New Jersey Court of Errors and Appeals.

BETWEEN

CHARLES W. L. ROCHE, *et al.*,
Complainants and Respondents,

and

GEORGE HOYT, *et al.*, *Defdts.*
GEORGE HOYT, *Appellant*

} *On Bill, etc.*

BRIEF FOR RESPONDENTS.

The appeal in this cause is from an order of the Court of Chancery overruling the demurrer filed by the defendant, George Hoyt.

The bill alleges facts discovered subsequent to a decree made in a suit brought to compel the specific performance of an agreement made between the complainant, Charles W. L. Roche, and the defendant, David L. Osborne. It seeks to compel the defendant, George Hoyt, to satisfy, cancel and discharge a mortgage fraudulently placed upon the property, for a conveyance of which the complainant, Roche, had obtained the decree of this Court.

That the decree against Osborne, also obtained in the former suit, for the payment of $1,714.93 with interest and costs had not been satisfied and discharged at the time of the filing of the bill in this cause, appears clearly in the bill itself, which expressly states that if the mortgage in question be annulled and declared to be of no effect, then the complainant, Roche, will become indebted to the defendant, Osborne, in a small amount (the difference between the decree and

costs and the amount of the mortgage) and will pay to said Osborne whatever amount may then be found to be due and will *satisfy and discharge* the decree heretofore obtained by said Roche against said Osborne. This would not be the case if the decree or any part of it had been paid.

Certainly in view of this statement in the bill, it cannot reasonably be implied that the complainant, Roche, has already received the amount so decreed to be paid to him.

The bill expressly alleges that the discovery that the mortgage was given without consideration and was a fraudulent contrivance between the defendants, Osborne and Hoyt, to hinder him in the performance of the contract of exchange, was not made uutil after the decree had been obtained in the former suit. If these facts had been known at the time the former suit was brought, the decree could have been made in accordance therewith and there is nothing to prevent the Court from granting further relief on a bill filed after the discovery of these facts.

Why should these complainants be compelled to pay to the defendant, George Hoyt, the amount of his mortgage and interest and take the chance of being able to obtain satisfaction of their decree against Osborne, if, in fact, this mortgage was given without consideration and is not a valid and subsisting lien against the property conveyed to the complainant, Roche, by virtue of the former decree?

The complainants were not bound to exhaust their remedies for the collection of the amount of this decree before seeking to have this mortgage annulled. They do not stand in the position of creditors who must exhaust all the ordinary modes of collection before invoking the aid of a court of equity. They were not creditors at the time this mortgage was given and the indebtedness represented by the decree against

the defendant, Osborne, *arose out of the fraudulent transaction against which the complainants now seek relief.* It was not a conveyance by way of mortgage to defraud or hinder creditors in the collection of debts due to them, *but was the means of bringing about the debt itself.* That courts of equity will not relieve either of the parties to a fraudulent transaction but will leave them in the same position in which their own fraud has placed them, we do not deny ; and this is clearly supported by the decisions in this state. (See *Schenck v. Hart, v. Stewart* 744.) but the position of the complainants in this cause is not that of a party to a fraudulent transaction.

In *Servis v. Nelson* 1, *McCarter* 100, Chancellor Green declares that, as between the parties thereto, such a conveyance will not be set aside, or relieved against, at the instance of either party, each of whom is *particeps criminis.*

The right of these complainants to the relief sought by their bill rests upon the broad and fundamental principle that courts of equity *will relieve against fraud* where the party seeking relief himself comes with clean hands and is not, in the language of Chancellor Green, *particeps criminis.*

If the facts set forth in the bill are true—and this the demurrer admits—the complainants have been placed in an embarrassing position through the fraudulent giving of this mortgage and ought not to suffer by reason of it, especially in view of the fact that neither of the defendants can complain if the relief prayed for is granted.

It is respectfully submitted that the order of the Court of Chancery overruling the demurrer of the defendant, Hoyt, should be affrmed.

E. C. & A. W. HARRIS.

Of Counsel with Respondents.

The Orange Journal Publishing Co., Law Case Printers, Orange, N. J.

In Chancery of New Jersey.

To His Honor William J. Magie, Chancellor of the State of New Jersey:

Humbly complaining showeth unto your Honor, your orators, Charles W. L. Roche, of the Township of Summit, County of Essex, and State of New Jersey, and Security Company, a corporation, of the State of New Jersey, that heretofore, and on the third day of October, in the year nineteen hundred and five, in a certain cause pending in this Court in which your orator, Charles W. L. Roche, was complainant, and David L. Osborne was defendant, it was ordered, adjudged and decreed that certain articles of agreement between your orator and the said David L. Osborne be in all things specifically performed by the said Osborne, and that the said Osborne, within ten days from the date of said decree, should satisfy and discharge a certain mortgage of two thousand dollars given by him to one George Hoyt upon the premises hereafter referred to, and that the said Osborne should make, execute, acknowledge and deliver to your orator, the said Charles W. L. Roche, a good and sufficient warranty deed for premises on Oakwood Avenue, described in the said bill of complaint, upon your said orator causing to be conveyed to the defendant, David L. Osborne, premises on Grove Street, mentioned in said agreement, and by a further order made in said cause, bearing date the ninth day of November, nineteen hundred and five, upon a report made by Frederick F. Guild, Esquire, one of the special masters of this Court, it was further ordered and decreed that your orator, the said Charles W. L. Roche, should deliver to said Master, Frederick F. Guild, a deed of conveyance from the Security Realty Company to the defendant, David L. Osborne, for the premises on Grove Street, and that the said defendant, David L. Osborne, should forthwith make, execute and de-

liver to your orator, Charles W. L. Roche, a good and sufficient warranty deed for all that tract of land and premises in the City of Orange, County of Essex, and State of New Jersey, situated on the east side of Oakwood Avenue, with a frontage of one hundred thirty-seven and fifty hundredths feet on said Oakwood Avenue by a depth of three hundred fifty-three and seventy hundredths feet on the north side and three hundred and forty-five feet on the south side, be the same more or less, and known as number 120 Oakwood Avenue, Orange, New Jersey, and that the defendant, David L. Osborne, pay to the complainant the sum of seventeen hundred fourteen dollars and ninety-three cents, with interest thereon from the fourth day of November, nineteen hundred and five, together with the taxed costs of the complainant and a counsel fee of fifty dollars, and that the deed to the defendant, David L. Osborne, deposited with the said Master, remain in his hands until the payment aforesaid be made, when the same should be delivered to the said David L. Osborne.

And your orators further show unto your Honor that the decree for the payment of said money by the said David L. Osborne was due to the fact that after the making of the contract for the exchanging of lands there was recorded upon the lands of the said David L. Osborne, on Oakwood Avenue aforesaid, a mortgage bearing date and purporting to have been acknowledged on the second day of July, in the year nineteen hundred and four, made by David L. Osborne to George Hoyt, and which mortgage was recorded on the sixteenth day of February, in the year nineteen hundred and five, and which mortgage the final decree in said cause directed the said George Hoyt to pay and satisfy, and by reason of his failure to obey said decree the second order was made upon the Master's report, fixing and adjusting the amount decreed to be paid by the said George Hoyt, in order for him to receive a conveyance of the property on Grove Street and to carry out the said contract of sale.

And your orator further shows unto your Honor, that by virtue of the final decree in the above cause, which was afterwards and on the eighteenth day of November, in the

year nineteen hundred and five, recorded in the Register's office of Essex County, in Book D 39 of Deeds, page 540, your orator, Charles W. L. Roche, became seized in fee simple to the said premises on Oakwood Avenue, and afterwards and by his deed bearing date the first day of December, in the year nineteen hundred and five, your orator, Charles W. L. Roche, and his wife, made, executed, acknowledged and delivered a deed of conveyance of the said premises on Oakwood Avenue to your orator, Security Realty Company, which deed was afterwards and on the sixth day of December aforesaid, recorded in the said Register's office, in Book K 39 of Deeds for Essex County, page 450, by virtue whereof your orator, the said Security Realty Company, is the owner of the said premises on Oakwood Avenue.

And your orators further show unto your Honor, that since the making of said final decree and the conveyance last aforesaid your orators have been informed, and they allege the truth to be, that the said mortgage of two thousand dollars given by David L. Osborne to George Hoyt upon the Oakwood Avenue property, was given without consideration, that the same was drawn and executed on the evening of the fifteenth day of February, in the year nineteen hundred and five, and the date thereof and the certificate of acknowledgment were written in as July second, nineteen hundred and four, and the said mortgage was placed on record the next morning, February sixteenth, nineteen hundred and five, and is recorded in Book L 18 of Mortgages for Essex County, page 247; that the said contract for the sale of said premises between your orator, Charles W. L. Roche, and David L. Osborne, by the terms thereof, was to have been carried out on the said fifteenth day of February, nineteen hundred and five, but by the request of the said David L. Osborne was postponed for two days, and that the said David L. Osborne, who desired to escape the obligation of his said contract to convey the said premises on Oakwood Avenue, communicated his desire to the said George Hoyt and the said Hoyt suggested that the said Osborne give a mortgage to him on said premises and he would record it, and thereby, being unable

to fulfill his said contract, he could escape the obligation thereof, and that he induced the said Osborne to make, execute and deliver the said mortgage, and he suggested that it be dated back, and he took the said David L. Osborne to the office of his attorney for the purpose of having the mortgage drawn and executed, and it was so drawn and executed and recorded, that no consideration was paid by the said George Hoyt to the said David L. Osborne for said mortgage and the same is void and of no effect.

And your orators further show unto your Honor, that if the said mortgage be by this Court annulled and declared to be of no effect against the said premises, your orator, Charles W. L. Roche, will become indebted to the said Osborne in a small amount, being the difference between the decree and costs aforesaid, and the amount of said mortgage, and your orators are willing to pay to said David L. Osborne whatever amount may be thus found due and to satisfy and discharge the decree heretofore obtained by your orator, Charles W. L. Roche, against the said David L. Osborne, and to have the deed of conveyance lodged with Frederick F. Guild, Esquire, the Master, delivered to the said David L. Osborne.

And your orators further show unto your Honor, that by deed of assignment, bearing date the twenty-third day of October, in the year nineteen hundred and five, the said George Hoyt made and executed an assignment of the said mortgage to Joshua A. Collinson, which assignment was recorded on the twenty-seventh day of October, in the year nineteen hundred and five, in Book No. 75 of assignments of mortgages for Essex County, page 140, and thereafter and on or about the twenty-fifth day of January, in the year nineteen hundred and six, the said Collinson assigned said mortgage back to the said George Hoyt, which assignment was recorded on the twenty-sixth day of January aforesaid, in the said Register's office.

And your orators further show unto your Honor, that they have frequently and in a kindly manner applied to the said George Hoyt and to the said David L. Osborne and requested them to satisfy and deliver up to your orators the said mortgage of two thousand dollars, and they

well hoped that the said George Hoyt and the said David L. Osborne would have complied with such reasonable requests of your orators, and they tendered themselves ready to pay and satisfy to the said David L. Osborne whatever amount might thus be found due to him and to satisfy the decree aforesaid; that the said David L. Osborne was willing to adjust said matter if the said George Hoyt would deliver up and cancel said mortgage, but the said George Hoyt absolutely refused to satisfy said mortgage, pretending that he had advanced and paid to said David L. Osborne the amount of said mortgage and pretending that the said mortgage had been made and executed at the time it bears date and not at any other time, which actings, doings and pretenses of the said George Hoyt and the said David L. Osborne, defendants, are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orators in the premises.

In tender consideration whereof, and forasmuch as your orators are remediless in the premises at and by the strict rules of the Common Law, and can only obtain adequate relief in this Honorable Court, where matters of this nature are properly cognizable and relievable. To the end, therefore, that the said George Hoyt and David L. Osborne may true, full and perfect answer make to the premises aforesaid, but without oath, and that the said George Hoyt may be compelled by the decree of this Honorable Court, to satisfy, cancel and discharge the said mortgage, and to surrender the same to your orators, and that your orators may have such other and further relief in the premises as to your Honor shall seem meet and as shall be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your orators the State's writ of subpoena issuing out of and under the seal of this Honorable Court, to be directed to the said George Hoyt and David L. Osborne, defendants, commanding them by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor, in this Honorable Court, then and there to answer all and singular the said premises and to stand to, abide by and perform such order and decree therein

as to your Honor shall seem meet, and as shall be agreeable to equity and good conscience.

And your orators as in duty bound will ever pray, &c.

E. C. & A. W. HARRIS,

Solicitors and of Counsel with Complainants.

Filed February 6, 1906.

IN CHANCERY OF NEW JERSEY.

BETWEEN CHARLES W. L. ROCHE, *et als.*, *Complainants*, *and* GFORGL HOYT, *et als.*, *Defendants.*	*On Bill, etc* *Demurrer of Defendant George Hoyt.*

The demurrer of George Hoyt, one of the defendants, to the bill of complaint of Charles W. L. Roche and Security Company, complainants.

This defendant, by protestation, not confessing all or any of the matters and things in complainants' bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer shows:

1. That inasmuch as the complainant, Charles W. L. Roche, was, by the decree of this Honorable Court, as set forth in said bill, awarded and allowed enough money to enable him to make payment to this defendant of the amount due on his mortgage, the complainants cannot compel this defendant to cancel and discharge said mortgage without such payment, as is sought by their said bill;

2. That complainants have no right to call upon this defendant concerning the time, consideration and purpose of the execution of said mortgage, as they seek to do in their said bill;

3. That complainants have no interest in said subjects to entitle them to institute this suit concerning same;

4. That complainants have no right to the relief they pray; and

5. That complainants have not in and by their said bill made or stated such a cause as entitles them, or either of them, in this Honorable Court to any relief against this defendant as to the matters contained in the said bill, or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant doth demur thereto, and humbly prays the judgment of this Honorable Court whether he should be compelled to make any further or other answer to the said bill, and prays to be hence dismissed, with his costs and charges in this behalf most wrongfully sustained.

WILLIAM A. LORD,
Solicitor for and of Counsel with Defendant George Hoyt.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

George Hoyt, of full age, being duly sworn according to law, saith that the foregoing demurrer is not interposed for delay, but in good faith, for the causes therein set forth.

GEORGE HOYT.

Sworn and subscribed before me,
this 20th day of March, A. D.
1906.
MARY BURKE,
Notary Public of N. J.

I certify that I have perused the complainants' bill in the above stated cause, and that the above demurrer is well founded in point of law.

WILLIAM A. LORD,
Of Counsel with Defendant, George Hoyt.

Filed November 20, 1906.

IN CHANCERY OF NEW JERSEY.

BETWEEN

CHARLES W. L. ROCHE, *et al.*,
Complainants,

and

GEORGE HOYT, *et al.*,
Defendants.

On Bill, etc.

Opinion.

1. A bill seeking relief which will vary a decree previously made in a cause for specific performance of an agreement for exchange of lands, upon allegations of facts subsequently discovered which, if proved, will justify relief, is good upon demurrer.

2. While parties to a fraudulent transaction are, as respects each other, bound thereby, a Court of Equity will neither enforce or avoid the transactions at the demand of either party.

On Demurrer.

Argued May 15, 1906.

Messrs. E. C. and A. W. Harris for Complainants.

Mr. William A. Lord for the Defendant, George Hoyt.

OPINION.

Magie, Chancellor.

The bill in this cause is filed by Charles W. L. Roche and the Security Realty Company, against George Hoyt and David L. Osborne, and its purpose is to procure a decree requiring the defendant Hoyt to satisfy, cancel and discharge a mortgage upon certain lands, or for other relief.

The facts stated in the bill as the ground for such relief are briefly as follows. On October 3, 1905, a decree was made in this Court, in a cause in which Roche was complainant, and Osborne was defendant, to the effect that certain articles of agreement between Roche and Osborne should be specifically performed by Osborne, and that Osborne, within ten days, should satisfy and discharge a mort-

gage of $2,000, given by him to the defendant Hoyt upon certain lands on Oakwood Avenue, in the City of Orange, and that Osborne should make, execute, acknowledge and deliver to Roche a warranty deed for those lands, upon Roche conveying to Osborne certain lands on Grove Street, in Orange, mentioned in said agreement between Roche and Osborne.

By an order in the cause, on November 9, 1905, upon a report made by a Master, it was further ordered and decreed that Roche should deliver to the Master a deed of conveyance from the Security Realty Company to Osborne, for the lands on Grove Street, and that Osborne should make, execute and deliver to Roche a warranty deed for the lands on Oakwood Avenue, and that Osborne should pay to Roche $1,714.93, with interest from November 4, 1905, with the taxed costs, and that the deed of Roche to Osborne should remain in the hands of the Master until that payment should be made. It is then stated that the decree for the payment of money by Osborne was made because, after the contract between Roche and Osborne for exchange of lands, a mortgage, purporting to have been made July 2, 1904, by him to George Hoyt upon said land, was recorded on the 16th day of February, 1905, which was the mortgage which the decree directed Osborne to pay and satisfy, and the second order was made because he failed to obey the decree in that respect, and the Master's report fixed and adjusted the amount to be paid by Osborne before receiving the conveyance of the Grove Street lands from Roche.

The bill further states that Roche had the final decree recorded in the Register's office of Essex County, and that afterward Roche made and delivered a deed of conveyance to the Oakwood Avenue lands to the Security Realty Company.

The bill then proceeds to state that since the making of the final decree and the conveyance to the Security Realty Company, the complainants have discovered that the mortgage given by Osborne to Hoyt was without consideration, and was placed on record the day before the contract of exchange between Roche and Osborne was to be per-

formed, and that the mortgage was not only made without consideration, but by the contrivance of Hoyt and Osborne, for the purpose of enabling Osborne to escape the performance of his contract to convey the Oakwood Avenue property.

The bill then states that if the mortgage be annulled, Roche will become indebted to Osborne in a small amount, being the difference between the decree and costs in said cause and the amount of said mortgage, and the complainants offer to pay Osborne whatever may be thus found due and to satisfy and discharge the decree obtained by Roche against Osborne, and to have the deed of conveyance now lodged with the Master, delivered to Osborne.

To this bill a demurrer is interposed by George Hoyt. The main contention is that there is no equity in the bill justifying the relief sought.

It is first contended that the bill leaves it uncertain whether or not Roche has not enforced his decree against Osborne for the payment of money, and received the amount which that decree required Osborne to pay. The bill does fail to expressly state that the decree for the payment of money remains unsatisfied, but the implication and inference from what is stated to that effect, is so strong that I think the demurrer cannot prevail upon this ground.

It is next contended that as the bill declares that Roche accepted the decree, recorded it so as under the statute to give him a title to the lands required to be conveyed by Osborne, and obtained a decree for the payment of money upon an accounting into which the mortgage to Hoyt entered, and has conveyed away the property to the Security Realty Company, he may not now, by a bill such as this, seek a varied relief.

I am unable to adopt this view. If Roche had known, at the time he filed his bill for specific performance, or at the time he sought for and obtained a decree upon that bill, that the mortgage made by Osborne to Hoyt was not only without consideration, but was a fraudulent contrivance between Osborne and Hoyt to hinder him in the performance of the contract of exchange, obviously he might have had the relief he now seeks in this bill. But he was

ignorant of the facts which he now relies on, and took his decree as the matter was then presented to the Court and assumed to be true by him. The decree which this bill seeks will no doubt vary the decree previously made, but if he makes proof of the facts stated in his bill, that decree ought to be varied. Whether this bill is a bill for relief, or a bill in the nature of a bill for relief, or an unclassified bill, is, in my judgment, immaterial. What he has now discovered entitled him to seek a varied relief, and if the facts are proved, that relief ought to be granted to him. The bill is not objectionable on this ground.

It is further contended that the bill ought to proffer the payment which will be coming from Roche if the mortgage is set aside, not to Osborne but to Hoyt. The contention is that, assuming what the bill states and the demurrer admits, the mortgage was without consideration and contrived in fraud, it yet is a valid instrument as between Osborne and Hoyt, and appeal is made to the well-settled doctrine that such fraudulent transactions are valid and unimpeachable as between the parties thereto. Such is the undoubted rule in respect to all conveyances and transfers of property intended to defraud creditors. In respect to such transactions neither party is entitled to the aid of a Court of Equity. Schenck v. Hart, 5 Stew. (32 N. J. Eq.) 774.

The like doctrine is undoubtedly applicable to other transactions conceived and carried out for the purpose of fraudulently diminishing or defeating the right of third parties. Such transactions will neither be enforced or avoided at the demand of either of the parties thereto. The doctrine is derived from the maxim "In pari delicto, portior est conditio possidentis." Brown v. Carpenter, 12 Dick. (57 N. J. Eq.) 23. What the Court would not do by any direct proceeding, it will not permit to be done indirectly.

The complainants are entitled, if they make out a case by sufficient proof, to have the mortgage discharged. Whether Hoyt may have any claim thereafter upon Osborne, is a matter to be settled in another proceeding, or elsewhere. The demurrer is not successful upon this ground.

Upon the whole case, I think the bill is good, and the demurrer will be overruled.

Filed July 9, 1906.

IN CHANCERY OF NEW JERSEY.

BETWLEN CHARLES W. L. ROCHE, *et als.*, *Complainants,* *and* GEORGE HOYT, *et als.*, *Defendants.*	*On Bill, etc.* *Order Overruling Demurrer.*

This cause coming on to be heard at the regular term of this Court, in the presence of Elwood C. Harris, of counsel with the complainants, Charles W. L. Roche and Security Realty Company, and William A. Lord, of counsel with the defendant, George Hoyt, and the Chancellor having heard the arguments of the counsel of the respective parties on the demurrer of George Hoyt filed in the above-stated cause, it is on this 17th day of July, 1906, on motion of Elwood C. Harris, of counsel with the complainants, ordered that the said demurrer be overruled, with costs, and that the defendant answer the complainants' bill within twenty days, and that if he fail so to do, the complainants' bill be taken as confessed against him.

W. J. MAGIE, C.

Filed July 17, 1906.

NEW JERSEY COURT OF ERRORS AND APPEALS.

BETWEEN CHARLES W. L. ROCHE, *et als.*, *Compl'ts and Appellees*, *and* GEORGE HOYT, *et als.*, *Deft's.* GEORGE HOYT, *Appellant.*	*On Bill, etc.* *Petition of Appeal.*

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

The petition of George Hoyt, the appellant in the above stated cause, respectfully shows, that your petitioner finds himself aggrieved by the order made in the Court of Chancery, by his Honor William J. Magie, Chancellor of the State of New Jersey, bearing date the seventeenth day of July, nineteen hundred and six, made in a cause wherein Charles W. L. Roche and the Security Realty Company were complainants, and George Hoyt and David L. Osborne were defendants, in this respect, to wit: The said order directs that the demurrer filed in this cause by said appellant, George Hoyt, be overruled, with costs, and that the defendant answer the complainants' bill within twenty days thereafter, and that if he fails so to do the complainants' bill be taken as confessed against him.

And your petitioner humbly appeals from all and every part of said order as aforesaid upon the following grounds, to wit:

1. The said Court of Chancery manifestly erred in holding that your petitioner's demurrer should be overruled.

2. The said Court of Chancery also manifestly erred in holding that the defendant must answer complainants' bill.

3. The said Court of Chancery also manifestly erred in holding that the case made out by complainants in the bill filed in this cause entitled them, or either of them, to any relief as against this defendant.

4. The said Court of Chancery also manifestly erred in not sustaining the demurrer filed by this appellant in this cause.

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.

WILLIAM A. LORD,
Solicitor for and of Counsel with Appellant.

Filed August 25, 1906.

NEW JERSEY COURT OF ERRORS AND APPEALS.

BETWEEN CHARLES W. L. ROCHE, *et als.*, *Compl'ts and Respondents*, *and* GEORGE HOYT, *et als.*, *Deft's.* GEORGE HOYT, *Appellant.*	*On Bill, etc.* *Answer to Petition of Appeal.*

The answer of the above-named respondents to the petition of the above-named appellant.

The respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit, that a decree was, on the seventeenth day of July, nineteen hundred and six, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe that the said decree is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

E. C. & A. W. HARRIS,
Solicitors and of Counsel with Respondents.

Filed October 22, 1906.

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New Jersey Court of Errors and Appeals.

Between
CHARLES W. L. ROCHE *et als.*,
Complainants and Respondents,

and

GEORGE HOYT *et als.*,
Defendants.

GEORGE HOYT,
Appellant.

On Bill, &c.,
Brief of
George Hoyt.

On February 3, 1905, complainant Roche entered into an agreement with defendant Osborne in which the former agreed to convey to the latter certain property in East Orange for a consideration of $8,100, and the latter agreed to convey to the former certain property in Orange for $7,500, the former property subject to a mortgage of $4,000 and the latter subject to a mortgage of $2,500, which amounts were to be deducted from the respective purchase moneys and the difference between the equities in each, $900, was to be paid by Roche to Osborne, $100 down, $400 when deeds were exchanged and $400 to be secured by a mortgage. The deeds were to be exchanged February 15, 1905, but the date was later, at the request of Osborne, postponed to February 17, 1905. On February 16, 1905, a mortgage to defendant Hoyt, for $2,000, given by Osborne on said Or-

ange property, bearing date July 2, 1904, and purporting to have been acknowledged on the same day was recorded. Osborne failed to carry out the agreement and Roche brought suit for specific performance in Chancery Court and October 3, 1905, obtained a decree ordering Osborne (not Hoyt, as erroneously stated in the bill) to specifically perform said agreement and within ten days to pay, satisfy and discharge the mortgage for $2,000 given to Hoyt, and also tax and water liens and to deed to Roche the Orange property upon Roche's conveying to him the East Orange property and otherwise fulfilling the terms of the agreement and both parties were ordered to appear before Frederick F. Guild, a master of this Court, upon five days' notice, to carry out the terms of the decree. Osborne failed to appear in response to the notice from the master, but Roche appeared and produced deed to Osborne of the East Orange property. The master reported, November 4, 1905, that the mortgage of $4,000, with interest at five per cent. from June 16, 1905, was an encumbrance against the Roche property and that the two mortgages, one for $2,500, with interest at five per cent. from October 13, 1904, and the other for $2,000, with interest at five per cent. from July 2, 1905, besides taxes of $568.92 and water charges of $56.50, were encumbrances against the Osborne property; from which it appeared that upon conveyances by Roche and Osborne each to the other, Osborne was indebted to Roche in the sum of $1,700.93. Whereupon, this Court, on November 9, 1905, made a further order directing Osborne (not Hoyt, as erroneously stated in the bill) to deliver to Roche a deed of the Orange property, together with the aforesaid sum of $1,700.93, with interest from November 4, 1905, taxed costs and

a counsel fee of $50, and that Roche deliver to the master the deed of the East Orange property to remain in his hands until Osborne should make said payments, and it was further ordered that an execution issue to levy and make the amounts directed to be paid by Osborne.

Most of these facts are set out in the bill and the remainder appear from the papers filed in this Court in said suit for specific performance and of which I assume this Court can take judicial notice upon this argument. The bill alleges that the mortgage of $2,000 on the Orange property, given by Osborne to Hoyt, was without consideration, that it was executed and acknowledged on February 15, 1905, and dated back to July 2, 1904, by Osborne and Hoyt in collusion, for the purpose of enabling Osborne to escape the obligation of said agreement and in fraud of the right of Roche and his grantee, The Security Realty Company, and that said mortgage is void and of no effect. The bill asserts that by the said final decree of October 3, 1905, Roche became seized in fee of the Orange property and on December 1, 1905, conveyed same to The Security Realty Company; that if said mortgage is set aside Roche will owe Osborne a small amount, which he is willing to pay to him and also satisfy the decree aforesaid, and that Osborne has been willing to adjust the matter if Hoyt would cancel his mortgage. The bill prays that Hoyt be compelled to satisfy, cancel and discharge said mortgage, but asks no relief against Osborne, although he has been made a party defendant. To the bill the defendant George Hoyt demurs.

1. It is not alleged anywhere in the bill that Osborne has not paid to Roche the $1,700.93 in accordance with the order of this Court, with which, added to the $900 due Osborne under the

terms of the agreement, he was to pay the Hoyt mortgage and other liens, and in the absence of such an allegation I assume a court of equity will regard as done that which it has ordered to be done. But if it may be *inferred* from the bill that this money has not been paid, there is no allegation that any effort has been made to collect same, nor that it is impossible, difficult or even inconvenient to collect same from Osborne either by ordinary process of law or under the execution especially awarded by this court in its aforesaid order and which it does not appear was ever taken out. Nor is there any allegation that any effort has been made to enforce said order by contempt proceedings. According to the agreement between Roche and Osborne there is an equity of $4,100 in the East Orange property out of which Roche can collect the $1,700.93 if it has not already been collected. And if Osborne has not paid this money to Roche and the mortgage to Hoyt is, as alleged, fraudulent and void as to Roche, then Roche should tender and hold himself ready to pay to *Hoyt* the difference between the face of the mortgage plus the difference between the equities in the two properties and less the amount of the liens as found by the master before this court can be asked to compel Hoyt to cancel this mortgage, which is indisputably good as between Hoyt and Osborne (Schenck *v.* Hart, 5 Stewart, 774). But this he has not done and does not offer to do in his bill. On the contrary he tenders payment of this money to Osborne, whereas, if he had tendered it to Hoyt, who can say that Hoyt would not have accepted it and cancelled the mortgage? Can Hoyt be compelled to cancel the mortgage until such a tender is made? The bill prays that Hoyt be ordered to cancel the mortgage without the payment of

any money to him, although it is clear that over $1,000 would be coming to him, even if the mortgage was invalid as against Roche.

In the case of Risley *v.* Parker, 5 Dickinson, 285, where a first and third mortgage were foreclosed and it appeared that a second mortgage was given without consideration to protect the mortgagors' property and the decree declared that it was not a lien upon the mortgaged premises, it was held, on petition for the surplus moneys from the foreclosure sale, that the allegation in the bill, finding of the master and declaration in the decree must be confirmed in their effect to the complainants' third mortgage and could not effect the rights of the second mortgagee as against the mortgagors, who were owners of the equity of redemption, and that the proceeds of the sale, after satisfying the complainants' two mortgages, must be applied to the second mortgage. This is certainly a case in point and does not, as I view it, interfere with the doctrine referred to by the Chancellor in his opinion below to the effect that a court of equity will not either enforce or avoid a fraudulent transaction at the demand of either of the parties thereto. Hoyt has not been paid or tendered even the amount which would be due him under the most adverse interpretation of the transactions set out in this bill, and, until this is done, this Court cannot order him to cancel his mortgage.

2. The complainants have been already given adequate relief in this Court, even if they have not pursued same, and cannot, therefore, have set aside an instrument which, even if the allegations of the bill are true, is valid as between Osborne and Hoyt. At least they cannot do so until they have exhausted their other remedies for the

collection of their debt. By the last order made in the suit for specific performance, if not before, the title to the properties passed, and thereby it became Roche's duty to pay off the Hoyt mortgage and other liens, and Roche became, in effect, a judgment creditor of Osborne to the amount of $1,700.93 and costs, etc., so that the law applicable to creditors' bills is in point here. A money decree in equity answers the same purpose as a judgment at law (12 Cyc., 15, and cases there cited).

Roche has parted with his title to the property affected by the mortgage in question, and, if entitled to any standing at all as a complainant in this cause, it must be as a judgment creditor solely. He certainly has lost his standing as a purchaser and could not, at any rate, be at once both creditor and purchaser (Boyce *v.* Conover, 9 Dickinson, 540).

If Roche is a proper party complainant in this cause it must be as a creditor holding a money judgment against Osborne for $1,700.93, etc., and his bill must be treated as a creditor's bill and to be entitled to relief he must show that he has exhausted his remedy at law and, at least, that he can not otherwise obtain satisfaction of his debt. To reach an equitable interest of the debtor, the creditor must first have taken out an execution at law, and have required it to be levied or returned, so as to show a failure of his remedy at law. Equity will only grant its aid to enforce legal process when it appears that the legal remedy of the complainant is exhausted. Robert *v.* Hodges *et al.*, 1 C. E. Green, 299. See also Stockton *et al.* v. Lippincott *et al.*, 10 Stewart, 443; Wait on Fraudulent Conveyances (3d ed.), Sec. 68; 14 Am. & Eng. Ency. of L., 329.

In this State, in the case of Dunham *v.* Cox, 2 Stockton, 467, Chancellor Williamson, in the Court

or Errors and Appeals, said: "It is not enough for the bill to show that the debtor has made a fraudulent disposition of any particular portion of his property to entitle the creditor to the aid of a court of equity. He must show that such disposition embarrasses him in obtaining satisfaction of his debt; for if the debtor has other property subject to the judgment and execution sufficient to satisfy the debt, there is no necessity for the creditor to resort to equity. If his debt can be satisfied out of property upon which his judgment is a lien, it is only inviting useless litigation for him to question conveyances made by the debtor, which, however they may have been intended, do not operate as a fraud upon him. The court of equity interposes because its aid is necessary to assist the creditor in obtaining his legal rights. If there is property which the law places within his reach free from embarrassment to satisfy his debt, the aid of a court of equity is not required." Wales *v.* Lawrence, 9 Stew., 207; Bailey *v.* Bailey, 21 Dick., 84.

The bill shows that Osborne has now property in East Orange which both Roche and Osborne valued, by the terms of their agreement, at $4,100 over and above the amount of the mortgage thereon, and surely a decree of $1,700.93 and costs could be satisfied out of it, but no execution has been issued against Osborne, and it is not even alleged in the bill that he is insolvent, that he has no property out of which this money decree could be collected or that complainants' other remedies have been exhausted, and they are therefore certainly not entitled to any relief in these proceedings.

3. As to the Security Realty Company, I fail to see where it is entitled to any relief, for it bought the property from Roche long after Hoyt's

mortgage was recorded and with full knowledge of its existence and, as the bill fails to show what the Company paid to Roche for the property, I should think it was fair to assume that the Company made ample allowance for the payment of all liens against the property (including Hoyt's mortgage), when arranging the amount of purchase money to be paid to Roche. If this is so, the Security Realty Company has not been damaged and can ask no relief in this Court. It was held that a purchaser at an execution sale, who secures the property for a smaller price by reason of the title being clouded by the judgment debtors' fraudulent conveyance, is estopped from afterwards attacking such conveyance, since the existence of such conveyance inures to his benefit. 20 Cyc., 435; De Graw *v.* Mecham, 48 N. J. Eq., 219. Is not this a similar case, in the absence of an allegation in the bill of a contrary state of facts?

The general rule is that a conveyance cannot be attacked on the ground of fraud by a creditor whose claim was acquired after due notice, either actual or constructive, of such conveyance. 20 Cyc., 427.

"The prevailing and sounder American doctrine is that a person purchasing property with full knowledge of a previous voluntary or fraudulent conveyance thereof by his grantor, cannot maintain an action to set aside such conveyance." 20 Cyc., 438. This, it seems to me, applies to the Security Realty Company, which is the grantee of Roche, who was practically the grantee of Osborne, the alleged fraudulent mortgagor.

In order that a conveyance or transfer may be attacked as being fraudulent and void as against creditors, it is necessary, even where there is

an actual fraudulent intent, that prejudice to the rights of creditors shall result therefrom, for fraud does not consist in mere intent not resulting in injury. 20 Cyc., 416.

For all that appears in the bill Roche may have been paid full price for the property by the Security Realty Company, the latter feeling confident and taking the risk of having the Hoyt mortgage set aside as to it, in which case Roche has suffered no loss; or, in transferring the property, Roche may have allowed the Company the amount due on the Hoyt mortgage on account of the purchase price, in which event the Security Realty Company has lost nothing and Roche, as before pointed out, is in the position of a judgment creditor merely and must allege his inability to collect his debt by other means before resorting to this one. Both complainants cannot be entitled to relief, and this suit should be brought by the one, if either, who has suffered loss and the character in which he sues and the nature of the damage he has sustained should be shown in the bill in order to require this defendant to answer same.

4. The bill in this case is, on its face, it seems to me, filed for the relief of Osborne, who is entitled to no relief, instead of for the relief of Roche and his grantee. Although Osborne has, it would seem, absolutely failed and flatly refused to obey two of the orders of this Court, nothing has been done to compel him to obey them, nothing has been done to enforce the collection of the money he was ordered to pay, from him or his property, and no relief is asked from him in this bill. It is even set out in the bill that Osborne will settle if Hoyt will cancel the mortgage, that if this is done Roche will pay to Osborne some money which would not be due him and would satisfy the former decrees of this Court against

Osborne, which he would have no right to do. Osborne was distinctly ordered to pay the Hoyt mortgage, and, even if it should be set aside as to Roche, Hoyt and not Osborne, as before pointed out, would be entitled to the surplus money and Hoyt would then probably be entitled to be subrogated to the rights of Roche against Osborne and be given the right to enforce Roche's decrees against Osborne. As before pointed out, the surplus of profits arising from property conveyed in fraud of creditors, after satisfying such creditors, belongs to the grantee or his heirs or representatives. 20 Cyc., 622 and cases there cited. From all of which it appears as if this bill was filed in the interest of Osborne to enable him to avoid his obligation to pay Hoyt $2,000.

In discussing the right of creditors to avoid conveyances, in 14 Am. & Eng. Ency. of Law, 282, it is said:

"A third requisite is that the creditor in bringing the action must have an eye single to his own benefit. In every case in which a debtor transfers his property to defraud his creditor, a condemnation of the property to satisfy that creditor would in law operate for the benefit of the debtor, for it would be the means of bringing about a payment of his debt, and that, too, with what, so far as the debtor is concerned, is another man's property. This, however, is an unavoidable consequence of the effort to do justice to the creditor; but this benefit must be an incident and not the purpose of the proceeding, for if it appears that the creditor moves at the instance of or in combination with the debtor and for his benefit, the Court will deny its assistance." Feagan *v.* Cureton, 19 Ga., 404; Faris *v.* Durham, 5 T. B. Mon. (Ky.), 400. See also Boutwell *v.* McClure, 30 Vt., 674.

"A court of equity will not aid a fraudulent debtor to do by indirection what it would not assist him to do directly." Anderson *v.* Tuttle, 10 C. E. Green, 144; Livermore *v.* McNair, 7 Stewart, 478.

The object of the bill being evidently for the relief of Osborne and not Roche should not be allowed to stand.

5. The complainants could not under any circumstances be entitled to the relief they pray, for they ask that the mortgage in question be set aside and assert that it is void and of no effect. But if every allegation in the bill were true and Roche could not enforce his claim against Osborne, this Court could only be asked to set aside the mortgage as to Roche upon Hoyt's being subrogated to the rights of Roche against Osborne, as before pointed out.

"As a general rule, where the purchaser's title to the land fails, he will be subrogated to the rights of the holders of liens or encumbrances which he has paid or which have been paid out of the purchase money." 27 Am. & Eng. Ency. of Law, 239, and cases there cited.

"If the value of the land conveyed is greater than the complainant's claim the decree should declare the conveyance void as against complainant, and it is error in such case to set aside and annul the deed in toto." 14 Am. & Eng. Ency. of Law, 339, and cases there cited.

For these reasons we respectfully submit that complainants have not made out any case in their bill that entitles them to any relief in the court of chancery as against defendant and that the order overruling his demurrer should be reversed and the demurrer sustained.

WILLIAM A. LORD,
Solicitor for and of Counsel with
George Hoyt.