurisdiction. At the end of page 231, Justice Swayze says:

> "The Court of Chancery has no jurisdiction in such a case in the absence of fraud."

The facts in this case were very similar to the facts in the present case.

In *Long Branch* v. *Hoch,* 99 N. J. Eq. 356, the question involved was the existence or non-existence of a public right in a strip of land. A final decree was entered in the Court of Chancery after a hearing at which the Vice-Chancellor found that there were public rights in existence (99 N. J. Eq. 103). Speaking for the Court of Errors and Appeals Chief Justice Gummere said that whether or not such an easement existed was a purely legal question which must be settled by a Court of Law and was not determinable by a Court of Equity. He then continued at page 358:

> "It is argued that in the present case the rule just adverted to should not be applied, for the reason that the jurisdiction of the court of chancery was not challenged, and

> that counsel for the defendants consented that the issue of fact should be determined by the vice-chancellor before whom the hearing was had. It is enough to say in disposing of this contention that counsel cannot, by mere silence or by express consent, confer upon courts of equity the power to determine litigated matters which, under our judicial system, must be settled in a court of law; or, stated in another way, strip the law courts of jurisdiction conferred upon them under the constitution and transfer it to courts of equity."

In *Welsh* v. *Hour,* 100 N. J. Eq. 417, Vice-Chancellor Backes found that the case made out by the bill and in a measure supported by the proofs, was a promise upon a valuable consideration to bequeath property of a definite value. He held that such a promise was enforceable in the Courts of Law and was not within any recognized head of equity jurisdiction. At page 420 he said:

> "Where, as here, the subject-matter of the suit in equity is purely for the vindication of a legal right, remedial at law, and though the cause is ripe for decision, and no objection to the jurisdiction has been made, or the parties consent, the cause ought to be dismissed, not in discretion but as a matter of clear duty, because of want of jurisdiction."

In *San Giacomo* v. *Oraton Investment Company,* 103 N. J. Eq. 273, the only question before the court was the amount of interest due to the defendant. The case was heard before a Vice-Chancellor who dismissed the bill finding that interest paid under protest could not be recovered back. The Court of Errors and Appeals said that the bill should have been dismissed on the ground that the Court of Chancery had no

jurisdiction over the subject-matter. At page 274 Justice Black said:

> "By the system of courts set up in New Jersey under the constitution, article 6, section 1, the jurisdiction of the equity and common law courts is separate and distinct. The common law courts have exclusive jurisdiction to hear and determine controversies resting upon a purely legal basis and determined by the principles of the common law, such as a money claim or a simple debt and the like, whether due or not. The jurisdiction of the equity courts cannot be conferred over this class of subjects by consent of counsel or acquiescence of a vice-chancellor. The court of chancery was not competent to adjudicate the claim. The first requisite to constitute jurisdiction is, the court must have cognizance of the class of cases to which the one to be adjudged belongs."

V.

The defect in title, if there was a defect, has been cured by the lapse of time.

The defect in title complained of by the appellant is that when Moses L. Gans and Henry Gans, as executors foreclosed a mortgage, title following the sheriffs sale on August 8th, 1892 was taken under the sheriff's deed in the name of Moses L. Gans and Henry Gans individually. It has been held that where the records show such a situation to have occured within the past eight years, a Court of Equity would decline to make a purchaser accept the title because the sale might be set aside on application of parties interested, *Grossman* v. *Pfister,* 80 N. J. Eq. 432, but in that same case, it is said at page 435:

> "* * * that a Court of Equity would presume after a lapse of a long period of

> time that the trustee had accounted to the beneficiaries and that all claims against him were barred by long delay, * * *."

And this was expressly held in the case of *Starkey* v. *Fox,* 52 N. J. Eq. 758, at p. 768 (aff'd. 53 N. J. Eq. 239). If Moses L. Gans and Henry Gans held the property in a fiduciary capacity, it was for the purpose of paying the legacies and making distribution under the Will of Isaac Gans but there is a presumption of payment of legacies after twenty years. *Hedges* v. *Norris,* 32 N. J. Eq. 192; *Peacock* v. *Newbolds Executor,* 4 N. J. Eq. 61 (Aff'd 5 N. J. Eq. 535), *Hayes* v. *Whitall,* 13 N. J. Eq. 241, and in *Matthew* v. *Kelly,* 70 N. J. Eq. 796, the Court of Errors and Appeals held that twenty years after the final account of a deceased lunatic had been allowed, it would be presumed that the balance in the hands of the guardian had been distributed to those entitled to it.

It is respectfully submitted therefore, that the Decree of the Court of Chancery should be affirmed.

ALEXANDER T. SCHENCK,
Of Counsel with Complainant-Respondent, George Wallace Lonsdale.

APPENDIX.

OPINION OF VICE-CHANCELLOR.

IN CHANCERY OF NEW JERSEY.

96/59.

Between

GEORGE W. LONSDALE,
Complainant,

and

JOE POMPEO, *et al.*,
Defendants.

Conclusions.

(Not to be published in any report.)

ON FINAL HEARING.

BUCHANAN, *V.-C.*

Complainant's bill is to foreclose a purchase money bond and mortgage of $12,800.00, made to complainant by defendant Pompeo, May 7, 1926. Due proof in respect thereof was made, showing the full amount of principal due and owing, together with interest at 6% from May 7, 1932.

Proof was also made by the United States of America, as a subsequent encumbrancer, that there is due to it $29.45, balance of a judgment for costs entered October 17, 1929.

The answer sets up no defence other than a denial of the amount alleged to be due; and admittedly the amount alleged and proven as due and owing on the bond and mortgage is correct, unless the defendant is entitled to some deduction or other relief in respect of his counterclaim.

This counterclaim sets up only complainant's warranty deed to defendant and certain allegations of fact as to the chain of title antecedent

to the deed by which complainant took title, and defendant's contention is simply that the title conveyed to him by complainant was and is defective, and he prays that that deed be "declared void," or (inferentially) that there be a decree for reconveyance by defendant to complainant, and that the purchase money mortgage be "cancelled of record," and that complainant return to defendant the portion of purchase price actually paid in cash.

There is no allegation of encumbrance, nor of fraud or misrepresentation by complainant, nor of mutual mistake, nor of any other ground of equitable jurisdiction; and defendant's counsel admitted that the sole contention was that there was a failure of consideration by reason of the alleged defective title.

There is neither allegation nor offer to prove eviction, nor any pending action at law to determine the issue as to the alleged defective title.

Under such circumstances, the matters set up by this counterclaim constitutes no defence to the foreclosure suit, and no ground for stay. *Hawthorne* v. *Odenson,* 94 N. J. Eq. 588; *Security Trust Co.* v. *Reed,* 101 N. J. Eq. 53; approved in *Emery* v. *Hansen,* 107 N. J. Eq. 117, at 119. Neither do they set forth any equitable cause of action; defendant's remedy must be sought at law.

Complainant is entitled to decree of foreclosure in usual form; and the counterclaim must be dismissed.

Defendant urges that this legal objection by complainant to the counterclaim is not set up in his answer to the counterclaim and, being made for the first time at the trial, comes too late. The objection being jurisdictional may be made

at any time. The counterclaim presents an issue as to title, and this Court is without jurisdiction to entertain such an issue in the absence of any other facts giving rise to equitable jurisdiction.

It is true that the objection could and should have been made earlier,—as by motion to strike; even if it had been made in the answer to the counterclaim, defendant would have been appraised thereof and would have produced his witnesses in Court at his own risk. In view of these facts, no costs will be allowed complainant other than the costs as on an uncontested foreclosure, and the counsel fee in such costs will be merely nominal.

EXHIBIT C. 2.

THIS INDENTURE, Made the Seventh day of May in the year of our Lord One Thousand Nine Hundred and Twenty-six.

BETWEEN JOE POMPEO of the City of Newark in the County of Essex and State of New Jersey, party of the first part;

AND GEORGE WALLACE LONSDALE of the Township of Livingston in the County of Essex and State of New Jersey party of the second part,

WHEREAS, the said JOE POMPEO is justly indebted to the said party of the second part, in the sum of TWELVE THOUSAND EIGHT HUNDRED Dollars, lawful money of the United States of America, secured to be paid by his certain bond or obligation, bearing even date with these presents, in the penal sum of TWENTY FIVE THOUSAND SIX HUNDRED Dollars, lawful money as aforesaid conditioned for the payment of the said first-mentioned sum of TWELVE THOUSAND EIGHT HUNDRED Dollars, lawful money as aforesaid, to the

said party of the second part, his executors, administrators or assigns, and to be paid on the Seventh day of May which will be in the year One Thousand Nine Hundred and Thirty-one and interest thereon to be computed from May 7th, 1926 at and after the rate of six percent per annum and to be paid semi annually

And It Is Thereby Expressly Agreed that should any default be made in the payment of the said interest or of any part thereof, 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 this mortgage, and become due and payable, and should the said interest remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent 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 then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum of Twelve Thousand Eight Hundred dollars, with all arrearage of interest thereon, shall, at the option of the said party of the second part, or his legal representatives, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything therein before contained to the contrary thereof in anywise notwithstanding: as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear.

Now This Indenture Witnesseth, That the said party of the first part, for the better secur-

ing 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 him in hand paid by the said 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, aliened, released, 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 his heirs and assigns forever,

All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Livingston in the County of Essex and State of New Jersey

Beginning at a point in or near middle of road leading from Livingston to Caldwell thirty links distant Northwesterly from a stake by a post at intersection of the Easterly line of said road with Southerly line of McClellan Avenue said distance of thirty links being a continuation of said Southerly line of said Avenue until it intersects centre line of said road and runs thence South sixty-seven degrees thirty minutes East fifteen chains and sixty links to a large stone at the intersection of the fences in line of land formerly of William H. McCreary and William Courter South twenty-one degrees and forty-five minutes West six chains and forty links to a stake and stones for the Southeasterly corner of the lot hereby intended to be conveyed; thence with other lands of Moses E. Halsey and parallel with the Southerly line of McClellan Avenue aforesaid North sixty-seven degrees and thirty minutes West sixteen chains and seventy links to or near the middle

of the aforesaid road; thence in said road North thirty-one degrees and thirty minutes East six chains and fifty links to the point of beginning. Containing ten acres and thirty-four hundredths of an acre, more or less.

EXCEPTING therefrom the following described lands:—BEGINNING at a point in the Southerly side of McClellan Avenue which is the Northeasterly corner of the above described tract of lands and is also the corner of Joseph H. Bedell; thence (1) Westerly along the said Southerly side of McClellan Avenue one hundred feet; thence (2) at right angles to McClellan Ave. one hundred and fifty feet thence (3) parallel with McClellan Avenue Easterly to the Westerly line of said Bedell; thence (4) along the Westerly line of said Bedell Northerly to the place of BEGINNING. BEING the same premises conveyed to the party of the first part by deed of George Wallace Lonsdale and Hetty N. Lonsdale, his wife, of even date and to be recorded herewith. Subject to the lease mentioned in said deed. This mortgage being given in part payment of the purchase price of said conveyance.

PROVIDED that the holder of this mortgage shall release from the lien thereof the dwelling house now on said premises and the land whereon the same is now standing, not exceeding one hundred feet frontage, upon payment of the sum of Thirty-five Hundred Dollars; shall release the lands at the corner of McClellan Avenue and Livingston Avenue, not exceeding a frontage of one hundred feet on either Avenue upon payment of the sum of Twenty-five Hundred dollars; shall release any part of the remaining lands upon payment of a sum equal to One Thousand Dollars for each acre or fraction thereof released, no acre to have a frontage greater than one hun-

dred feet on either McClellan Avenue or Livingston Avenue; shall release any lot hereinafter laid out by the mortgagor excepting the house lot or corner lot above referred to upon payment of the sum of One Hundred Fifty Dollars for the release of a lot having a depth of one hundred feet and a frontage of twenty-five feet on either Livingston or McClellan Avenues and the sum of One Hundred Dollars for a lot having a depth of one hundred feet and a frontage of twenty-five feet on any street or streets to be laid out and constructed on said property by the mortgagor.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise 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 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:

To Have And To Hold the above granted and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his 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, his heirs, executors or administrators, shall well and truly pay unto the said party of the second part, his executors, administrators or assigns, the said sum of money mentioned in the condition of said bond or obligation, and the interest thereon, at the time and times, and in the manner mentioned in the said condition, ac-

cording to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine and be void.

And the said Joe Pompeo for himself, his heirs, executors and administrators, do covenant and agree to pay unto the said party of the second part, his heirs, executors, administrators 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 of these presents, that the said party of the first part, his heirs, executors, administrators and assigns shall and will keep the buildings erected, and to be erected, upon the lands above conveyed, insured against loss or damage by fire, by insurers, and in an amount approved by the said party of the second part, his executors, administrators 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 per cent. per annum, from the time of payment of such premium or premiums.

And The Said Joe Pompeo is the owner of the lands above described for himself, his heirs and assigns, does further covenant and agree to and with the said party of the second part, his heirs, executors, administrators and assigns, that he and they will pay in full, all taxes levied, or to be levied, upon the lands embraced in this mortgage, and will not claim any credit on, or make

any deduction from the interest or principal hereby secured by reason of the payment of any taxes so levied, or to be levied, during the continuance of the lien of this mortgage, and upon the breach of this covenant or any part thereof, this mortgage may become and be due and payable immediately, at the option of the said party of the second part hereto.

All of the covenants and conditions hereinabove contained shall be for the benefit of and shall apply to and bind the said parties hereto and their respective heirs, executors, administrators, successors and assigns.

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

JOE POMPEO.
(L. S.)

Signed, Sealed and Delivered
in the presence of

Lines 21 to 30 Excised
before Execution.

W. G. Brandley,

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

Be It Remembered, That on this Seventh day of May in the year of our Lord One Thousand Nine Hundred and Twenty-six before me, the subscriber, An Attorney-at-Law of New Jersey personally appeared Joe Pompeo who, I am satisfied, is the mortgagor mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon he acknowledged that, he signed, sealed and delivered the same as

his voluntary act and deed, for the uses and purposes therein expressed.

WALTER G. BRANDLEY,
Attorney at Law of New Jersey.

MORTGAGE.

JOE POMPEO

COMPARED
BY
35 & 13

To

GEORGE WALLACE LONSDALE,

Dated May 7th 1926

Received in the Register's Office of the County of Essex N. J., on the 11th day of May A. D., 1926, at 11:42 o'clock, in the forenoon, and Recorded in Book K 57 of MORTGAGES for said County, on page 543-544

HOWARD S. DODD,
Register.

WALTER G. BRANDLEY,
Attorney at Law
Caldwell, N. J.

RECEIVED
REGISTERS OFFICE
May 11, 1926 11:42 AM
ESSEX COUNTY
NEWARK, N. J.

EXTRACT FROM EXHIBIT C. 3.

IN CHANCERY OF NEW JERSEY.

In the Matter of the Awards of Essex County Highway Right of Way Commission for land taken by County of Essex, *From* * * * Joe Pompeo	D. Bk. U. 84-380-381. *Notice of the Payment of Award into the Court of Chancery.* *Rec'd, Aug. 1, 1932.*

To: Joe Pompeo, 10 Boylan St., Newark, N. J.

Notice of payment of $1.86 to Clerk of the Court of Chancery under order of the Chancellor dated Nov. 5, 1930 as the award made by said Commission for the plot of land designated as Plot No. 10 shown on Map 7-F-25 filed etc.

Service of notice acknowledged by Joe Pompeo on Aug. 1, 1932.