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Notice of Appeal.

(Filed January 20, 1931.)

In Chancery of New Jersey

Between

E. Charles Altshul,
Complainant,

and

Benjamin A. Margulies, *et al.*,
Defendants.

70–99.

On Appeal from the Court of Chancery.

Complainant, E. Charles Altshul, hereby appeals from an order striking out complainant's amended complaint, which order was made by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice Chancellor James F. Fielder on January 19, 1931, and from the whole and every part thereof.

Dated January 20, 1931.

Gross & Gross,
Solicitors and of Counsel with
Complainant, E. Charles Altshul.

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

Isaac Gross,
Of Counsel with Complainant,
E. Charles Altshul.

Petition of Appeal.

(Filed January 20, 1931.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

E. CHARLES ALTSHUL,
Complainant-Appellant,

and

BENJAMIN A. MARGULIES, *et al.*,
Defendants-Respondents.

On Appeal from the Court of Chancery.

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

The petition of E. Charles Altshul, the appellant in the above stated cause, respectfully shows:

1. That your petitioner finds himself aggrieved by an order striking out his amended complaint, made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice Chancellor James F. Fielder, bearing date January 19, 1931, in a certain cause wherein your petitioner, E. Charles Altshul, is complainant, and Benjamin A. Margulies and Max Gerstenfeld are defendants, in this respect, to wit:

2. That in and by the said order the motion of the said defendants-respondents hereto to strike out petitioner's amended bill of complaint is thereby granted and the said amended bill of complaint is stricken out; whereas the said motion to so strike out your petitioner's amended bill of complaint should have been denied.

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

GROSS & GROSS,
Solicitors and of Counsel with
Appellant, E. Charles Altshul.

ISAAC GROSS,
Of Counsel with Appellant,
E. Charles Altshul.

Amended Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

To the Honorable EDWIN ROBERT WALKER, Chancellor of the State of New Jersey:

The complainant, E. Charles Altshul, of the City of Jersey City, County of Hudson and State of New Jersey, by this, his amended bill of complaint, shows that:

1. Paul Kleinzahler, being then the owner of certain lands and premises hereinafter more particularly described, together with Gussie Kleinzahler, his wife, on March 1, 1926, did execute and deliver to Benjamin A. Margulies a mortgage to secure the payment of the sum of $15,000.00, due on the 1st day of March, 1930, with interest thereon to be computed from the date of said mortgage, and to be paid quarter-annually; which said mortgage, after having been duly acknowledged, and the certificate of acknowledgment endorsed thereon, was recorded in the office of the Register of Hudson County in Book 1354 of Mortgages for said County, page 451.

2. The said mortgage covered four tracts of land and premises which are therein more particularly described as follows:

FIRST TRACT.

All the lot, tract or parcel of land and premises, situate in the City of Jersey City, in the County of Hudson and State of New Jersey, more particularly described as follows:

Beginning at the corner formed by the intersection of the southwesterly side of Boyd Avenue with the southeasterly side of Hudson County Public Road, also known as the Hudson County Boulevard; and from thence running (1) southeasterly along said southwesterly side of Boyd Avenue forty-six and sixteen hundredths (46.16) feet; thence (2) southwesterly and parallel with the westerly line of lot #102 on a map entitled "Map of property belonging to Daniel V. C. Raff situated on Bergen and Boyd Avenue, Jersey City, Hudson County, N. J. 1889," surveyed by Early & Harrison, and filed in the office of the Register of the County of Hudson July 12, 1889, one hundred (100) feet; thence (3) northwesterly parallel with the said southwesterly side of Boyd Avenue forty-four and thirty hundredths feet (44.30) more or less to the southeasterly side of the Hudson County Public Road; thence (4) northeasterly along said southeasterly side of the Hudson County Public Road one hundred (100) feet to the point or place of beginning.

Being also known as lot #104, City Block

1792, on the Official Assessment Map of Jersey City, made by L. D. Fowler, 1894.

SECOND TRACT.

All that lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, described as follows:

Beginning at a point on the northwesterly line of Jackson Avenue distant sixty-seven and forty-seven one-hundredths (67.47) feet northeasterly from the corner formed by the intersection of the northwesterly line of Jackson Avenue with the northeasterly line of Claremont Avenue; thence running northwesterly sixty-eight and thirty-one one-hundredths (68.31) feet to the southeasterly line of lot No. 32 in Block No. 704, as the same is laid out on a map entitled "Map of property belonging to Nicholas Vreeland in the 16th Ward of Jersey City, filed in the office of the Clerk (now Register) of Hudson County, June 28, 1871, at a point therein distant sixty-seven and ninety-four one-hundredths (67.94) feet northeasterly at right angles from Claremont Avenue; thence northeasterly at right angles to Claremont Avenue and along said southeasterly line of said lot #32, forty and two tenths (40.2) feet to the rear line of said lot; thence northwesterly parallel with Claremont Avenue and along the rear line of said lot thirty-two (32) twenty-five (25) feet to the southeasterly line of Lot No. 31, in said block; thence southwesterly at right angles to Claremont

Avenue and along said southeasterly line of said lot #31, sixty-two and seven tenths (62.7) feet; thence southeasterly to and along the southerly side of the building erected upon the premises herein described ninety-three and forty hundredths (93.40) feet more or less to the northwesterly line of Jackson Avenue; thence northeasterly along the northwesterly line of Jackson Avenue twenty-two and sixty-four one hundredths (22.64) feet more or less to the beginning.

THIRD TRACT.

All that lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, bounded and described as follows:

Commencing at the corner formed by the intersection of the southwesterly side of Woodlawn Avenue formerly known as Vreeland Avenue with the northwesterly side of Jackson Avenue formerly known as Essex Street; and from thence running northwesterly along said Woodlawn Avenue one hundred (100) feet to a point; and from thence running southwesterly in a line running parallel with said Jackson Avenue twenty-five (25) feet to a point and from thence running southeasterly on a line running parallel with said Woodlawn Avenue one hundred (100) feet to the said northwesterly side of Jackson Avenue and from thence running northeasterly along said Jackson Avenue twenty-five (25) feet to the point or

place of beginning; and which on a certain map on file in the office of the Register of Hudson County aforesaid, entitled "Map of property of D. Gould and A. Morell, at Woodlawn, Greenville, Hudson Co., N. J. made by C. I. Van Horne, C. E. and Town Surveyor, is known as parts of lots numbered six to nine on Block numbered five.

FOURTH TRACT.

All those certain lots, tracts or parcels of land and premises hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, particularly described as follows:

Beginning at a point in the easterly line of Palisade Avenue distant twenty-five (25) feet northerly from the intersection of the easterly line of Palisade Avenue with the northerly line of Hoboken Avenue (formerly Hoboken Turnpike); thence (1) northerly and along the said easterly line of Palisade Avenue one hundred one feet and four inches; thence (2) easterly and parallel or nearly so with Hoboken Avenue ninety-four and twelve one-hundredths (94.12) feet; thence (3) southerly and nearly parallel with Palisade Avenue one hundred one feet and four inches; thence (4) westerly and parallel or nearly so with Hoboken Avenue one hundred (100) feet to the point or place of beginning. The aforesaid premises are known by street numbers 76, 78, 80, 80-½ Palisade Avenue, Jersey City.

3. The said mortgage contains the following agreement:

"It is distinctly understood and agreed by and between the parties hereto that the mortgagor herein or his assigns shall have the right to pay off the whole or any part of the principal sum due under this mortgage at any time before maturity, and the mortgagee agrees that if the mortgagor or his assigns shall pay off the sum of Three Thousand ($3,000.00) Dollars, together with a sum equivalent to One Hundred ($100.00) Dollars per month from the date of said mortgage up to the date of such payment, that then and in that event the mortgagee or his assigns will execute and deliver to the mortgagor a release of the mortgaged premises, releasing from the operation of said mortgage all of the property described therein, except the premises situate at the southeast corner of the Boulevard and Boyd Avenue, conveyed to the mortgagor by said Benjamin A. Margulies and Max Gerstenfeld and their respective wives, and upon such payment being made by the mortgagor or his assigns, and such release being delivered by the mortgagee or his assigns, then the mortgagor or his assigns hereby agree that they will continue to pay the principal sum or any balance remaining due under said mortgage in quarter annual installments of Three Hundred ($300.00) Dollars each, the first installment to be paid three months after the date of said release."

4. Thereafter the said Benjamin A. Margulies, the mortgagee in said mortgage named, assigned a one-half interest in said mortgage to Max C. Gerstenfeld, and thereafter, and on August 8, 1928 the

said Benjamin A. Margulies and Max G. Gerstenfeld assigned said mortgage to the Trust Company of New Jersey, by assignment dated August 8, 1928, and recorded in the office of the Register of Hudson County on August 13, 1928. Said Trust Company of New Jersey has since re-assigned said mortgage to the defendants, Margulies and Gerstenfeld, and they are the owners and holders thereof, and said Trust Company of New Jersey disclaims any interest in the matters herein set forth, but said Margulies and Gerstenfeld admit and concede that the tender made by the complainant, as hereinafter set forth, to the Trust Company of New Jersey should be regarded as if made to them, the said Margulies and Gerstenfeld, the actual owners and holders of said mortgage.

5. On August 18th, 1927 said Paul Kleinzahler the owner of said four tracts, and Gussie, his wife, made a mortgage bearing that date, to complainant, to secure the payment of $8,400.00 on August 18th, 1928, with interest thereon payable quarterannually, which said mortgage so made to complainant, was recorded in the Register's Office of Hudson County on August 18th, 1927 in Book 1464 of Mortgages, page 314, of which said mortgage the defendants had due knowledge, but which said mortgage of the complainant constitutes a lien only on the second tract described in paragraph 2 of this amended bill and no other property. Nothing has been paid on account of complainant's mortgage.

6. The defendants, Margulies and Gerstenfeld, executed releases of the said third and fourth tracts under dates of September 15th, 1927 and November 10th, 1926 and since the filing of the

original bill of complaint herein the lien of said defendants' mortgage on the first tract has been cut off by the foreclosure of a prior mortgage thereon.

7. On the date of the complainant's mortgage and on the date of the record thereof, said defendants' (Margulies and Gerstenfeld) mortgage covered the first, second and third tracts, the fourth having been released prior thereto as aforesaid, and on the date of the making of the tender by the complainant hereinafter set forth and of the filing of the original bill of complaint herein, defendants' mortgage covered the first tract and second tract, and the lien of their mortgage on the first tract has, since the filing of the original bill of complaint herein, been cut off by the foreclosure of a prior mortgage thereon as aforesaid.

8. There is on this date due on the defendants' (Margulies & Gerstenfeld) mortgage, the sum of $12,000.00 and interest thereon from June 1st, 1928 and said mortgage at this time covers only the said second tract, but complainant insists and contends that his rights are fixed as of the time of the filing of the original bill of complaint herein.

9. On or about September 15, 1927, Paul Kleinzahler, the owner of said four tracts, paid to the defendants, Margulies and Gerstenfeld, on account of said $15,000.00 mortgage so held by the defendants, the sum of $3,000.00; and thereupon the said defendants executed and delivered to the said Kleinzahler, a release of the third tract, as aforesaid.

10. On August 8, 1928, one Paul Dembow became the owner of the second tract, having purchased the same from the trustee in bankruptcy

of said Kleinzahler and has held the record title thereto ever since.

11. On August 18th, 1928, default having been made in the payment of complainant's mortgage, complainant did on said date, by virtue of the conditions in his mortgage contained, take possession of said mortgaged premises constituting said second tract and has ever since continued in possession thereof.

12. There were no moneys paid to the defendants Margulies and Gerstenfeld under said release clause by the said Kleinzahler other than the $3,000.00 above mentioned as having been paid on or about September 15th, 1927. Complainant computed that in order to entitle him to a release from the operation of the defendants' mortgage on the said second tract, he was required to pay to the said defendants, in addition to the said sum of $3,000.00 theretofore paid by the said Kleinzahler, as aforesaid, for thirty months at $100.00 per month, besides $162.00 accrued interest, making in all the sum of $3,162.00, which complainant tendered on August 21st, 1928, to the Trust Company of New Jersey, which refused to accept the same for the stated reason that it was not interested in the matter; but the defendants Margulies and Gerstenfeld concede that the tender so made to the Trust Company of New Jersey was as though made directly to the defendants Margulies and Gerstenfeld. Upon such refusal of tender, complainant filed his original bill of complaint herein and is ready, able and willing and has at all times been ready, able and willing to pay to the defendants Margulies and Gerstenfeld, such sum as they may be legally and lawfully

entitled to receive under said release clause under the facts herein for a release of said second tract (which is not the premises situate at the southeast corner of Boulevard and Boyd Avenue) from the lien of said defendants' mortgage.

13. On September 15, 1927, an agreement was entered into between the said Kleinzahler owner and the defendants Margulies and Gerstenfeld, to which agreement the complainant is not a party, under which the said Kleinzahler waived to the said defendants, the provisions of said release clause which said agreement of waiver was recorded in the office of the Register of Hudson County on September 15th, 1927, in Book 76 of Releases of Mortgages page 48.

14. On August 8th, 1928, Paul Dembow, then the owner of said second tract, executed to the defendants Margulies and Gerstenfeld, an estoppel certificate to the effect that the sum of $12,000.00, with interest at 6% from June 1st, 1928, was due on the said $15,000.00 mortgage of the defendants.

15. On August 8th, 1928, Margulies & Gerstenfeld assigned to complainant a mortgage dated March 1st, 1926, made by Kleinzahler for $6,000.00 which constituted a lien prior to the said $15,000.00 mortgage and upon assigning the said $6,000.00 mortgage to complainant, he, the complainant executed a subordination agreement whereby the said $6,000.00 mortgage was subordinated to the lien of the $15,000.00 mortgage of the said defendants and to the balance of $12,000.00 then due on the same. Said subordination agreement was thereafter recorded in the Hudson County Register's Office.

16. The defendants Margulies and Gerstenfeld contend, and complainant disputes the contentions, that the complainant is not entitled to the relief prayed for for the following reasons:

a. The amount of the tender was insufficient.

b. Complainant did not at the time of the making of the tender, agree to continue to pay the principal sum or any balance remaining due under the mortgage in equal quarter annual installments of $300.00 each, the first installment to be paid three months after the date of said release.

c. Complainant, as the holder of a junior encumbrance, was not entitled to exercise the option for a release.

d. Because prior to the time of the making of tender, the release clause had actually been modified so as to deprive the owner of the premises and anyone holding any rights from the owner, of any further right to insist upon the release.

e. Because prior to the making of the tender complainant had subordinated another encumbrance to the Margulies and Gerstenfeld $15,000.00 mortgage and could not thereafter do that which would invalidate such subordination agreement.

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

1. That Benjamin A. Margulies and Max G. Gerstenfeld, who are the defendants to this suit, may answer this bill of complaint, and each statement therein contained, without oath.

2. That an account may be taken of the amount required to be paid by the complainant to the owner or holder of said mortgage so made by said Paul Kleinzahler and wife to said Benjamin A. Margulies, hereinabove firstly mentioned, under the above mentioned terms and conditions of said mortgage, to entitle complainant to a release of the said second tract therein described from the lien and operation of said mortgage.

3. That a decree may be made that upon payment or tender of payment by the complainant of the amount so required to be paid, the said Benjamin A. Margulies, and Max G. Gerstenfeld, or either of them, be ordered, directed and required to execute, acknowledge and deliver unto the complainant a release of the lands and premises described as the second tract in the said mortgage so made by Paul Kleinzahler and wife to said Benjamin A. Margulies.

4. That it may be decreed that the provisions of said mortgage so made by said Paul Kleinzahler and wife to Benjamin A. Margulies, hereinabove set forth in paragraph 3 of this bill, may be specifically performed and enforced.

5. That subpoenas issue out of this Honorable Court commanding the defendants herein to answer this bill of complaint, and to abide by such decree as this court may make in the premises; and that the complainant have such other and further relief as may be just.

GROSS & GROSS,
Solicitors of and of Counsel
with Complainant.

Notice of Motion to Strike Out Amended Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

Between

E. CHARLES ALTSHUL,
Complainant,

and

BENJAMIN A. MARGULIES, *et al.*,
Defendants.

70–99.
On Bill, &c.

SIRS:

PLEASE TAKE NOTICE that the defendants, Margulies and Gerstenfeld will apply to the Chancellor, at Chancery Chambers, No. 1 Exchange Place, Jersey City, on Monday, December 22, 1930, at 10 A. M. or as soon thereafter as counsel can be heard, for an order striking out the amended Bill of Complaint filed herein upon the following grounds:

1. The Bill does not disclose any right to equitable relief in favor of complainant because the complainant, as the holder of a subordinate encumbrance, is not entitled to the benefit of the release clause contained in the mortgage referred to in the Bill of Complaint.

2. Complainant is not entitled to equitable relief because the terms and conditions of the release clause were not complied with.

3. Complainant is not entitled to equitable relief for the reason that in connection with the tender, complainant did not agree to assume payment of the full balance of the mortgage.

Notice of Motion.

4. Complainant is not entitled to equitable relief for the reason that the entire balance of the mortgage debt is now due and the only relief complainant would be entitled to would be the right to redeem by payment in full which is not the prayer of the amended Bill.

5. Because these defendants are entitled to payment in full as a condition of either giving the release or discharging the mortgage and complainant is not entitled to a release upon payment of the amount tendered and offered by the amended Bill of Complaint.

6. Because there is a want of equity in the Bill.

Dated December 17th, 1930.

Yours, etc.,

AARON GORDON,
Solicitor for Defendants,
Margulies & Gerstenfeld.

To

Messrs. GROSS & GROSS,
Solicitors of Complainant.

Memorandum.

[NOT TO BE PUBLISHED IN ANY REPORT]

January 9, 1931.

IN CHANCERY OF NEW JERSEY.

Between

E. CHARLES ALTSHUL,
Complainant,

and

BENJAMIN A. MARGULIES, *et al.*,
Defendants.

70–99.
On Bill, &c.

On motion to strike out bill of complaint. Mr. Aaron Gordon and Mr. John W. Ockford, for the motion. Messrs. Gross & Gross, *contra.*

FIELDER, V. C.:

This is a motion to strike out the amended bill of complaint on the ground, speaking generally, that it does not show a cause of action against the defendants.

The story told by the bill is that March 1, 1926, one Kleinzahler executed a mortgage, now held by the defendants, for $15,000 due March 1, 1930, covering four tracts of land, which mortgage contained the following agreement.

> "The mortgagee agrees that if the mortgagor or his assigns shall pay off the sum of $3,000, together with a sum equivalent to $100 per month from the date of said mortgage up to the date of such payment, that then and in that event the mortgagee or his

assigns will execute and deliver to the mortgagor a release of the mortgaged premises, releasing from the operation of said mortgage all the property described therein, except the premises situate at the southeast corner of the Boulevard and Boyd Avenue * * * and upon such payment being made by the mortgagor or his assigns and such release being delivered by the mortgagee or his assigns, then the mortgagor or his assigns hereby agree that they will continue to pay the principal sum or any balance remaining due under said mortgage in quarter annual installments of $300 each, the first installment to be paid three months after the date of said release."

The property at the southeast corner of the Boulevard and Boyd Avenue, is the first tract described in the mortgage.

November 10, 1926, the defendants released the fourth tract from the mortgage lien to Kleinzahler for the nominal consideration of one dollar.

August 18, 1927, Kleinzahler executed a mortgage to the complainant for $8,400 covering the second tract, which mortgage was duly recorded.

September 15, 1927, Kleinzahler paid defendants $3,000 on account of the mortgage and received a release for the third tract and Kleinzahler agreed in a recorded writing, to waive the release clause.

August 8, 1928, one Dembow purchased the second tract from Kleinzahler's trustee in bankruptcy and agreed with defendants that $12,000 principal was then due on their mortgage. August 18, 1928, Dembow made default in payment of complainant's mortgage and complainant took possession of the second tract and is still in possession.

Memorandum.

While defendants mortgage still covered the first and second tracts, complainant claimed to be entitled to a release from the defendants for the second tract, upon payment to defendants, in addition to the $3,000 paid defendants by Kleinzahler September 15, 1927, a sum equivalent to $100 per month from the date of defendants' mortgage to the date of payment tendered by complainant, being $100 for thirty months, beside $162 accrued interest and on August 21, 1928, complainant tendered defendants $3,162 and demanded a release. Upon defendants' refusal to accept the tender and comply with the demand, the bill was filed.

The prayer of the bill is that an account be taken of the amount required to be paid by the complainant to the defendants for a release and that upon payment of such amount the defendants be directed to execute a release of the second tract to the complainant.

On this motion to strike the bill the defendants contend (1) that the complainant, being a second mortgagee and not a grantee, is not entitled to demand a release; (2) that the amount tendered by the complainant was insufficient and (3) that the terms of the release clause were modified or abandoned before the complainant acquired his mortgage interest.

I deem it unnecessary to consider the first objection raised by the defendants because even if complainant as a mortgagee is entitled to demand a release from the defendants, I think the bill of complaint fails to show that he is entitled to one, for the following reasons and that the motion to strike out the bill should be granted.

Memorandum.

1. The tender and demand made by complainant for a release were not in compliance with the terms of the release clause.

The agreement for release did not provide for a release of single tracts but merely for a release of the second, third and fourth tracts together and for a specified consideration, which was $3,000, plus $100 a month for each month the mortgage had run up to the time of the release.

2. The agreement for release was not intended to run with each tract separately.

The agreement provided that upon a release being given for three tracts, the mortgagees would hold the fourth tract as security for the balance due on the mortgage (which would be some sum less than $12,000) and thereupon the terms of the mortgage as to payment of principal, should be changed by the "mortgagor or his assigns" agreeing to pay the balance in quarterly installments of $300. From the unusual and peculiar terms of the release clause, it appears that the agreement was intended to run with the four tracts (or at least with tracts one, two and three) as a whole, title thereto being held by the mortgagor or his grantee and that it should not run with each separate tract so as to give the grantee of a single tract the right to a release from the mortgage.

3. When the complainant acquired his mortgage on tract two, he had notice that the terms of the release clause were no longer in effect.

While title to the four tracts still stood in the mortgagor and before the complainant had acquired his mortgage interest in the second tract, the mortgagees released the fourth tract to the mortgagor without consideration. This was notice

to the complainant that the only parties who then had an interest in the release clause, had agreed to abandon it or materially change its terms and had entered into a new agreement, in consequence of which and after the release of tract four had been given, the first mortgage stood as a lien for the whole principal sum of $15,000 upon the remaining three tracts and that if the mortgagor, or those claiming under him, thereafter desired the mortgagees to release one of the remaining tracts, such release could not be obtained on the terms expressed in the release clause. With such notice the complainant accepted his mortgage on the second tract.

Order.

(Filed January 19, 1931.)

J. F. F., V. C.

IN CHANCERY OF NEW JERSEY.

Between

E. CHARLES ALTSHUL,
Complainant,

and

BENJAMIN A. MARGULIES, *et al.*,
Defendants.

70–99.
On Bill, &c.

This cause being opened to the Court by Aaron Gordon, solicitor of the defendants, Margulies and Gerstenfeld, and John W. Ockford, of counsel, in the presence of Isaac Gross, Esq., of counsel with

complainant, and upon the amended bill of complaint in this cause and the said defendants' notice of motion to strike out the same for the reason specified in the said notice, and upon the argument of counsel,

It is, on this 19th day of January, 1931,

ORDERED that the said defendants' motion to strike out the amended bill of complaint be, and the same is hereby granted and the amended bill of complaint be, and the same is hereby stricken out; and

IT IS FURTHER ORDERED that the said defendants be, and they hereby are allowed counsel fee in the sum of Two hundred Dollars ($200) to be included in their taxed bill of costs.

E. R. WALKER,
C.

Respectfully advised,

JAMES F. FIELDER,
V. C.

New Jersey Court of Errors and Appeals

E. Charles Altshul, Complainant-Appellant, and Benjamin A. Margulies, *et al.*, Defendants-Respondents.	On Appeal from the Court of Chancery.

BRIEF OF DEFENDANTS-RESPONDENTS.

Statement.

This is complainant's appeal from an Order striking out his Amended Bill of Complaint upon defendants' motion upon the ground that the Amended Bill of Complaint did not disclose facts entitling complainant to equitable relief.

The Bill in effect is for specific performance of a release clause in a mortgage and for the redemption of the mortgaged premises.

The complainant is the holder of a junior mortgage and his claim is that he is entitled to the benefit of a release clause in the defendant's prior mortgage.

All of the facts pertinent to the matter are set forth in the Amended Bill of Complaint and defendants contend that complainant is not entitled to any relief for the following reasons:

1. The release clause was not intended to be for the benefit of a junior encumbrancer.

2. Under the terms and conditions of the release clause the junior encumbrancer is not entitled to the benefit of its provisions.

3. The terms and conditions of the release clause were not complied with.

4. Complainant did not bring himself within the terms and conditions.

5. The release clause had been exhausted before the complainant's attempt to further have it operative.

6. The release clause was only to be exercised by an assumption of payment of the entire balance, and the entire balance and such payment was not assumed.

7. The whole balance on the mortgage is past due and complainant's right to redeem upon payment of the whole balance exists either under the release clause or because of his interest in the property.

8. Complainant did not and does not offer to redeem by paying the whole balance.

Statement of Facts.

One Kleinzahler, owned four tracks of land and mortgaged the same to defendant, Margulies.

The mortgage was made March 1, 1926, to secure $15,000.00 and was to become due March 1, 1930.

The mortgage is now vested in defendants, Margulies and Gerstenfeld. On November 10, 1926, defendants released the fourth tract.

On August 18, 1927, Kleinzahler mortgaged the second tract to complainant to secure $8,400.00 payable August 18, 1928.

On September 15, 1927, defendants released to Kleinzahler the third tract.

On August 21, 1928, complainant requested a release of the second tract and this action is brought upon the theory that complainant is entitled to a

release of the second tract because of such tender. The lien of the mortgage as to the third tract has been cut off by foreclosure of a prior mortgage.

The present concern is entirely with the second tract.

The release clause reads as follows:

> "It is distinctly understood and agreed by and between the parties hereto that the mortgagor herein or his assigns shall have the right to pay off the whole or any part of the principal sum due under this mortgage at any time before maturity, and the mortgagee agrees that if the mortgagor or his assigns shall pay off the sum of Three Thousand ($3,000.00) Dollars, together with a sum equivalent to One Hundred ($100.00) Dollars per month from the date of said mortgage up to the date of such payment, that then and in that event the mortgagee or his assigns will execute and deliver to the mortgagor a release of the mortgaged premises, releasing from the operation of said mortgage all of the property described therein, except the premises situate at the southeast corner of the Boulevard and Boyd Avenue, conveyed to the mortgagor by said Benjamin A. Margulies and Max Gerstenfeld and their respective wives, and upon such payment being made by the mortgagor or his assigns, and such release being delivered by the mortgagee or his assigns, then the mortgagor or his assigns hereby agree that they will continue to pay the principal sum or any balance remaining due under said mortgage in quarter-annual installments of Three Hundred ($300.00) Dollars each, the first installment to be paid three months after the date of said release."

The tender of August 21, 1928, by complainant was in the sum of $3,162.00. The amount due on the mortgage is $12,000.00 with interest at 6% from June 1, 1928. An estoppel certificate to that effect was executed August 8, 1928, by one, Dembow, who

purchased the second tract from Kleinzahler's trustee in bankruptcy. Thereafter, Dembrow defaulted on complainant's mortgage and complainant obtained possession of the second tract.

Contentions.

Defendants contend that the release did not provide for the release of single tracts, but for a release of the second, third and fourth tracts together, and for a specified consideration and that it was not intended, nor does the language provide for the releasing of each tract separately.

The defendants further contend that when complainant acquired his mortgage on the second tract he had notice that the release clause was no longer in effect.

Tract No. 4 having been released the mortgage ~~suit~~ STOOD is a lien for the whole amount upon the remaining three tracts and there was no longer the right in any one to procure a release of any one of the remaining tracts in accordance with the original terms of the release clause.

Defendants also contend that the tender was insufficient upon any theory and that it required a complete assumption and that at the present time the premises can only be redeemed under the release clause or otherwise by payment in full.

Defendants also urge the other contentions first set forth, although some of them were not considered by the Court below, because it was deemed unnecessary to do so. However, all of the points are urged and will be now argued.

POINT I.

The release clause was single and did not run separately as to each tract.

The precise words of the clause are:

> "* * * In that event the mortgagee or his assigns will execute and deliver to the mortgagor a release of the mortgaged premises, releasing from the operation of said mortgage all of the property described therein, except the premises at * * * Boulevard and Boyd Avenue. * * *"

Boulevard and Boyd Avenue was tract No. 1, so that the release clause ran as to tracts 2, 3, and 4 taken together. Tract No. 4 had been released November 10, 1926, and although defendants were under no obligation to do so, they also released tract No. 3. (September 15, 1927.) At the time of the making of the tender by complainant there was no right in any one to ask for a further release because the option for a release had already been exercised and, therefore, exhausted.

POINT II.

The tender was insufficient in amount.

Assuming for the purpose of this argument, that there was some life in the release clause at the time of the tender, the provision as to amounts was as follows:

> "* * * If the mortgagor or his assigns shall pay off the sum of $3,000. together with a sum equivalent to $100.00 per month from the date

of said mortgage up to the date of such payment * * *."

Complainant only tendered $3,000.00 plus interest thereon and made no tender equal to the $100.00 per month accumulation. Complainant would also have been called upon to agree to pay the entire principal sum. Complainant did not offer to do so and could not have been held for the balance except by a positive assumption in writing of the obligation.

POINT III.

Complainant is not entitled to relief.

There are cases where a purchase from a mortgagor of a portion of the mortgaged premises is entitled to exercise the provisions of a release clause contained under a blanket mortgage provided, however, that such release clause is specific, definite and without time limit and runs at so much per lot or at a specified rate per front foot or by other specific assignments of area.

Van Arsdale vs. *Gorenflo,* 93 N. J. E. 486.
s. c. 116 Atl. 869.
Malba Terrace Co. vs. *Portanpeck Properties, Inc.,* 105 N. J. E. 453.

The only condition imposed is that the mortgagor is not in default.

Chatsworth Estates Co. vs. *Chatsworth Estates Co.,* 1 N. J. A. R. 951.
s. c. 121 Atla. 517.

The same principle is to be found in the following cases:

Hall vs. *Home Building Company,* 56 N. J. E. 304;
American Net Co. vs. *Githens,* 57 N. J. E. 539;
Ventnor vs. *Record,* 79 N. J. E. 103;
Harris vs. *Pearsall,* 83 N. J. E. 472.

In the Ventnor case the purchaser of a building lot before default was given the right to a release of his lot upon payment of the stipulated amount, notwithstanding the pendency of a foreclosure suit.

A very different situation is presented in the case at bar.

Complainant is not the owner of a single lot with a definite release clause for the particular lot. The release clause is not at all the kind of a release clause which was before the Courts in the cases referred to. Complainant refers to the junior encumbrancer's right to redeem and with this contention respondents have no quarrel. Undoubtedly the complainant has the right to redeem because of his interest in the premises as junior encumbrancer.

Bigelow vs. *Cassidy,* 26 N. J. E. 557;
Hamilton vs. *Dobbs,* 19 N. J. E. 227.

This right, however, is dependent upon complainant paying the full amount due and defendants will accept the full amount due and will cancel the mortgage or assign it because it now covers only the second tract upon which complainant has the junior mortgage.

Complainant refers to three cases decided in other jurisdictions, but these did not sustain his contention.

In

Gamell vs. *Goode,* 103 Iowa 301,

the release clause was specific and ran in favor of one or more acres at $800.00 per acre or lots on the same basis at any one time.

In

Vawter vs. *Crafts,* 41 Minn. 14,

the release covenant was held to run with the land because of its terms and because it was clearly intended to add to the value of the separate lots as such in the hands of their respective owners.

In

Ricker vs. *Moore,* 77 Maine 292,

the Court held that the mortgagee of the rights of a vendee might exercise the rights of such vendee as his equitable assignee. In that case it appeared that A agreed to sell lots to B. B, therefore, became the owner in equity and A held the legal title in trust for B. B then mortgaged this interest to C. C assigned the mortgage to D. The Court held that D could compel specific performance of the agreement by A upon making a seasonable and proper tender. The last mentioned case does not seem to be included in complainant's present Brief, but it was cited below and for that reason reference is made to it here. It was cited below as a case "on all fours".

Complainant refers to (Br., p. 12)

Cogswell vs. *Stout,* 32 N. J. E. 240.

This case had to do with a prior mortgagee's release of a part of the mortgaged premises to the prejudice of a subsequent encumbrancer where such prior mortgagee had actual notice of the rights of the subsequent encumbrancer and of the prejudice that would result from the release it so held that originally a prior mortgagee may assume that the condition has continued, and in the case, the Court found that the prior mortgagee did not have actual notice and knowledge, and his right to surrender a part of his security was sustained.

In

Walker vs. *Renner,* 60 N. J. E. 493,
s. c. 46 Atl. 626,

cited at page 11 of complainant's Brief, the Court held,

> "A covenant in a deed conveying two lots whereby the grantee covenants that the lot hereby conveyed is not to be sub-divided and that no more than one residence is to be erected upon the same, did not forbid the building of more than one residence on the two lots, but was only a restriction on the right to build more than one building on each lot."

In

Gillis vs. *Dyer,* 93 N. J. E. 348,
s. c. 116 Atl. 704, aff. 93 N. J. E. 635,
s. c. 117 Atl. 611,

this Court held on the general equitable principal involved in this case, that:

> "The maxim that one seeking equity must do equity, applies where a mortgagor's successor paid part of the debt after maturity, and claimed a partial redemption under a pro rata release provision of the mortgage, and his attitude in seeking to lessen the value of the security indicated that he did not intend to pay the residue." and "Where a mortgage provided that on payment of not less than a stated amount the land should be released pro rata, and, after maturity, on the owner's paying more than the stated amount, the mortgage was extended, nothing being mentioned in the extension agreement concerning any release, the owner was not entitled to a pro rata release."

This presents a parallel situation to the one involved in the case now before the Court and appears to sustain respondents' contention that whereas complainant has the right to redeem by

paying in full, he has no right to seek to obtain a release of the one remaining tract on payment of less than the amount due.

In

Avon Land Co. vs. *Finn,* 56 N. J. E. 805; s. c. 41 Atl. 366,

this Court held that there was no right to compel a release that might impair the mortgagee's security after the mortgage became due by a condition broken and that thereafter there was only an equity of redemption upon payment of the entire debt.

A suggestion is made that the release of November 10, 1926, was for a nominal consideration and that complainant may, therefore, treat it as not being made in accordance with the release clause. This was long before complainant acquired any interest in the property and even if he had an interest at the time, the mortgagee had a perfect right to release without insisting upon full consideration.

New Jersey Title Guaranty & Trust Co. vs. *Jersey Realty Company,* 90 N. J. E. 615, 110 Atl. 109.

POINT IV.

Complainant is not entitled to equitable relief.

Assuming that the complainant was at any time entitled to obtain any benefit under the release clause, such benefit could only have been obtained by his assumption of payment of the entire balance. Whether this was expressly assumed or impliedly assumed by the provisions of the release clause com-

plainant would be obligated to pay the entire balance. This entire balance is now due and it would be idle to allow the complainant to obtain a release and then put the burden on defendants ~~by~~ OF enforcing such assumption.

Complainant is now seeking equitable relief and he is only entitled to such relief upon performing on his part. When complainant accepted a mortgage, the release clause had already been taken advantage of and complainant was put on notice by the record of the release of the fourth tract which had been released November 10, 1926. When he sought to obtain a release by the tender of August 21st, 1928, he was manifestly endeavoring to get something without paying even the minimum, the required amount, to say nothing of his failure to definitely promise to pay the whole balance. His effort to obtain a credit of $3,000.00 which had been paid by Kleinzahler for the release of September 15, 1927, shows that the complainant was entirely unwilling to pay the amount required. It is also quite apparent that this contention is an after thought and that the tender of August 21, 1928, was made upon the erroneous assumption that only $3,000.00 had to be tendered. Upon discovering that the amount required was $100.00 per month plus the $3,000.00, an effort is now made to obtain credit for something that complainant was never entitled to. By making this claim, complainant is endeavoring to gain the benefit of the prior release which shows clearly that he knew of this prior release and should have known that there would be no further right to a release at a later date unless such right was preserved by the terms of the granting of the release on the third tract. In other words, complainant at one moment seeks to avoid the effect of the release of the third tract so as to keep alive his alleged right to a release while at

the same moment he is seeking to secure the benefit of the $3,000.00 paid at the time of the procuring of such prior release. This attitude is not only inconsistent, but highly inequitable.

It is respectfully submitted upon the facts and upon the law and upon all principles of equity that the complainant failed to make out a case for equitable relief and that the amended Bill of Complaint should be dismissed and that to that end the Order of the Court of Chancery should be affirmed.

AARON GORDON,
Solicitor of Defendants-Respondents.

JOHN W. OCKFORD,
Of Counsel.

New Jersey Court of Errors and Appeals

Between

E. Charles Altshul,
Complainant-Appellant,

and

Benjamin A. Margulies, *et al.*,
Defendants-Respondents.

On Appeal from the Court of Chancery.

BRIEF OF COMPLAINANT-APPELLANT

Preliminary Statement

This is an appeal from an order of the Court of Chancery striking out complainant's amended bill of complaint on motion of the defendants-respondents, upon the ground that the said amended bill of complaint did not allege facts constituting a cause of action, or entitling the complainant-appellant to *any* relief.

The notice of motion is printed on page 15 of the state of the case, and the order striking out the amended bill of complaint, at the middle of page 21. The motion to strike out is the equivalent of a demurrer (Chancery Act 1915, Comp. Stat. of N. J., 1st Supplement, 1911-1915, p. 132, Sec. 108). Any relief to which complainant might be entitled under the facts pleaded might be

granted without specific prayer therefor (Comp. Stat. of N. J., 1st Supplement, 1911-1915, p. 131, Rule 47, bottom of page).

The Facts

Since the matter was decided by the Court of Chancery as upon a demurrer to the complainant's amended bill of complaint (p. 3), the facts therein pleaded, and which must for the purposes of the decision be taken as true, are as follows:

One Kleinzahler, being the owner of four tracts of land and premises, not contiguous to one another and described in the bill as "First Tract," "Second Tract," "Third Tract" and "Fourth Tract," on March 1st, 1926, executed to the defendant Margulies, a mortgage to secure the sum of $15,000 to become due on March 1st, 1930, with interest thereon to be computed from the date of said mortgage payable quarter-annually, which mortgage was duly recorded, and thereafter became vested by mesne assignments, in the defendants-respondents Margulies and Gerstenfeld. This mortgage so recorded, contained the following agreement:

> "It is distinctly understood and agreed by and between the parties hereto that the mortgagor herein or his assigns shall have the right to pay off the whole or any part of the principal sum due under this mortgage at any time before maturity, and the mortgagee agrees that if the mortgagor or his assigns shall pay off the sum of Three Thousand ($3,000.00) Dollars, together with a sum equivalent to One Hundred ($100.00) Dollars per month from the date of said mortgage up to the date of such payment, that then and in that event the mortgagee or his assigns

> will execute and deliver to the mortgagor a release of the mortgaged premises, releasing from the operation of said mortgage all of the property described therein, except the premises situate at the southeast corner of the Boulevard and Boyd Avenue, conveyed to the mortgagor by said Benjamin A. Margulies and Max Gerstenfeld and their respective wives, and upon such payment being made by the mortgagor or his assigns, and such release being delivered by the mortgagee or his assigns, then the mortgagor or his assigns hereby agree that they will continue to pay the principal sum or any balance remaining due under said mortgage in quarter-annual installments of Three Hundred ($300.00) Dollars each, the first installment to be paid three months after the date of said release.''

On November 10th, 1926, the defendants Margulies and Gerstenfeld, *for a nominal* consideration, released to said Kleinzahler, the ''Fourth Tract'' described in their mortgage.

On August 18th, 1927, said Kleinzahler made a mortgage to the complainant *on the second tract alone* to secure the payment of $8,400, payable on August 18th, 1928, with interest thereon payable quarter-annually, which mortgage was, on its date, duly recorded, and of which mortgage the defendants-respondents here, *had due knowledge,* and upon which said mortgage of complainant, nothing has been paid (p. 9, Para. 5).

On September 15th, 1927, almost a month after the date and recording of complainant's mortgage, Kleinzahler paid to the defendants, on account of their $15,000 mortgage, the sum of $3,000 and thereupon defendants executed and delivered to Kleinzahler a release of the ''Third Tract'' (p. 10, Para. 9) and on the same date the defend-

ants entered into an agreement with Kleinzahler, owner, to which complainant is not a party, under which Kleinzahler waived to the defendants, the provisions of the release clause so contained in said defendants' mortgage, which agreement of waiver was recorded (p. 12, Para. 13).

Default having been made in the payment of complainant's mortgage he did, on August 18th, 1928, by virtue of the conditions in his mortgage contained, take possession of the mortgaged premises as described in *his* mortgage, being the "Second Tract" of the four tracts, described in the defendants' mortgage, and has since continued in possession thereof (p. 11, Para. 11).

On August 21st, 1928, complainant tendered to the defendants-respondents Margulies and Gerstenfeld, the sum of $3,162, being the required payments of $100 per month plus $162 accrued interest, payable under the provisions of the clause in said mortgage hereinabove set forth (Kleinzahler having already paid $3,000), and demanded a release from the operation of defendants' mortgage of the said "Second Tract" so covered by his, complainant's mortgage, which said release the defendants refused to execute. At the time of such tender defendants' mortgage still covered the "First Tract," being the property situate at the southeast corner of Boulevard and Boyd Avenue, which, by the express provisions of the said release clause, were excepted from its operation and was not releasable, and the "Second Tract" so covered by complainant's mortgage.

Upon the refusal of the defendants to so release the "Second Tract" upon the making of such tender, complainant immediately filed his bill of complaint in the Court of Chancery and there-

after amended the same, which amended bill of complaint was so ordered stricken out. From the order striking the same, this appeal is taken.

Complainant-appellant contends that he is entitled to relief under his said amended bill of complaint, both on general principles of equity, and under the express provisions of the release clause or agreement set forth in defendants' mortgage, and that the order of the Court of Chancery striking out his amended bill of complaint, is erroneous.

POINT I

Complainant, upon his having made tender, was entitled to a release of the "Second Tract" under the provisions of the agreement contained in defendants' mortgage.

Defendants had *due knowledge* of the existence of complainant's mortgage. The release of the "Fourth Tract" described in their mortgage on November 10th, 1926, was executed upon a nominal or for no consideration since the only moneys paid the defendants was $3,000.00 for a release of the "Third Tract" on September 15, 1927 (p. 10, Para.; p. 11, Para 12.) This $3,000.00 was so paid by Kleinzahler to the defendants, almost a month after complainant's mortgage of which defendants knew, was executed and recorded.

The learned Vice-Chancellor, in his opinion (p. 18) holds that because the defendants had on November 10th, 1926, released to Kleinzahler the "Fourth Tract" for a nominal consideration, the complainant was put upon notice that the release provisions of defendants' mortgage had been

waived. There had in fact been no such waiver, and the parties themselves did not consider that any such waiver existed, because, not until September 15, 1927, after the making and recording of complainant's mortgage, was the release clause in fact agreed between the defendants and Kleinzahler, to be waived. There is no allegation nor anything approaching one in the amended bill of complaint to indicate, and it is not a fact, that this release clause or any of its provisions was waived until the defendants, on September 15th, 1927, agreed with Kleinzahler by writing, that it should be waived. This written agreement, the defendants recorded, but it was neither executed nor recorded until almost a month subsequent to the recording of complainant's mortgage. It is clear that even inquiry of the parties would have disclosed no waiver at the time complainant obtained his mortgage.

It is the settled rule that every intendment should be made in favor of the pleading demurred to and every inference favorable to the pleader should be indulged in. 49 *Corpus Juris* 667 and Notes 88-89-90.

Furthermore, waiver as a fact, should be pleaded by way of defense, unless it clearly appears on the face of the bill, which it does not in this case by any possible interpretation.

The complainant was not a party to the agreement of September 15th, 1927, between defendants and Kleinzahler, and since the defendants had knowledge of the complainant's mortgage they could not by that agreement, affect any rights which he, the complainant may have acquired prior to the making of said agreement.

When complainant acquired his mortgage he was charged by the record notice of the defend-

ants' mortgage with the existence of the provisions of the release clause and had the right to assume, as was the fact, that these provisions were in full effect and that he might relieve the property upon which he was taking a mortgage (the "Second Tract") from the lien of defendants' prior mortgage, for a maximum payment of $3,000.00 plus the monthly installments of $100.00 each. He had a further right to assume, from the express language and intendment of the release clause so contained in defendants' mortgage, that the defendants would look to the property at the corner of Boulevard and Boyd Avenue as their primary security for $12,000.00, less the aggregate of such $100.00 monthly installments as might in the interim accrue. Not only that, but that upon payment of such sum of $3,000 plus the monthly $100.00 installments, *all* the property covered by defendants' mortgage, excepting the Boulevard and Boyd Avenue property, might be freed from the lien thereof, by the mortgagor or his assigns, and thereafter freely conveyed without any interest of defendants therein.

A subsequent mortgagee is in fact an assignee of the equity of redemption as security for his debt. The release clause here involved does not run to the mortgagor alone but to his assigns as well. Such a covenant to release runs with the land. *Ventnor Investment Co.* v. *Record Development Co.,* 79 N. J. Eq. 107; *Gammell* v. *Goode,* 103 Iowa 301; *Vauter* v. *Crafts,* 41 Minn. 14.

In *Hamilton* v. *Dobbs,* 19 N. J. Eq. 227 Chancellor ZABRISKIE says:

> "The tenant, or other person, like a second mortgagee or judgment creditor, having a right to redeem, &c."

In *Long* v. *Richards,* 170 Mass. 120, it is said:

> "The right of the second mortgagee to redeem the first mortgage is paramount, irrespective of any question of time or good faith, of defendant's motion."

See also *Bigelow* v. *Cassidy,* 26 N. J. Eq. 557 (Err. and App.)

Such right to release as is here contended for is also held by the Court of Chancery to exist even after default in the prior mortgage, in *Malba Terrace Corporation* v. *Portaupeck Properties,* 148 Atl. Rep. 206 (105 N. J. Eq. 453).

The case on all fours with the one at bar is *Ricker* v. *Moore,* 77 Maine 292. There "A" made a deed of land to the defendant, which contained a provision that if "A" paid the defendant a certain sum, the defendant would deed back the land. This, in legal effect, was a mortgage. "A" subsequently paid about one-half of the required amount and then executed a mortgage on his interest in the land to the plaintiff who tendered the balance to the defendant and demanded a conveyance, which was refused. The Court held that the plaintiff there was entitled to specific performance.

In *McKnight* v. *Clark,* 29 N. J. Eq. 105 Chancellor Runyon recognized the right of a junior mortgagee to a release of mortgaged premises from the operation of a prior mortgage containing a covenant for the execution of such release, but there denied the relief due to a fraud practiced by the mortgagor.

In *Jones on Mortgages* (7th Ed.) Sec. 1064, it is said:

> "The right of a junior encumbrancer to redeem is a common law right. The language

> of most cases is broad enough to establish the doctrine that a junior mortgagee, simply as such, and under all circumstances, has the absolute right to pay off or redeem from a senior mortgage past due.''

In the instant case the express provisions of the release clause permitted payment and required release at any time before maturity.

Complainant was not only a junior encumbrancer of whose mortgage the defendants had knowledge, but he was a mortgagee in possession of the ''second tract'' because of default having been made in his mortgage. He was a qualified owner of the property. *Stewart* v. *Fairchild-Baldwin Co.,* 91 N. J. Eq. 86 (Err. and App.).

The evident purpose of the release clause and its effect was to give the defendants a lien on the second, third and fourth tracts for $3,000.00 plus $100 per month, and the balance on the unreleasable first tract, Boulevard and Boyd Avenue, unless of course, no release from the defendants' mortgage was required by the mortgagor or his assigns.

The agreement made between the defendants and Kleinzahler about a month after the recording of complainant's mortgage, whereby Kleinzahler and defendants attempted, without complainant's knowledge or acquiescence, to destroy the effect of the release clause while having knowledge of the complainant's mortgage on the ''second tract,'' could certainly not bind the complainant nor affect his rights. Complainant took his mortgage in good faith in reliance upon the existence of this release clause and it would be most inequitable to permit the mortgagor and prior mortgagee (the defendants) under these circumstances, to get together and in effect de-

stroy the complainant's security. Certainly that would be the result should such agreement between owner and defendants be given effect as against the complainant.

The equitable principle involved is stated, for this Court, by Chief Justice Beasley in *Brewer* v. *Marshall,* 19 N. J. Eq. 537 at page 543, as follows:

> "It will be found, upon examination, that these decisions proceed upon the principle of preventing a party having knowledge of the just rights of another, from defeating such rights, and not upon the idea that the engagements enforced create easements or are of a nature to run with the land."

The learned opinion of the Chief Justice is replete with citations from other decisions upon the same point. See also, *De Gray* v. *Monmouth Beach Club House Co.,* 50 N. J. Eq. 329, where the same principle is recognized and applied.

Keeping in mind that of the four tracts described in defendants' mortgage the mortgagor might well have sold or mortgaged, subsequent to the defendants' mortgage, the second, third and fourth tracts, and that such purchasers might well have relied upon the provisions of the release clause and freed their respective properties of the lien thereof by payment of $3,000.00 plus the $100.00 monthly installments, and that the evident purpose of the release clause, as thereby indicated, was that the mortgagees (defendants) would look to the Boulevard and Boyd Avenue property as their primary security for $12,000 less such monthly payments of $100 as might accrue, we do not believe that it can be successfully contended that if one of such three grantees upon making the required payment, secured a release of the tract conveyed to him, the

other two grantees would forever be barred or precluded from also procuring a release of the tracts respectively granted to them by Kleinzahler upon their paying such additional sum as under the release clause may be required.

The construction of the release clause for which we contend is, that each grantee of Kleinzahler should be entitled to a release from the lien of defendants' mortgage upon $3,000.00 plus $100.00 monthly being paid, would tend to make the property more readily alienable and the courts have always been inclined to favor a construction having such tendency. *Walker* v. *Renner,* 60 N. J. Eq. 493. The release clause runs, not only to the mortgagor, but to his assigns as well, and those words should be given their broad significance.

The defendants could not possibly be injured by such construction, as it would be carrying out literally the bargain which they had a right to insist upon, that is, to release the second, third and fourth tracts upon being paid $3,000 plus a sum equivalent to $100 a month. The acceptance by them of complainant's tender would put the defendants in the very position which they agreed to assume and give them precisely what, by their solemn covenant contained in their mortgage duly recorded, they agreed to accept. Any other construction would seriously and inequitably jeopardize and impair the interest of the complainant and would sanction a practice which would enable one standing in the position of the defendants to get together with the owner, their mortgagor, and cast an undue burden upon a subsequent encumbrancer of one of the mortgaged tracts, contrary to what the parties represented by the record to be the agreement upon the basis of which subsequent grantees and mortgagees

have a right to rely upon in accepting a conveyance or security. The effect in this case is manifest, for here the defendants seek to impose the entire burden of their mortgage, upon which there remains due $12,000, upon the one tract, upon which complainant's mortgage rests, contrary to the clear understanding spread upon the records as contained in the defendants' mortgage.

POINT II

Complainant is entitled to relief upon general principles of equity.

After the recording of the complainant's mortgage, of which the defendants *had due knowledge,* the defendants, prior mortgagees, on September 15th, 1927, released the "third tract" to Kleinzahler, the owner, for a payment of $3,000 and on the same date, entered into an agreement with Kleinzahler, to which complainant was not a party, the claimed effect of which is to destroy the right of complainant to a release of the "second tract" upon which he held his mortgage security and to thereby impose the entire burden of the balance remaining due on defendants' mortgage, to wit, $12,000 and accrued interest on the tract so covered by complainant's mortgage. The equitable principle applicable is set forth by Vice-Chancellor Van Fleet in *Cogswell* v. *Stout,* 32 N. J. Eq. 240 on page 241, as follows:

> "The rule is undoubted, that if a prior mortgagee releases part of the mortgaged premises, to the prejudice of a subsequent encumbrancer or purchaser with notice of said subsequent mortgage or deed, his release operates as a discharge of his lien, to the

extent of the value of the land released'' (citing cases).

Even though the amended bill of complaint may not have specifically prayed for relief under the principle thus declared, we respectfully submit that the amended bill of complaint should not, therefore, have been stricken out, since under the Chancery Act of 1915, if the complainant be entitled to any relief upon the facts pleaded in the body of the bill, it is not demurrable.

In the Court below the defendants contended and may contend here, that subsequent to the date and recording of complainant's mortgage, one Dembow, while owner of the ''second tract,'' upon which complainant's mortgage rests, executed an estoppel certificate to the effect that there was $12,000 due on defendants' mortgage; also that the defendants assigned to the complainant a prior mortgage, which complainant then subordinated to the lien of defendants' present mortgage. The estoppel certificate referred to as having been so executed by Dembow, could not possibly affect the complainant, not a party nor privy thereto, and of whose mortgage the defendants had knowledge; nor could the subordination of a prior mortgage to the lien of the defendants' mortgage, have any bearing on the question. The complainant being the holder of a prior mortgage might very well agree to subordinate that prior mortgage (which is not the mortgage here involved) to the lien of the defendants' mortgage and thereby establish their respective priorities under the particular mortgages involved, but how any such subordination agreement could possibly affect the rights of the complainant under the mortgage here in question, to a release under defendants' express agree-

ment to make such release, is to us not understandable.

The transaction with respect to the subordination was that the complainant accepted from the defendants, an assignment of an entirely independent mortgage which he, complainant, subordinated to the lien of the defendants' mortgage without in any wise affecting his rights as junior mortgagee under the mortgage held by him from Kleinzahler and referred to in the amended bill of complaint on page 9, Paragraph 5.

Defendants further contended below that the complainant's rights are only such as the owner Kleinzahler might have had. If that be limited to the rights of the owner at the time he gave complainant his mortgage, of which the defendants had knowledge, we will not quarrel therewith. At that time the release clause was in full force and effect and the defendants knew of complainant's mortgage. If, however, it is intended to be asserted that a subsequent mortgagee's rights, of which the defendants had knowledge, might at any time be affected or impaired without his consent, by private treaty or agreement between the defendants and owner, we must respectfully insist that that cannot be and that such a proposition would be most inequitable and unconscionable.

Lastly, after the making of the tender by the complainant to the defendants, which would have entitled him to a release of the "second tract," the defendants permitted their primary security, the first tract (Boulevard and Boyd Avenue) to be sold under a foreclosure of a prior mortgage and now contend that the entire burden of the balance remaining due on their mortgage, $12,000.00 should be borne by the only remaining parcel, the second tract, upon which complain-

ant's mortgage rests as his only security. Complainant was not interested in any of the other three tracts covered by defendants' mortgage. At the time that complainant made his tender, defendants' mortgage still covered the first and second tracts. If complainant, upon making his tender was then entitled to a release, it should then have been given him, and what subsequently happened with regard to the foreclosure of the first tract, cannot affect his rights. *Equity regards as done what should have been done.* Complainant's rights must be regarded as fixed as of the time he made his tender and demanded a release.

Defendants further contended below that complainant should have also agreed to assume the payment of the balance due on defendants' mortgage at the time he made his tender. We respectfully submit that complainant was required to do no such thing. First, because the release clause does not require any independent agreement to that effect, and secondly, because complainant was not interested in paying the mortgagor's general debt, his only interest being to free his own land of the lien of complainant's mortgage. It seems to us that the logical interpretation of the release clause is that the second, third and fourth tracts should be released upon payment of $3,000.00 plus a sum equivalent to $100.00 per month and that thereupon those three tracts, and the owners thereof forever thereafter, in whosesoever hands said respective properties might come, should be free from any further obligation under said mortgage, but that the mortgagor, still retaining the first and unreleasable tract (Boulevard and Boyd Avenue), should pay the balance of the mortgage debt, in installments

of $300.00 as in said release clause provided. In other words that the balance of the mortgage debt was to continue as an encumbrance against that first tract until fully paid in the manner specified. Were it otherwise, and were the three tracts subsequent to the first, conveyed to three separate parties, it would be contended that each of these three parties, in order to secure a release, would be obliged to enter into an agreement with the defendants to pay the balance remaining due upon the mortgage, each in the specified $300 installments, although they had not the slightest interest in the remaining unreleased property covered thereby, nor in each other.

It is respectfully submitted that for the reasons above set forth, the order of the Court of Chancery appealed from is erroneous and should be reversed.

Respectfully submitted,

GROSS & GROSS,
Of Counsel with Complainant-Appellant.

ISAAC GROSS,
Of Counsel.