INDEX.

COMPLAINT.

(Filed February 20, 1928.)

IN CHANCERY OF NEW JERSEY. 10

Between

WILLIAM STONAKER AND GERTRUDE STONAKER,

Complainants,

and

ESTHER COHEN AND SOL KANTOR, 20

Defendants.

To the Honorable EDWIN WALKER, Chancellor of the State of New Jersey;

The complainants, William Stonaker and Gertrude Stonaker, of the City of Perth Amboy, County of Middlesex and State of New Jersey, respectfully show that: 30

1. Complanants reside at 210 Lewis Street in the said City of Perth Amboy.

2. On or about October 1, 1927, the complainant, William Stonaker, went in answer to an advertisement for mortgage applications to the office of Sol Kantor, an attorney-at-law, having offices at 217 Smith Street, in the City of Perth Amboy, and applied for a second mortgage on 40

property located on Lewis Street in the said City of Perth Amboy. A copy of the advertisement appearing in the Perth Amboy Evening News is as follows:

10 "First and Second Mortgages—Local and suburban. Kantor—217 Smith Street. Telephone 2709."

3. The complainant, William Stonaker, was informed by the defendant, Sol Kantor, that he had clients, who wanted him to put out money for them and arrangements were made that night for a $3000.00 second mortgage loan from a client to the complainants, William Stonaker and Gertrude Stonaker, for a term of two years,
20 and the complainant, William Stonaker was to pay a bonus of $400.00. This arrangement was satisfactory to the complainants, and he was instructed to bring to the defendant, Sol Kantor, a contract for sale of his property at 210 Lewis Street, in the said City of Perth Amboy, and a deed of two lots situated in the Borough of Sayreville, County of Middlesex and State of New Jersey.

30 4. On or about October 4, the complainant, William Stonaker, left with the defendant, Sol Kantor, a deed of two lots in the Borough of Sayreville, and also a contract for sale of complainants' property on Lewis Street for the purpose of preparing the bond and mortgage.

5. Several weeks later, to wit, on or about the 20th day of October, the complainants, William Stonaker and Gertrude Stonaker, signed a bond and mortgage bearing date October 14,
40 1927.

6. The defendant, Sol Kantor, informed the complainant, William Stonaker, that the $3,000.00 less the $400.00 bonus fee would be turned over to the complainants just as soon as the Perth Amboy Savings Institution, represented by Charles C. Hommann, had completed its search and were ready to disburse to the said complainant the money on the first mortgage loan applied for previously.

7. On or about December 1, 1927, the defendant, Sol Kantor, informed the complainant in the presence of Thomas Layden that the money was ready, awaiting the completion of the search by the Perth Amboy Savings Institution.

8. On or about December 22, 1927, the defendant Sol Kantor, informed the complainant, William Stonaker, in the presence of Alex Kozub, that the money was ready and all would be paid in twenty-four hours.

9. On or about December 12, 1927, the Perth Amboy Savings Institution were ready to grant the loan and Charles C. Hommann in the presence of the complainant, telephoned to the defendant, Sol Kantor, and informed the said defendant, Sol Kantor, that they were ready to make disbursements on the first mortgage loan.

10. The defendant, Sol Kantor, at that time informed the solicitor for the Perth Amboy Savings Institution that he, the said defendant, had the money and would have a check at the office of Charles C. Hommann, the next day.

11. A few days later, the complainant, William Stonaker, called at the office of the defendant,

Sol Kantor, and asked him why the money was not turned over to Charles C. Hommann as agreed. The defendant, Sol Kantor, told the complainant, William Stonaker, that his client, the defendant, Esther Cohen did not want to give the $3,000.00 as the defendant, Esther Cohen, did not have $3,000.00 to give at that time but would give the complainant, William Stonaker, $1700.00 then and would give $900.00 more at another time. This the complainant refused.

12. On or about December 23, 1927, in response to the orders of the defendant, Sol Kantor, the complainant, William Stonaker, called at Esther Cohen's home, at which time she too made the proposition mentioned above. This was the first time the complainant, William Stonaker, knew the name of the mortgagee or ever saw her. The name of the mortgagee the defendant, Sol Kantor, refused to divulge, up to that time.

13. On or about January 5, 1928, the complainant, with James Murray, called at the office of the defendant, Sol Kantor, for the bond and mortgage and other papers which the said complainant had left with the defendant, and he informed the said complainant, William Stonaker, that he owed him, the defendant, Sol Kantor, $100.00 for services rendered. The complainant refused to pay him.

14. On or about January 9, 1928, the defendant, Sol Kantor, placed the mortgage mentioned above on record in the Clerk's Office of the

County of Middlesex in Book 551 of Mortgages Pages 190 etc.

15. By reason of the aforesaid tactics of the defendants, Esther Cohen and Sol Kantor, the complainants have been compelled to lose time and labor in attempting to secure a new mortgage to replace the one previously granted, and the second mortgage loan, and also to spend divers sums of money in securing the new mortgage.

The complainants, William Stonaker and Gertrude Stonaker, are without an adequate remedy at law and therefore pray:

1. That the defendants, Esther Cohen and Sol Kantor, who are the defendants to this suit, may answer this complaint and each statement therein made.

2. That a mandatory writ of injunction be issued compelling the defendants, Esther Cohen and Sol Kantor, to cancel the said mortgage of record.

3. That the complainants demand judgment of $500.00 for the lost time and moneys expended in securing a new loan.

4. That the complainants may have such other relief in the premises as the nature of the case may require and as shall be agreeable to equity and good conscience.

5. That a writ of subqoena may be issued commanding the said defendants, to answer this bill

of complaint and abide by such decree as this Court may make in the premises.

JOSEPH F. DEEGAN,
Solicitor for and of counsel with complainants.

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SUPOENA.

New Jersey, to wit: The State of New Jersey to Esther Cohen and Sol Kantor.

GREETING: Whereas a bill of complaint has lately been exhibited against you in our Court of Chancery by

20 William Stonaker and Gertrude Stonaker to be relieved touching the matters therein contained.

Therefore, we command you, if you intend to make a defense, that you file an answer to said bill in the office of the Clerk of our said court at Trenton, on or before the expiration of twenty days from and after the 15th day of March, 1928, and in default thereof such order or decree will be made against you as the Court

30 shall think equitable and just.

Witness, his Honor, Edwin Robert Walker, Chancellor of our State, at Trenton, the first day of March, in the year of our Lord one thousand nine hundred and twenty-eight.

THOMAS BARBER,
Clerk.

Joseph F. Deegan,

40 Solicitor.

ANSWER.

(Filed April 2, 1928.

IN CHANCERY OF NEW JERSEY

Between:

10

WILLIAM STONAKER and GERTUDE STONAKER,

Complainants,

and

ESTHER COHEN and SOL KANTOR,

Defendants.

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The defendant, Sol Kantor, residing in the City of Perth Amboy, in the County of Middlesex and State of New Jersey; answering the bill of complaint, says:

1. He admits paragraph one of the complaint.

2. Defendant admits paragraph two of the complaint.

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3. He admits paragraph three of the complaint; except he denies:

(a) that the loan was granted that night.

(b) that there was an agreement to pay a bonas.

(c) that complaint left with this defendant a contract of sale for the premises at 210 Lewis Street.

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Answer.

4. He admits paragraph four of the complaint; except he denies:

(a) that a contract for the sale of the property on Lewis Street, was left with this defendant.

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5. He admits paragraph five of the complaint.

6. He denies paragraph six of the complaint.

7. He denies paragraph seven of the complaint.

8. He admits paragraph eight of the complaint.

20 9. He admits paragraph nine of the complaint.

10. He admits paragraph ten of the complaint.

11. He denies paragraph eleven of the complaint; except he admits that the complainant called at his office.

12. He denies paragraph twelve of the complaint; except that he admits that the complainant called upon the defendant Esther Cohen.

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13. He admits paragraph thirteen of the complaint, except he denies that the complainant called with James Murray.

14. He admits paragraph fourteen of the complaint.

15. He has no knowledge of the matters and things alleged in paragraph fifteen, sufficient to form a belief, and therefore leave complainants to make proof thereof.

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Answer.

At the trial of the above matter this defendant will urge the following defenses:

1. That he is not a proper party defendant.

2. That the bill of complaint sets forth more than one cause of action. 10

3. That he is not the mortgagee and therefore, has no right, power or authority to cancel said mortgage of record; or in the alternative he will urge:

(a) that no demand was made for the cancellation of said mortgage, before the institution of the said suit, nor does the bill so allege. 20

(b) that it was agreed that the mortgagee was to receive interest from the date of the loan October 14, 1927.

(c) that the mortgagee was to turn the money over upon the completion of the house.

(d) that the complainants represented that the house was fully completed, where as a matter of fact it was not. 30

(e) that the mortgagee was ready to turn over the $3000.00 upon the house completed and so advised complainants.

(f) that the mortgagee offered to give complainants 2/3rds ($2100.00) and the balance of 1/3 ($900.00) upon the completion of the house, which complainants refused. 40

Answer.

(g) that the mortgagee has not made any other profit upon said $3000.00.

(h) that the complainants have refused and neglected to pay the interest as agreed upon.

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(I) that the said mortgage was placed on record to protect the interest due the mortgagee.

4. That the bill of complaint fails to set forth an equitable cause of action.

SOL KANTOR,
Defendant Per Se.

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NOTICE OF MOTION TO STRIKE OUT.

(Filed April 10, 1928.)

IN CHANCERY OF NEW JERSEY

On Bill Etc.

10

Between

WILLIAM STONAKER and GERTRUDE STONAKER

Complainants

and

SOL KANTOR and ESTHER COHEN,

20

Defendants

To the Defendants, Esther Cohen and Sol Kantor:

TAKE NOTICE that on Tuesday, the tenth day of April, 1928 at the hour of 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard at the Chancery Chambers in the City of Newark. I shall apply to the Chancellor for an order striking out the answer filed by you in the above-entitled cause, for the following reasons:

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1. The said answer does not set up an equitable defense or counterclaim in that:

(a) The defendants, Sol Kantor and Esther Cohen, both admit the execution of a bond and

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mortgage October 20, 1927 as of October 14, 1927, and although no moneys have been advanced to the complainants, Esther Cohen demands interest and sets this up as a defense for not cancelling the mortgage of record.

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(b) The defendant, Sol Kantor, sets up as a defense that he is not the proper party defendant, although he admits a refusal on his part to turn over the bond and mortgage when demanded and further that he, himself, placed the mortgage on record after the demand was made, and further claimed the complainants still owed him One Hundred ($100.00) Dollars for services rendered.

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(c) The defense of Esther Cohen is one involving a usurious payment of interest and the attempt to extort interest from the complainants fraudulently and against equity and good conscience.

2. The said defenses of Esther Cohen and Sol Kantor are obscure and uncertain in that:

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(a) It is impossible to determine whether Sol Kantor is setting up a counterclaim or;

(b) Whether the defendant; Esther Cohen, is willing to cancel the mortgage of recod as she says she was never asked to cancel it of record.

JOSEPH F. DEEGAN,
Solicitor for and of counsel
with Complainants.

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AFFIDAVIT OF WILLIAM STONAKER.

(Filed February 20, 1928.)

State of New Jersey,
County of Middlesex,—*ss.*: 10

WILLIAM STONAKER, of full age, being duly sworn according to law upon his oath, deposes and says that:

I am the complainant in the foregoing Bill of complaint mentioned. I have read the same and am familiar with the contents thereof, and the matters and things therein set forth are true.

2. I reside at 210 Lewis Street, in the City of Perth Amboy, County of Middlesex and State of New Jersey. I had erected a house on the premises mentioned above and I sought a mortgage to be placed thereon from the Perth Amboy Savings Institution and from one of the clients of Sol Kantor, an attorney-at-law with offices at 217 Smith Street, in the City of Perth Amboy, County of Middlesex and State of New Jersey. 20

3. On or about October 1, 1927, I called at the office of Sol Kantor, in answer to an advertisement that appeared in the Perth Amboy Eevening News, a copy of which advertisement appears in the bill of complaint hereto. I made the application and was granted a second mortgage loan of Three Thousand ($3,0000.00) Dollars for which I was to pay a bonus of Four Hundred ($400.00) Dollars, and I and my wife signed the bond and mortgage on October 20, 30 40

1927, and the bond and mortgage were dated October 14, 1927.

4. Sol Kantor told me that the money would be turned over to me just as soon as the search was completed by the Perth Amboy Savings Institution.

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5. On December 12, 1927, the search of the Perth Amboy Savings Institution was completed and I signed the bond and mortgage to that institution on that date.

6. In my presence, Charles C. Hommann, the solicitor of the Perth Amboy Savings Institution, called up Sol Kantor on the telephone and informed him that his company was ready to place a mortgage of Five Thousand Five Hundred ($5,500.00) Dollars and turn the said money over to me after paying off the mechanic liens thereon. Sol Kantor informed the solicitor for the Perth Amboy Savings Institution that he would be over to his office with a check for Three Thousand ($3,000.00) Dollars the next day.

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7. Delay after delay ensued and being pressed by the material men, I, for the purpose of assuring them that the money was forthcoming, took Thomas Layden, who furnished the plumbing supplies to the office of Sol Kantor, on or about December 1, and Kantor informed him in my presence that the money was ready to be turned over just as soon as the Savings Institution had furnished the search.

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8. On or about December 22, 1927, I took the electrician, Alex Kozub, to the offices of Sol

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Kantor, and he informed me and Alex Kozub that the checks would be drawn the next day.

9. On or about December 23, 1927, Sol Kantor informed me that his client did not have $3,000, but would give $1,700.00 then, and $900.00 some other time. I refused to accept this. 10

10. On or about January 5, 1928, I called at the offices of Sol Kantor for my bond and mortgage and he refused to turn them over to me, alleging that I owed him One Hundred ($100.00) Dollars for services.

11. On January 9, 1928, the bond *mortgage* signed by me on October 20, 1927, was recorded in the Clerk's Office of the County of Middlesex in Book 551 of Mortgages, Pages 190, etc. 20

Because of the tactics of Sol Kantor and Esther Cohen, I have been compelled to spend much time and labor in attempting to secure a mortgage, and I have insurred expenses with the Perth Amboy Savings Institution which otherwise would not have been incurred. Much embarrassment and worry has been caused me by Sol Kantor and Esther Cohen.

WILLIAM STONAKER. 30

Sworn to and Subscribed
Before me this 16th
day of February, 1928.

JOHN R. MCGUIRE,
Atty. at Law of N. J.

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AFFIDAVIT OF CHARLES C. HOMMANN.

(Filed February 20, 1928.)

State of New Jersey,
County of Middlesex,—*ss*: *b*

10 CHARLES C. HOMMANN, being duly sworn according to law upon his oath deposes and says that:

1. He is the attorney for the Perth Amboy Savings Institution, and that on the eighteenth day of August, 1927, William Stonaker applied for and was granted a loan in the amount of $5500.00 on property owned by him, known as 210 Lewis Street, in the City of Perth Amboy,
20 County of Middlesex and State of New Jersey.

2. At the request of the Perth Amboy Savings Institution, he caused a search to be made of the property of William Stonaker and Gertrude Stonaker, and that the Perth Amboy Savings Institution was ready to make the loan upon the completion of his search which was on December 12, 1927.

30 3. The deponent further says that Sol Kantor. an attorney-at-law of Perth Amboy was securing a second mortgage of $3000.00 from one of his clients on the same property for William Stonaker.

4. The deponent further says that William Stonaker and his wife signed a bond and mortgage to the said Perth Amboy Savings Institution on December 12, 1927 in the amount of
40 $5500.00.

5. The deponent further says that Sol Kantor told him over the telephone on December 19, 1927 that his client was ready to close the transaction and that he would have her check at the deponent's office the next day.

6. I never heard from Sol Kantor after this. 10

C. C. HOMMANN.

Sworn to and Subscribed before me this tenth day of February, 1928.

DORIS SCHROEDER,
Notary Public, N. J.

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AFFIDAVIT OF PETER CLAUSEN.

(Filed February 20, 1928.)

State of New Jersey,
County of Middlesex,—ss:

PETER CLAUSEN, of full age, being duly sworn according to law upon his oath deposes and says: 30

1. I am a counselor-at-law of the State of New Jersey and am associated with Charles C. Hommann, the solicitor for the Perth Amboy Savings Institution.

2. I personally made a search of the property of William Stonaker and Gertrude Stonaker, and I was entrusted with the closing of the mortgage loan to William Stonaker and Gertrude 40

Stonaker, his wife, that the Perth Amboy Savings Institution is making, and I completed the search on the Stonaker property on December 12, 1927.

10 3. Sol Kantor, an attorney-at-law, of Perth Amboy, told me that a client of his was placing a second mortgage of $3000.00 on the same property for William Stonaker and on or about December 12, 1927, the said Sol Kantor came into the office of C. C. Hommann and asked me for the search. As a matter of courtesy, I promised him a copy of the abstract as soon as it was written up. Pending the writing up of the abstract, I went over the work sheets with him.
20 He then told me he would grant the money.

4. The said Sol Kantor, on or about December 19, 1927, told me that he would deliver either to me or the Perth Amboy Savings Institution a check for the proceeds of said second mortgage by Wednesday of that week, to wit. December 21, 1927. The money was never turned over to me by Sol Kantor as agreed.

5. The said Sol Kantor did not carry out
30 his agreement to disburse the $3000.00. As a result, the Perth Amboy Savings Institution mortgage has not been placed to this date.

PETER CLAUSEN.

Sworn to and subscribed before me this
15th day of February, 1928.

DORIS SCHROEDER,
Notary Public, N. J.

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AFFIDAVIT OF THOMAS LAYDEN.

(Filed February 20, 1928.)

State of New Jersey,
County of Middlesex,—ss:

THOMAS LAYDEN, being duly sworn according to law upon his oath deposes and says that: 10

1. I live in the City of Perth Amboy, County of Middlesex and State of New Jersey, and am engaged in the business of plumbing supplies.

2. I furnished the plumber materials for William Stonaker and wife on their property at 210 Lewis Street in the said City of Perth Amboy.

3. On or about December 1, 1927, I went to the law offices of Sol Kantor with William Stonaker, to inquire as to when I might expect payment for my work. 20

4. Sol Kantor, told me that a loan of $3000.00 had been approved by him on the property of William Stonaker, and that his client had left with him that sum of money to turn over. He told me that the money then was in his office and the only thing that held the disbursing of it was the fact that he was waiting for the completion of the search by Charles C. Hommann, Solicitor for the Perth Amboy Savings Institution. 30

THOS. LAYDEN.

Sworn to and Subscribed before me this
11th day of February, 1928.

JOHN P. MCGUIRE,
Atty, at Law of N. J. 40

AFFIDAVIT OF ALEX KOZUB.

(Filed February 20, 1928.)

State of New Jersey,
County of Middlesex,—ss:

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ALEX KOZUB, being duly sworn according to law upon his oath deposes and says that:

1. He lives in the City of Perth Amboy, County of Middlesex and the State of New Jersey, and is in the electrical business.

2. He wired the house of William Stonaker and Gertrude Stonaker at 210 Lewis Street in the said City of Perth Amboy, County of Middlesex and State of New Jersey.

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3. There is still coming to him some money for the work done on that house.

4. On December 22, 1927 this deponent says that he went with William Stonaker to the law offices of Sol Kantor to see when the mortgage money would be available and Sol Kantor informed William Stonaker and the deponent that the money would be turned over within twenty-four hours.

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5. This deponent was in the office of Sol Kantor from 7:30 to 8:15 P. M. on that night.

6. Sol Kantor informed Mr. Stonaker in the deponent's presence, not to bring any more contractors to his office, that he did not want to be

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bothered any more and that payment would be made within twenty-four hours.

ALEX KOZUB.

Sworn to and Subscribed
Before me this 11th
day of February, 1928.

JOHN P. MCGUIRE,
Atty. at Law of N. J.

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AFFIDAVIT OF WILLIAM STONAKER.

(Filed February 29, 1928.)

IN CHANCERY OF NEW JERSEY

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WILLIAM STONAKER AND GERTRUDE STONAKER

Complainants,

VS.

ESTHER COHEN AND SOL KANTOR,

Defendants.

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WILLIAM STONAKER being duly sworn according to law upon his oath deposes and says:

1. I have seen the affidavits of Sol Kantor and Esther Cohen and in regard thereto I say:

a. Esther Cohen never offered me Twenty One Hundred ($2100.00) Dollars and Nine hundred ($900.00) Dollars when the house was

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completed. Her proposition was Seventeen Hundred ($1700.00) Dollars payable December 27, and Nine Hundred ($900.00) Dollars payable in the Spring. The balance of the Three Thousand ($3000.00) Dollars, to wit Four Hundred ($400.00) Dollars was the bonus fee.

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b. Kantor never asked me for the interest on the mortgages. When I called for the papers on or about January 6, he told me I could have them if I gave him One Hundred ($100.00) Dollars for his services. This I refused to do as his client had not made the loan.

c. I did not tell Kantor I was getting Three Thousand Dollars elsewhere. I told him as long as his client refused to advance the money I should have my papers back. He further told me that his client advised him all the time that she had the money and he did not know why she was fooling him so long.

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d. When I first applied for mortgage money, on or about September 25, Kantor told me that his client could give me Two Thousand ($2000.-00) Dollars on a second mortgage. The bonus would be Three Hundred ($300.00) Dollars. I told him this was not enough. A few days later Kantor came to my house at 307 Market Street, Perth Amboy, N. J. and he told me that his client had looked the place over and would give me Three Thousand ($3000.00) Dollars. The bonus on that sum would be Four Hundred ($400.00) Dollars.

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e. Kantor, counsel for Esther Cohen, said that the loan was approved October 24, and

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definitely stated it to Layden and Kozub and other mechanical lien claimants.

f. The house was actually finished on or about December 1, 1927. After my tenancy was up at the former residence of mine I moved into the said premises December 15, 1927. The downstairs apartment was accupied by Mr. Henry Gillespie on the same date. 10

g. The house has fourteen rooms and two baths, seven room downstairs and seven upstairs The attic had one room finished off with wainscoat. I never intended finishing off the attic and never told anyone I was going to do it. The cellar had a concrete floor, a small part of which was cinder. All rooms were finished. The back entrance was completed as was also the storm shed attached thereto. It was enclosed like a sunparlor. The back bedroom was finished and was also the inside painting. 20

h. Before I moved in all work was finished and the mechanics bills were in the hands of the solicitor of the Perth Amboy Savings Institution prior to December 12 1927. 30

i. The walks around the house were made of wood—16 feet long 8 inches wide with four abreast. This made a walk of three feet wide. In front of the house there was a solid board walk, from the front portch to the curbing. This walk was sixteen feet wide. As a sewer had softened the ground in front of the house no other type of walk could be placed there. 40

j. On the entire block an eight inch sewer had been laid underneath the sidewalk and the ground had not yet settled and will not settle for some time. There are no sidewalks on this entire block fronting on Lewis Street because of this condition.

k. The mechanic's Lien bills that have been on file prior to December 12, with the Savings Bank are as follows:

Boynton Lumber Co.	$1616.42
Thomas Layden, plumber	1330.00
C. & S. Co.	348.00
Kozub, electrician	154.00
Due on property	3027.00

D. S. BEFORE EXECUTION

j. The Franklin Savings Bank of New York City has approved a loan of $8500 on the same property.

WILLIAM STONAKER.

Sworn to and Subscribed
before me this 29th
day of February, 1928

DORIS SCHROEDER,
Notary Public,
of N. J.

AFFIDAVIT OF ESTHER COHEN.

(Filed April 11, 1928.)

IN CHANCERY OF NEW JERSEY.

Between:

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WILLIAM STONAKER and GERTRUDE STONAKER,
Complainants,

and

ESTHER COHEN and SOL KANTOR,

State of New Jersey,
County of Middleex,—*ss.*:

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Esther Cohen, of full age, being duly sworn on her oath according to law, deposes and says:

1. That sometime in the early part of October, 1927; deponent went to the premises of the complainants and at that time the house was in the process of complete remodling, it being an old house, that was formerly a railroad station: and deponent agreed to grant a loan of $3000.00, to be paid when the house was completed. Complainants were to give deponent a second mortgage upon the above premises and a first mortgage upon two lots in Sayersville, N. J.

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2. Sometime at the end of December, 1927 the complainant, William Stonaker, called at my home; and asked why I did not want to

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give him the money. I informed him that the house was not completed and he admitted this; but said he could not do the work because of the cold weather. He advised me that he had not completed the unfinished work before the
10 cold weather, because he did not have the money, having invested every cent he had. Your deponent then advised the said William Stonaker, that she would advance him $2100.00 and retain $900.00 until the house was finished. Complainant left saying he would let deponent know, but he never did.

3. That deponent at various times called up her Solicitor and inquired why the matter was
20 delayed. That deponent has always had the $3000.00 available, subject to the mortgagors call, and has not used this money for any other purpose. That deponent has been ready at all times to turn over the $3000.00, upon the house being fully completed. That deponent was to receive interest from the date of the loan, October 14, 1927.

4. Deponent was advised that the house was
30 fully completed and thereupon made an inspection of the premises and found the house in an unfinished condition; to wit; the cellar was unpaved, no sidewalks were laid, the rooms were unfinished, the back entrance was not completed, the attic had unfinished rooms, the back bedroom was unfinished and the inside painting was not completed.

5. That after the inspection of the premises as related above, the complainant William
40 Stonaker, called at the premises of deponent

and she then advised him as to the condition of the house, as heretofore related. and that she advised him, that she had always had the $3000.00 available.

ESTHER COHEN.

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Sworn and subscribed
to before me this 23rd,
day of February, 1928.

STANLEY F. KACZMAREK,
M. C. C. of N. J.

AFFIDAVIT OF SOL KANTOR.

(Filed April 11, 1928.)

IN CHANCERY OF NEW JERSEY.

20

Between:

WILLIAM STONAKER and GERTRUDE STONAKER,
Complainants,

and

ESTHER COHEN and SOL KANTOR,
Defendants.

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State of New Jersey,
County of Middlesex,—*ss.*:

SOL KANTOR, of full age, being duly sworn on his oath, deposes and says:

1. On or about October 1, 1927 the Complainants applied at the office of deponent, for

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a second mortgage upon their premises in Perth Amboy, N. J. Accordingly the defendant Esther Cohen viewed the premises of the complainants and granted a loan of $3000.00, upon the two premises as set forth in the mortgage. No mention was made of a bonus, the complainants agreeing to pay deponent $100.00 for his services.

2. That on or about October 4, 1927 complainants left at the office of deponent, a deed to two lots in Sayersville, N. J. and that it was agreed that they would sign the bond and mortgage upon the call of deponent. It was also agreed, that interest was to run from October 4, 1927 and that the mortgagee was to hold the $3000.00 in readyness, subject to the complainants call, which was to be paid to them, upon completion of the house. The bond and mortgage was signed on the twenty-fourth day of October, 1927.

3. Deponent agreed to turn over the $3000.00 less his fee of $100.00, to complainants; as soon as the house was completed and the Savings Bank was ready, so that both transactions could be closed at the same time.

4. On or about December 1, 1927 complainant called at deponent's office and advised him that the house was completed and upon this representation; deponent in complainant's presence called up the mortgagee and advised her that complainant had said that the house was completed. Upon such representation, the mortgagee was ready to turn over the $3000.00.

Affidavit of Sol. Kantor.

5. On or about December 1, 1927 complainant called at the office of deponent, with Thomas Layden; who had furnished materials for these premises and on or about December 22, 1927 complainant called at deponent's office, with Alex Kozub; who had done electrical work upon these premises and upon the representation being made by complainant, that the house was fully completed; deponent advised complainant that he was ready to turn over the money just as soon as arrangments could be made with the Solicitor for the Savings Bank. Complainant was indebted to the said Thomas Layden for materials furnished upon said premises and was indebted to the said Alex Kozub for electrical work done upon said premises.

6. In the meantime ,the mortgagee (the defendant) Esther Cohen, had made an inspection of the premises and found the same in an unfinished condition. Deponent so informed complainant and advised him to see the mortgagee. Complainant returned to deponent's office and stated that he had seen the mortgagee, who had complained that the house was unfinished; but complainant refused to complete the house and demanded the entire $3000.00. He refused to accept the mortgagee's offer of $2100.00 at present and $900.00 when the house was completed; saying that Mr. Deegan could get him a loan for the $3000.00 elsewhere and that he would not have to hold out any sum until the house was completed. Deponent advised complainant that his Client had the $3000.00, but was unwilling to pay the entire amount, as the house was not completed.

Affidavit of Sol. Kantor.

7. The complainants knew the name of the mortgagee, as it was written in the mortgage and deponent so advised them.

8. On or about January 5, 1928 complainant called at deponent's office, alone, and demanded the bond and mortgage and the deed; stating that Mr. Deegan was getting him $3000.00 elsewhere and that he did not want the loan of defendant Esther Cohen. He refused to pay deponent for his services, and he refused to pay any interest, as agreed upon. Complainant left deponent's office, threating to make trouble.

9. Upon the representation that the house was completed, deponent had made arrangments with the Solicitors for the Savings Bank, to close the matter and negotiations ceased, when complainants refused to complete the house, or make any other arrangments.

10. Deponent never told Thomas Layden, that he (deponent) had the $3000.00, but said that the money was ready, upon arrangments being made with the Savings Bank; stating that the mortgagee had the money. All this was said upon the representation, that the house was completed.

11. When complainant called at deponent's office on or about December 22, 1927, deponent advised him that his client had the money, but would not pay all of it as the house was not completed. He informed complainant, that the $2100.00 would about pay all debts; but complainant demanded the full $3000.00.

Decree.

12. Deponent never heard from complainants again, until this suit was instituted.

SOL KANTOR.

Sworn and subscribed
to before me this 23rd
day of February, 1928.

STANLEY F. KACZMAREK,
M. C. C. of N. J.

DECREE.

(Filed April 12, 1928.)

IN CHANCERY OF NEW JERSEY

Between

WILLIAM STONAKER AND GERTRUDE STONAKER,
Complainants,

and

ESTHER COHEN AND SOL KANTOR,
Defendants.

This matter coming on to be heard in the presence of Joseph F. Deegan, solicitor of the complainants and Sol Kantor, solicitor per se and of the defendant, Esther Cohen, and the Court having examined the pleadings and considered the affidavits mentioned therein, and

the Court having heard and considered the arguments of counsel thereon;

And it appearing to the satisfaction of the Court that the defendants, Esther Cohen and Sol Kantor have caused to be recorded in the Clerk's Office of the County of Middlesex a mortgage from William and Gertrude Stonaker to Esther Cohen in Book 551 of Mortgages, page 190;

And it further appearing to the Court that no moneys have been paid to the complainants at the time of the signing of the bond and mortgage or at any other time; and it further appearing to the satisfaction of the court that the defenses as set up by the defendants for so doing are against equity and good conscience and that the complainants are entitled to the relief prayed for by them in the bill of complaint filed herein;

It is on this twelfth day of April, 1928, ORDERED, ADJUDGED AND DEGREED that the said defendants, Esther Cohen and Sol Kantor be and they are hereby commanded forthwith to cancel the mortgage of record now recorded in the Clerk's Office of the County of Middlesex in Book 551 of Mortgages on Page 190;

It is further ORDERED ADJUDGED AND DECREED that the defendant, Esther Cohen pay to the complainants the costs of this suit to be taxed together with a counsel fee of $150.00 which is hereby allowed to said complainants.

Respectfully advised.

E. R. WALKER,
C.

ALONZO CHURCH.

DECREE (Copy served)
ON DEFENDANT-APPELLANT.

IN CHANCERY OF NEW JERSEY

Between 10

WILLIAM STONAKER AND GERTRUDE STONAKER,

Complainants,

and

ESTHER COHEN AND SOL KANTOR,

Defendants. 20

This cause coming to be heard in the presence of Joseph F. Deegan, solicitor of the complainants and Sol Kantor, solicitor per se and of the defendant, Esther Cohen, and the Court having examined the pleadings and considered the affidavits contained therein, and the Court having heard and considered the arguments of counsel thereon; 30

And it appearing to the satisfaction of the court that the defendants, Esther Cohen and Sol Kantor have caused to be recorded in the Clerk's Office of the County of Middlesex a mortgage from William and Gertrude Stonaker to Esther Cohen in Book 551 of Mortgages, Page 190;

And it further appearing to the Court that no moneys have been paid to the compalinants at the time of the signing of the bond and mortgage or at any other time; and it further ap- 40

pearing to the satisfaction of the court that the defenses as set up by the defendants for so doing are against equity and good conscience and that the complainants are entitled to the relief prayed for by them in the bill of complaint filed herein;

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This is the Decree filed in Court.

It is on this twelfth day of April, 1928 ORDERED, ADJUDGED AND DECREED that the said defendants, Esther Cohen ~~and Sol Kantor~~ be and they are hereby enjoined and commanded forthwith to cancel the mortgage of record now recorded in the Clerk's Office of the County of Middlesex in Book 551 of Mortgages and Page 190;

This is not the decree.

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It is further ORDERED, ADJUDGED AND DECREED that the defendant, Esther Cohen, & Sol Kantor pay to the complainants the costs of this suit to be taxed together with a counsel fee of $150.00 which is hereby allowed to said complainants.

E. R. WALKER,
C.

Respectfully advised,
ALONZO CHURCH.

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A true copy
JOSEPH F. DEEGAN.

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NOTICE TO AMEND FINAL DECREE.

(Filed May 8, 1928)

IN CHANCERY OF NEW JERSEY

Between

WILIAM STONAKER AND GERTRUDE STONAKER, 10

Complainants,

And

SOL KANTOR AND ESTHER COHEN,

Defendants.

To the Defendants, Esther Cohen and Sol Kantor: 20

TAKE NOTICE that on Tuesday, the first day of May, 1928, at the hour of 10:00 in the forenoon or as soon thereafter as counsel can be heard, at the Chancery Chambers in the City of Newark, I shall apply to the Chancellor for an order amending the final decree filed in the above entitled cause for the following reasons:

1. Through inadvertence, the name of the defendant, Sol Kantor, was omitted from that part of the order pertaining to the costs and counsel fees. 30

2. There was also omitted, through inadvertence, the statement that the costs were to be paid equally by the defendants.

JOSEPH F. DEEGAN,
Solicitor for Complainant. 40

PETITION TO AMEND DECREE.

IN CHANCERY OF NEW JERSEY

Between

WILIAM STONAKER AND GERTRUDE STONAKER,

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Complainants,

And

SOL KANTER AND ESTHER COHEN,

Defendants.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

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The petition of William Stonaker and Gertrude Stonaker of the City of Perth Amboy, County of Middlesex and State of New Jersey, respectfully shows that:

1. The petitioners are the complainants in th bill of complaint herein, which was filed to compel the cancellation of a certain mortgage given by them to the defendant, Esther Cohen.

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2. Such proceedings were had in this cause that a final decree was made on April 12, 1928 directing the defendants, Esther Cohen and Sol Kantor, to cancel the mortgage of record and that Esther Cohen pay to the complainants the costs of the suit to be taxed together with a counsel fee, but through inadvertence, the name of the defendant, Sol Kantor, was omitted from that part of the order concerning the payment of costs and counsel fees, and

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there was also omitted a statement that the costs were to be paid equally.

Petitioners therefore pray that that part of the decree may be amended so as to conform with the directions of the Court.

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JOSEPH F. DEEGAN,
Solicitor of Petitioners.

State of New Jersey,
County of Middlesex.—*ss.;*

WILLIAM STONAKER, being duly sworn according to law upon his oath deposes and says:

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That he is one of the petitioners in the above-entitled cause, and that the matters and things therein contained are true to the best of his knowledge and beilef.

WILLIAM STONAKER.

Sworn to and Subscribed Before me this
day of May 1928.

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JOHN P. McGUIRE

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ORDER AMENDING DECREE.

(Filed May 8, 1928)

IN CHANCERY OF NEW JERSEY

Between

---

10 WILLIAM STONAKER and GERTRUDE STONAKER,
Complainants,

and

ESTHER COHEN and SOL KANTOR
Defendants.

A petition having been filed herein by the
20 complainants, William Stonaker and Gertrude Stonaker, whereby it appears that the bill of complaint herein was filed to compel the cancellation of a certain mortgage given by the complainants to the defendant, Esther Cohen; that on the twelfth day of April, 1928 a decree was made directing the defendants, Esther Cohen and Sol Kantor, to cancel the mortgage of record; and that Esther Cohen pay to the complainants the costs of the suit to be taxed to-
30 gether with the counsel fee;

And that through inadvertence the name of the defendant. Sol Kantor, was omitted from that part of the order containing the matter of the payment of costs and counsel fees; and that there was omitted through inadvertence the statement that the costs were to be paid equally;

And it appearing that due notice of this application has been given to all parties in in-
40 terest;

Order Amending Decree.

It is on this 8th day of May, 1928 on motion of Joseph F. Deegan, solicitor of the complainants;

ORDERED, that the aforesaid decree be and it is hereby amended by the insertion of the name of the defendant, Sol. Kantor, in that part of the order pertaining to the costs and counsel fees, and by an insertion in the same paragraph of a statement to the effect that the costs are to be paid equally by the defendants.

Respectfully advised,

E. P. WALLAN.

ALONZO CHURCH,
V. C.

A true Copy,
JOSEPH DEEGAN.

FINAL DECREE AMENDED.

(Filed May 8, 1928)

IN CHANCERY OF NEW JERSEY

Between

10 WILLIAM STONAKER and GERTRUDE STONAKER,

Complainants,

and

ESTHER COHEN and SOL KANTOR,

Defendants.

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20 This cause coming on to be heard in the presence of Joseph F. Deegan, solicitor of the complainants and Sol Kantor, solicitor per se and of the defendant, Esther Cohn, and the Court having examine the pleadings and considered the affidavits contained therein, and the Court having heard and considered the arguments of counsel thereon;

And it appearing to the satisfaction of the 30 court that the defendants, Esther Cohen and Sol Kantor have caused to be recorded in the Clerk's Office of the County of Middlesex a mortgage from William and Gertrude Stonaker to Esther Cohen in Book 551 of Mortgages, Page 190;

And it further appearing to the Court that no moneys have been paid to the complainants at the time of the signing of the bond and mortgage or at any other time; and it further appear-

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ing to the satisfaction of the court that the defenses as set up by the defendants for so doing are against equity and good conscience and that the complainants are entitled to the relief prayed for by them in the bill of complaint filed herein;

And it further appearing that the final decree dated April 12, 1928 as drawn, contained orders contrary to the directions of the Court;

It is on this 8th day of May, 1928 ORDERED,

ADJUDGED AND DECREED that the said defendants, Esther Cohen and Sol Kantor, be and they are hereby commanded forthwith to cancel the mortgage of record now recorded in the Clerk's Office of the County of Middlesex in Book 551 of Mortgages in Page 190;

It is further ORDERED, ADJUDGED AND DECREED that the defendants, Esther Cohen and Sol Kantor, each pay to the complainants his and her pro rata share (one half) of the costs of this suit to be taxed which costs include a counsel fee of One Hundred and Fifty ($150.00) Dollars which is hereby allowed the said complainants.

Respectfully advised,

ALONZO CHURCH,
V. C.

A true Copy,
JOSEPH DEEGAN.

NOTICE OF APPEAL.

(Filed May 14, 1928)

IN CHANCERY OF NEW JERSEY

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10 *Between*

WILLIAM STONAKER AND GERTRUDE STONAKER,

Complainants.

and

ESTHER COHEN AND SOL KANTOR,

Defendants.

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To: William Stonaker and Gertrude Stonaker, the above named Complainants; or Joseph F. Deegan, Esq. their Solicitor and Counsel:

SIR:

TAKE NOTICE that the defendant Sol Kantor hereby appeals to the Court of Errors and Ap-
30 peals of the State of New Jersey, from the amended order and final decree made by the Chancellor of the State of New Jersey (advised by Vice Chancellor Church) on the eight day of May, 1928, in the above entitled matter. and from the whole and every part thereof; particularly that part striking out the answer

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of this defendant and that part ordering this defendant to cancel said mortgage of record and that part taxing costs and counsel fees.

Dated, May 10, 1928.

SOL KANTOR, 10
Solicitor and of Counsel Per Se.

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

SOL KANTOR,
Solicitor and of Counsel Per Se.

PETITION OF APPEAL. 20

(Filed June 1, 1928)

NEW JERSEY COURT OF ERRORS
AND APPEALS

Between

WILLIAM STONAKER AND GERTRUDE STONAKER,
Complainants. 30

and

ESTHER COHEN AND SOL KANTOR,
Defendants.

To the Honorable the Court of Errors and Appeals in the last resort in all causes: 40

Petition of Appeal.

The petition of Sol Kantor, the appellant in the above entitled cause, respectfully shows that:

1. Petitioner finds himself aggrieved by an amended final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey (advised by Vice Chancellor Church) bearing date the eighth day of May. 1928, in a certain cause in said Court of Chancery wherein the said William Stonaker and Gertrude Stonaker were complainants and the said Sol Kantor and Esther Cohen (she not appealing) were defendants. in this respect, to wit: that the said amended final decree adjudges that the answer of this defendant (Sol Kantor) shall be striken out, that this defendant is decreed and ordered to cancel the mortgage of record and that this defendant is decreed and ordered to pay costs and counsel fees.

2. And Petitioner appeals from the said amended final decree of the Chancellor which decree as aforsaid, upon the ground that that the same is eroneous in that:

(a) Defendant was not given due notice of the motion to amend said decree.

(b) Defendant was denied the right to be heard in open court, as to whether or not he had any objections to the amending of said decree.

(c) That said final decree was amended as against this defendant, without due

process of law and in violation of the fourteenth amendment to the Constitution of the United States.

(d) That this defendant was never served with any order striking out the answer.

(e) That there is no statute or rule of the Court of Chancery, allowing the taxing of costs or counsel fees against the unsuccessfull party; in cases like this, where there has not been a final hearing.

(f) That the mortgage had been cancelled of record before the application, granting and enrolling of the amended final decree.

(g) That the amended final decree orders the cancellation of the mortgage, which had already been done and in that respect the amended final decree is a nulity.

(h) That as the amended final decree could no longer grant any relief, it could not tax costs and counsel fees.

(i) That the Chancellor erred in striking out the answer of this defendant, as the said answer set up just, equitable, and meritoreous defenses.

(j) That the Chancellor erred in granting relief against this defendant, as there was no relief that the complainants could have as against this defendant, for the reason that he was not the mortgagee.

(k) That the Chancellor erred in allowing costs and counsel fees.

(l) That the Chancellor erred in granting a mandatory injunction as against this defendant, without a final hearing, where there was a disputed question of fact and a disputed question of law.

(m) That the complainants served upon this defendant an untrue copy of the first final decree; although the copy was certified by them as a true copy; in the following respects: *First* the decree on file with the Clerk orders both defendants to cancel the mortgage of record, while the copy only orders the other defendant (Esther Cohen) to cancel said mortgage, *Second* the decree on file with the Clerk only orders the other defendant to pay costs and counsel fees, while the copy orders both defendant to pay, the name of this defendant being written in ink.

3. Petitioner therefore prays that the said amended final decree of the Chancllor may be, in the particulars aforesaid reversed, set aside and for nothin holden and that petitioner may have such other relief in the premises as in this Court may seem proper.

SOL KANTOR,
Solicitor and of Counsel Per Se.

NOTICE OF ARGUMENT.

NEW JERSEY COURT,
OF ERRORS AND APPEALS.

WILLIAM STONAKER AND GERTRUDE STONAKER,
Complainants-Respondents, 10

vs.

ESTHER COHEN AND SOL KANTOR,
Defendant-Appellant.

To: William Stonaker and Gertrude Stonaker, the above named Complainant-Respondents; or Joseph F. Deegan, Esq., their Solicitor and Counsel: 20

SIR:

Take notice of the argument of the issue joined in the above cause, before the New Jersey Court of Errors and Appeals, at the State House, in the City of Trenton, in the County of Mercer and State of New Jersey; on the third Tusday of October, next, at the hour of eleven o'clock in the forenoon, or as soon thereafter as the Court can attend to the same. 30

Dated, August 24, 1928.

Yours respectfully,

SOL KANTOR.
Defendant-Appellant Per Se. 40

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New Jersey Court of Errors and Appeals

Between:

WILLIAM STONAKER and GERTRUDE STONAKER
Complainants-Appellants

and

ESTHER COHEN and SOL KANTOR,
Defendant-Appellant.

ON APPEAL FROM CHANCERY.

BRIEF OF DEFENDANT APPELLANT.

JOSEPH F. DEEGAN,
Solicitor for and of Counsel with
Complainants.

SOL KANTOR,
Defendant-Appellant, Per Se.

New Jersey Court of Errors and Appeals

Between:

WILLIAM STONAKER and GERTRUDE STONAKER,
Complaint-Respondents,

and

ESTHER COHEN and SOL KANTOR
Defendant-Appellant.

On Appeal from Chancery

BRIEF OF DEFENDANT-APPELLANT.

This is an appeal by the defendant Sol Kantor, alone, from an amended final decree of the Chancellor.

STATEMENT OF FACTS.

1. Complainants filed a bill, praying that a mandatory injunction may issue compelling both of the defendants to cancel of record a certain mortgage made by the complainants to the defendant Esther Cohen. (Appellant not being a party to the mortgage.)

2. The bill alleges that complainants went to the office of defendant and made application for

a loan upon their premises, and that a client of defendant granted such a loan, upon the consideration that a bonas should be paid, which arrangment complainants state was satisfactory to them. A bond and mortgage was then signed. They allege that subsequently defendant advised them that the money was ready, but stated that his client did not have all of it and that the client so advised complainants, but was willing to give the greater part of it. Complainants further state, that they called at the office of defendant for their papers and that they were indebted to defendant for services rendered. The mortgage was placed on record.

3. An answer was then filed in which defendant admitted the loan and execution of the mortgage, but denied an agreement about a bonas, and denied that the client did not have all of the money. Defendant set up the defense that he was not a proper party defendant and that not being the mortgage he had no power to cancel the mortgage of record. The answer also set up the defense that the bill alleged two distinct causes of actions and that it failed to set forth an equitable cause of action. Defendant as further defenses set forth, that the bill failed to allege a demand or the cancellation before the institution of the suit, that interest was to run from the date of the loan, that the money was to be paid when the house was completed and that the house was not completed as represented; that the mortgage was ready to turn over the money upon the completion of the house and offered to give 2/3 and the balance when the house was completed; that the mortgage has made no profit upon the money and that complainants have refused to pay any interest agreed upon.

4. A motion was then made to strike out the answer and affidavits were filed by the respective parties. The answer was striken out and a decree was made ordering both defendants to cancel said mortgage of record and only ordering the defendant Esther Cohen and not this defendant, to pay costs and counsel fees. Without the knowledge of defendant, complaint's Solicitor went to the defendant Esther Cohen and secured her cancellation of the mortgage and payment of half costs and counsel fees. Defendant was then served with a proported true copy of the degree, in which his names was crossed out in ink in that part ordering cancellation of the mortgage and his name inserted in ink in that part taxing costs and counsel fees. Subsequently thereto, this defendant was served with a notice on the first day of May, 1928 to appear on that day before the Chancellor for the purpose of amending the decree so as to include his name in that part taxing costs and counsel fees and that the same be paid equally, then admitting that this clause was left out through inadvertance on their part. In the absence of defendant, an amended decree was so advised on the eight of May, 1928. This appeal is from that amended decree.

LAW

I. THAT THE CHANCELLOR ERRED IN STRIKING OUT THE ANSWER OF THIS DEFENDANT, AS THE SAME SET UP JUST, EQUITABLE AND MERITORIOUS DEFENSES.

2. THAT THE CHANCELLOR ERRED IN GRANTING RELIEF AGAINST THE DEFENDANT SOL KANTOR, AS THERE WAS NO RELIEF THAT THE COMPLAINANTS COULD HAVE AGAINST THIS DEFENDANT.

As the above two points involve the same authorities they will be argued together.

Appellant contends that he is not a proper party defendant, as he is not the mortgage he cannot cancel the mortgage. There is no allegation of facts showing what relief complainant could have against this defendant, nor is there any positive allegation showing in whose possession the papers were. Six weeks elapsed from the time complainants say they called upon defendant and the filing of the bill and there is no allegation stating who had the papers during that time, or at the time the bill was filed. As set forth in the case of Pattison vs. Skillman 43 N. J. E. at page 395,

> "from the testimony I infer, but cannot so adjudge, that they are in the attorney's safe..... and without proof to satisfy me that the defendant has it in his power to produce the papers, or that he has willfully put them away to obstruct justice, I certainly ought not to advise a decree which would prove wholly ineffectual to the compalinant, however much the court might punish the defendant for disobeance."

Even under a prayer for general relief, the court cannot infer any facts, the complainants must clearly and positively make out their case. And in the case at bar, there is absolutely no positive and clear allegation as to what relief they could have of this defendant. Walker

Hill's 21 N. J. E. 191, lays down the doctrine "that under a prayer for general relief, only such relief can be given as is warranted by facts positively and clearly set forth in the bill."

Complainants allege a mortgage to the co-defendant and pray its cancellation and defendant not being a part to the instrument, it is not within his power to cancel it, nor is there any allegation or proof that he has such authority. There is no fraud alleged on the part of appellant.

The defendant further sets up the defense that the bill fails to allege an equitable cause of action; and the same reasons just argued can be applied to this point. In addition to that we have the admittance on the part of the complainant, that the transaction was usureous and that this arrangment of a bonas was satisfactory to them. The maxium, "that he who comes into equity must do so with clean hands", applies to the case at bar. Here are complainants who admit that they were a party to the usureous transaction, asking for equitable relief. Equity will not grant relief to either part to a usureous transaction, it leaves them where it finds them. Brindely v. Lawton 53 N. J. E. at page 261 (third paragraph) "the law will not assist either part to an illegal contract, and the parties being in pari delicto, it will leave them where it finds them. If the contract is still executory it will not enforce it, and if already executed it will not restore the price paid or the property delivered." So in this case, the complainant was not entitled to ask for equitable relief, he was not entitled to be restored to his former position.

The answer sets up the defense and the affidavits supporting it, show that there was an

agreement to pay interest from the date of the loan, and that the mortgage was to hold the money subject to the complainants call, which was to be paid over when the house was completed. The complainants affidavit do not deny such an agreement about interest. That the mortgage had the money ready and had not made any other profit upon it, that the house was not completed as represented and that complainants refused to pay any interest as agreed upon. The authorities are in uniformity and our own state as well, that where there is an agreement as to the date from which interest is to run, that agreement is controlling *Muir* v. *Newark Savings* 16 N. J. E. at page 540, "no case has been produced, which has held it to be illegal to reserve or take interest for money on hand and subject to the call of the borrower." Also the case of *Holt* v. *Creamer* 34 N. J. E. 181.

Any consideration is sufficient to support a mortgage, for after all a mortgage is merely a contract between the parties. A consideration may be a benefit to one party and a determent to another. The consideration for this loan was, the granting of the loan to complainants upon the condition that the mortgagee would hold the money subject to their call. In other words, the mortgagee was deprived of the use of the money while she was holding it for the mortgagor. see 41 C. J. page 385 section 199 and on page 472 section 378, which last section cites the case of *Kurezi* v. *Scott* 74 N. J. E. 218 and the case of *Bangs* v. *Fallon* 179 Mass. 77. It will therefore be seen, that any consideration

is sufficient to support a mortgage and that an agreement that interest shall run from the date of the mortgage is controlling.

There is no allegation in the bill that a demand was ever made for a cancellation of the mortgage and a refusal with out just cause. The complainants must allege facts showing that they were entitled to the cancellation, a demand and a refusal. They apparantly knew they were not entitled to it, unless they paid the interest as agreed upon and so filed their bill, without first making such demand, taking their chance as to success.

3. That the Chancellor erred in granting a Mandatory Injunction against this Defendant, before final hearing.

In the case at bar the complainants ask for the doing of a positive act, namely the cancelling of a mortgage. The answering affidavits explicitly deny the affirmative allegation of complainants and leaves the case in such doubt as to make it compulsary upon the court to set the controversary down for hearing upon bill and answer. These disputed facts cannot be decided on a preliminary moion, they must be decided upon only at a final hearing.

> *Delaware, Lackawanna R. R.* v. *Central Stockyards* 43 N. J. E. 71 "no rule of equity is better settled than the doctrine, that a complainant is not in a position to ask for an injunction, where the right on which he founds his claim is, is as a matter of law unsettled, or where the facts are in dispute. Injunctions of this kind will not be granted until final hearing."

Bailey v. *Schnitzius* 45 N. J. E. 178 "that as this form of injunction to accomplish it's purpose, must command the defendant or coerce him to do certain affirmative acts, not merely to remain inactive or refraim, it is not granted before final hearing, until the parties have had a full opportunity to present all the facts to the court, as will enable the court to see and judge what the truth may be.

Allman v. *Union Brotherhood* 79 N. J. E. 150 "It is perfectly well settled that where complaint's case is doubtful, on the law or on the facts, injunction will not issue, to doubt is to deny. As to this the denials of the defendant under oath, are as explicit as the sworn statements of the complainant, and put the facts relied upon for the injunction in such a state of doubt, as under the well known rule, to forbid of the issue of an injunction.

22 Cyc. 954 (11) Difficult or doubtful questions of law or of fact, will generally not be determined upon preliminary hearings.

It will ,therefore, be seen, that there is a doubtful question of law or a disputed question of fact, the matter must go to final hearing, in order that the Court may more fully inquire into the matter.

4. THAT THE CHANCELLOR ERRED IN AMENDING THE FINAL DECREE, AS THE SAID AMENDMENT DID NOT AID THE RELIEF ALLOWED COMPLAINANTS, AS THE COMPLAINANTS SECURED THE CANCELLATION OF THE MORTGAGE BEFORE THE NOTICE TO AMEND.

The original final decree orders both defendants to cancel the mortgage of record and only orders the co-defendant, Esther Cohen, to pay costs and counsel fees. The mortgage was cancelled before the application to amend the decree, so when the decree was amended, it in no way aided the complainants in their relief, as they had already secured that relief. The cases are uniform that a decree can only be amended when it is necessary to effect the relief afforded complainant. *Dorsheimer* v. *Robrack* 24 N. J. E. 33,

5. That as the amended final decree could no longer grant relief to Complainants, it could not tax costs and Counsel fees.

The amended final decree, orders the cancellation of the mortgage, when that had already been done and so in that respect the amended decree is a nulity and useless, and as it could afford no further relief to complainant, it could not tax this defendant with costs and counsel fees. Furthermore the inadvertance was of their own negligence.

6. That this Defendant was taxed costs and Counsel fees contrary to Rule 139 of the Court of Chancery as Complainants admit their own negligence.

Rule 139 of the Court of Chancery expressly provides "a party shall not be allowed costs against his adversary for any amendment or for any motion occassioned by his own fault, mistake or laches * * *" The complainants admit that the inadvertance was his own fault,

he cannot now turn around and have costs and counsel fees, because of his own mistake.

7. THAT THE STATURE DOES NOT PERMIT THE TAXING OF COSTS AND COUNSEL FEES AGAINST AN UNSUCCESSFUL PARTY.

Chapter 116 P. L. 1915 section 6, provides that the *successful* party may be taxed, not the unsuccessful party. This is the statue under which the taxation was made in this case and the statue gives no authority to tax an unsuccessful party. If there is an error, it is for the legislature and not for the Court to correct it.

8. That this defendant was never served with an order striking out the answer.

Complainants never served this defendant with an order striking out the answer and so far as this defendant knows, a decree was advised without the answer ever being striken out by a formal order in writting.

9. AS THE ORIGINAL FINAL DECREE DID NOT TAX THIS DEFENDANT WITH COSTS OR COUNSEL FEES, THE COMPLAINANTS BY TAKING FROM THE CO-DEFENDANT, ESTHER COHEN, A CANCELLATION OF THE MORTGAGE AND HALF COSTS AND COUNSEL FEES, BEFORE THE APPLICATION TO AMEND SAID DECREE: THEREBY RELEASED THIS DEFENDANT FROM THE PAYMENT OF ANY COSTS OR COUNSEL FEES FOR WHICH HE MAY HAVE BEEN LIABLE FOR, IF AT ALL.

After the original final decree was made, the complainants without the knowledge of this defendant secured the cancellation of the mortgage and half costs and counsel fees; from the

Defendant Esther Cohen when the decree only ordered the co-defendant Esther Cohen to pay the same and not this defendant. Therefore, by taking a cancellation of the mortgage and half of the counsel fees, they waived any rights they might have had against this defendant, because they thereby secured the relief they wanted and accepted from the co-defendant a less sum than what she was ordered to pay. In other words there had been an accord and satisfaction. They were entitled to the full amount from the other defendant and by taking half they released her of further payment and a release to her works a release against this defendant.

10. That Defendant was not given due and proper notice of the motion to amend the decree.

The notice to amend the decree was served on the first day of May, 1928 and orders the defendant to appear on that day. On the eight of that month, in the absence of defendant the decree was amended. It has been the settled practice in this state, that a decree can only be amended upon due and proper notice; especially where the rights of the party noticed, are to be effected thereby, as it is a dictum of natural justice that a man shall not be condemned without a hearing.

11. That Complainants served upon this Defendant an untrue copy of the original final decree.

The original decree on file with the clerk has the name of both defendants in that part ordering the cancellation of the mortgage and only the name of the defendant, Esther Cohen,

in that part ordering the payment of costs and counsel fees. In the copy served upon this defendant, his name is crossed out in ink in that part ordering the cancellation of the mortgage and in that part ordering the payments of costs his name is written in ink. It will, therefore, be seen that the complainants admit themselves that they have no case against this defendant, for they scratched out his name in that part ordering cancellation and if they have no relief against this defendant, they cannot have costs and counsel fees.

ARGUMENT.

What the purpose was of making this appellant a party to the bill, complainants fail to show by their pleadings. They ask for a cancellation of the mortgage, something that this defendant cannot do, nor has any authority to do. There is even no allegation as to who has the papers and after all the title to the papers are in the mortgagee, the co-defendant. Nor do the complainants allege any facts showing fraud on the part of this defendant; a defendant cannot be taxed costs if he makes a mistake—2 C. J. page 902 (last sentence) "The fraud must be such as is ~~congniable~~ COGNIZABLE in a court of equity, as the rule does not apply where the agent merely acts erroneously." It must be born in mind that six weeks elapsed from the time complainant says he called at defendant's office for his papers and the date of the filing of the bill and no facts are alleged, positively and clearly showing who had the papers. Facts cannot be infered, they must be alleged.

2. The complainants admit by their own allegations that they were a party to an illegal contract, (assuming that there was an agreement to pay a bonas) then how can it be said that they come into equity with clean hands, as they are bound by their own statements? And certainly a complainant does not set forth an equitable cause of action, where he himself admits that he has been a party to an illegal transaction. *Wooden* v. *Shotwell* 24 N. J. L. 791 (first paragraph) "the principal is correct, that a court of equity will not assist a suitor in obtaining posession of property, where his right thereto grows directly out of an immoral or illegal transaction. A party should come into court with clean hands to invoke its aid. The maxiums, *In Pari Delicto Melior Est Conditio Possidentis* and *In Pari Delicto Potior Est Conditio Defendentis* (Et Possidentis) apply to the case at bar.

3. The answer and the affidavits supporting it, show that there was an agreement to pay interest from the date of the loan, that the mortgagee was to hold the money subject to the mortgagors call and that she (mortgagee) has made no other profit upon it. Such an agreement is valid and enforcable, and so held by the authorities heretofore cited. This must be so, as the complainants themselves admit the execution of a bond and mortgage on October 20, 1927 and that the said bond and mortgage bore date as of the 14th. If there was no agreement to pay interest from the date of the loan, then what would be the purpose of signing a bond and mortgage on the 20th and having it dated the 14th? And the mortgage being signed, it meant that the mortgagee held the money as mere custodian for the mortgagor, it was his

money subject to be paid to him at his call, when the house was completed. The complainants make the allegation that they did not know the name of the mortgagee and that defendant refused to reveal who his client was. How can such an allegation be accepted, when they admit the signing of the mortgage and there was the name of the mortgagee right before their very eyes?

4. Here were answering affidavits filed, contradicting every affirmative allegation of the complainants that raised a disputed question of fact and that could only be finally disposed of upon final hearing, after both parties have had an opportunity to fully present their case. And yet a mandatory injunction was issued upon a preliminary motion. How could the court, upon a motion to strike out an answer, say who was telling the truth? That could only be determined upon a final hearing after all the testimony was in.

5. The complainants, without the knowledge of this appellant, secured the relief allowed them in the original decree and then applied to have the decree amended. How could the amended decree, aid them in the relief they sought, when they already had that relief? Then if they could no longer have any relief, how could they tax this defendant with costs and counsel fees. And they admit it was their own fault, then how could this defendant be taxed in view of rule 139 of the Court of Chancery? And it must be born in mind, that the complainants themselves knew that they could have no relief against this appellant, for in the copy served upon defendant, they crossed his name

out in that part ordering the cancellation of the mortgage. And if they could have no relief against him, they cannot tax him with costs and counsel fees. In addition to that, the legislature has apparantly made a mistake, for they enact that the successfull (not the unsuccessful) party shall be taxed. Such an error can only be corrected by the legislature, not by the Courts (P. L. 1915 Chapter 116. The original final decree on file with the clerk, only orders the other defendant to pay costs and counsel fees and the complainants, without the knowledge of this appellant, went to the mortgagee, had her execute a cancellation and got her to pay half costs and counsel fees, when the decree ordered her to pay all of it. In other words, they released her from further payment and a release to her, works a release to this defendant. (this cancellation and payment was made before the notice to amend the decree)

6. Complainants failed to serve this defendant with any order, showing that the answer was striken out. It is the settled practice that a defendant shall be served with true copies of all orders affecting his status in the case.

7. The notice that the appellant received, was returnable on the same day it was served and the decree was amended a week lated, in his absence. Such a notice is ineffectual and a decree founded upon such a notice is a nulity. According to the cases heretofore cited, it is the practice, that a decree can only be amended upon petition and proper notice to the party to be affected thereby and only after he has had a

full opportunity to be heard. This was not done in the case at bar, for the notice was not proper and the decree was amended in appellant's absence.

8. The complainants case, so far as this appellant is concerned, has no foundation in law or in fact. There is no allegation of fraud, nor proof of it, nor are their any facts alleged showing in what way complainants have an equitable case against this defendant. This defendant was merely an agent acting for a client And to hold that an attorney can be made a party to a suit, in which his client is involved, merely because he is an agent, without proof that he is involved in any fraud; would be to say that an attorney is liable for the obligations of his client. Fraud; that is the test for liability.

It is respectfully urged, that the amended decree of the Chancellor may be reversed, or that the Court may grant such other relief as may be just and equitable.

Respectfully submitted,

SOL KANTOR,
Defendant Per Se.

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Record Publishing Company, Law Printers, Perth Amboy, N. J.

New Jersey Court of Errors and Appeals.

Between:

WILLIAM STONAKER and
GERTRUDE STONAKER
Complainant-Respondents,

and

ESTHER COHEN and SOL KANTOR,
Defendant-Appellant.

ON APPEAL FROM CHANCERY.

AUGMENTED STATE OF CASE

JOSEPH F. DEEGAN,
Solicitor for and of Counsel with
Complainants,

SOL KANTOR,
Defendant-Appellant, Per Se.

INDEX

ORDER TO SHOW CAUSE

(Filed Feb. 20, 1928)

IN THE CHANCERY OF NEW JERSEY

Between:

10

WILLIAM STONAKER and
GERTRUDE STONAKER

Complainants,

and

ESTHER COHEN and SOL KANTOR,

Defendants.

20

This matter being opened to the Court by Joseph F. Deegan, solicitor of the complainants, and the Court having read the Bill of Complaint in the above-entitled cause and the affidavits thereto annexed:

It is on this 20th day of February 1928, ORDERED that the defendants, Sol Kantor and Esther Cohen, show cause before the Chancellor at the Chancery Chambers in the City of Newark, on Tuesday the 28th day of February, 1928 at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, why the said defendants, Sol Kantor and Esther Cohen, should not be compelled to cancel of record the mortgage of William Stonaker and Gertrude Stonaker, now recorded in the Clerk's Office of the County of Middlesex in Book 551 of Mortgages Pages 190 etc.

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It is further ORDERED that true but uncertified copies of the said Bill of complaint and the

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affidavits thereto attached, and this order, be served on the said defendants within two days from the date hereof.

Respectfully advised,

E. R. WALKER
C.

ALONZO CHURCH
V. C.

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ORDER

(Filed Feb. 29, 1928)

IN THE CHANCERY OF NEW JERSEY

Between:

10

WILLIAM STONAKER and
GERTRUDE STONAKER
Complainants,

vs.

ESTHER COHEN and SOL KANTOR,
Defendants.

20

This matter being presented to the Court by Joseph F. Deegan, solicitor for and of counsel with complainants, in the presence of Sol. Kantor, representing himself and Esther Cohen, and the Court having duly considered the affidavits and the answering affidavits of the contending parties, and the arguments of counsel,

It is hereby ORDERED that Sol Kantor and Esther Cohen turn over to William Stonaker and Gertrude Stonaker the Agreement for the sale of their property on Lewis Street, Perth Amboy, N. J. and their deed of two lots in the Borough of Sayreville and all other papers left by them at the office of Sol Kantor. It is so ordered on this 29th day of February, 1928.

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Respectfully advised,

E. R. WALKER
C.

ALONZO CHURCH
V. C.

40

ORDER

(Filed March 30, 1928)

IN THE CHANCERY OF NEW JERSEY

Between:

10 GERTRUDE STONAKER and
WILLIAM STONAKER
Complainants,

and

ESTHER COHEN and SOL KANTOR,
Defendants.

20 This matter being opened to the Court by Joseph F. Deegan, solicitor of the complainants in the presence of Sol Kantor, solicitor for himself and for the defendant, Esther Cohen; and the Court having considered the bill of Complaint and the affidavits filed herein and the answering affidavits on the part of the said defendants, and having heard and considered the arguments of the counsel and being satisfied that the complainants are entitled to an order restraining the said defendants, Sol Kantor and Esther Cohen,
30 and their agents and servants from transferring, assigning or otherwise negotiating the mortgage of the complainants, now recorded in the Clerk's Office of the County of Middlesex in Book 551 of Mortgages Page 190;

And it appearing that the order to show cause made in this matter on the 20th day of March, 1928 has been duly served in the manner therein the manner therein directed;

It is on this 30th day of March, 1928 ORDER-
40 ED that the said defendants, Sol Kantor and Esther Cohen and their servants and agents be

and they are each and everyone of them hereby enjoined and commanded to desist and refrain from transferring, assigning or otherwise negotiating the mortgage of William Stonaker and Gertrude Stonaker now recorded in the Clerk's Office of the County of Middlesex in Book 551 of Mortgages Page 190, until the further order of this Court.

Respectfully advised, 10

E. R. WALKER
C.

ALONZO CHURCH
V. C.

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ORDER DISMISSING ANSWER

(Filed April 11, 1928)

IN THE CHANCERY OF NEW JERSEY

10 Between:

WILLIAM STONAKER and
GERTRUDE STONAKER

Complainants,

and

SOL KANTOR and ESTHER COHEN

Defendants.

20

This matter coming on to be heard in the presence of Joseph F. Deegan, solicitor of the complainants, William Stonaker and Gertrude Stonaker, and of Sol Kantor, solicitor per se and the defendant Esther Cohen, and the Court having heard the arguments of the said solicitors and being of the opinion that the answer filed herein discloses no equitable defense;

30 And it appearing that due notice of the said complainants' motion to dismiss the said answer for the cause aforesaid has been given to the defendants;

It is thereupon on this 11th day of April, 1928 ORDERED, ADJUDGED AND DECREED that the said answer filed by the defendants be and the same is hereby dismissed with costs. A counsel fee of $150.00 shall be taxed as part of the costs as against both defendants.

40 And it is further ORDERED, ADJUDGED AND DECREED that the defendant, Esther Cohen,

cancel the mortgage of the complainants of record, which mortgage is duly recorded in the Clerk's Office of the County of Middlesex in Book 551 of Mortgages Page 190.

Respectfully advised,

E. R. WALKER
C.

ALONZO CHURCH
V. C.

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Record Publishing Company, Law Printers, Perth Amboy, N. J.

New Jersey Court of Errors and Appeals.

Between:

WILLIAM STONAKER and
GERTRUDE STONAKER
Complainant-Respondents,

and

ESTHER COHEN and SOL KANTOR,
Defendant-Appellant.

ON APPEAL FROM CHANCERY.

BRIEF OF COMPLAINANTS-RESPONDENTS.

JOSEPH F. DEEGAN,
Solicitor for and of Counsel with
Complainants,

SOL KANTOR,
Defendant-Appellant, Per Se.

New Jersey Court of Errors and Appeals.

Between:

10

WILLIAM STONAKER and
GERTRUDE STONAKER

Complainants-Respondents,

and

ESTHER COHEN and SOL KANTOR,

Defendant-Appellant.

20

On Appeal from Chancery

BRIEF OF COMPLAINANT-RESPONDENT.

STATEMENT OF FACTS

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Complainants filed a bill praying that a mandatory injunction may issue compelling both of the defendants to cancel of record a certain mortgage made by the defendant, Esther Cohen and also praying for general relief. Defendant Kantor was not a party to the mortgage but the bond and mortgage were in his possession and he refused to turn them over to the complainants after a demand for them was made, claiming a lien thereon for services rendered.

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The bill alleges that the complainants went to

the office of the defendant Kantor, in answer to an advertisement reading as follows: "First and second mortgages—local and suburban. Kantor, 217 Smith Street, telephone 2709," and made application for a loan upon their premises, and that the client of the defendant granted such a loan upon the consideration that a bonus should be paid which consideration complainants stated
10 was satisfactory to them. Bond and mortgage was signed, bearing date October 20, 1927 with interest from October 14, 1927. The money was to be paid over to the complainants when the search by the Perth Amboy Saving Institution was completed and were ready to disburse to the complainants the money on the first mortgage loan applied for previously. On December 12, 1927 the Perth Amboy Saving Institution completed its search and was ready to disburse to the complainants the money on the first mortgage loan.
20 On December 10, 1927 the defendant Kantor was notified of this by the attorney for the Perth Amboy Saving Institution and he promised to give a check over for the amount of the second mortgage loan to the attorney of the Perth Amboy Saving Institution so that both the disbursements could be made by the attorney for the first mortgagee. On December 19, 1927 Kantor was told to bring over the money to the attorney for the mortgagee and Kantor said he would have
30 a check over the next day. The check was not delivered as agreed and delay after delay followed. The Perth Amboy Saving Institution did not disburse the $5,000.00 first mortgage loan as that sum was not sufficient to pay off the mechanics liens, balance due on contract for the sale of the property and the other lien. Mechanics had submitted bills to the complainants and were pressing them for payment. Instead of a check for the second mortgage loan being turned over as agreed upon, the defendants then promised
40 part of the money and the balance later. The complainants refused and on January 5, 1928 the

complainants demanded of the defendant, Sol Kantor, the return of the bond and mortgage, and Kantor refused saying that Stonaker owed him for services $100.00. Up to this time the second mortgage had not been recorded, but after the demand and refusal were made upon Kantor, the latter placed on record the mortgage, on January 9, 1928.

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The ~~defendants~~ complainants set up that the interest on the second mortgage was to be six per cent of $3,000.00 and the interest on the $3,000.00 was to run from October 14, 1927. The money was not to be turned over until on or about December 12, 1927. On or about December 26, 1927 the proposition was made to the complainants to take $1,900.00 then and $700.00 at another time.

20

An answer was filed in which the defendant admitted that Stonaker went to his office in answer to the advertisement mentioned above for mortgage loans and applied for a second mortgage loan. He further admitted that arrangements were made in his office for a $3,000.00 loan and that a bond and mortgage was excuted in his office on or about October 20, 1927. The answer denied that the money was to be turned over, less bonus fee when the Perth Amboy Saving Institution search was completed and ready to disburse the funds. Kantor admits that on December 22, 1927 he gave out the information that the money was ready and to be paid out in twenty-four hours, and on December 12, 1927 he admits he had the money and informed the solicitor of the Perth Amboy Saving Institution that he would have the check in his office the next day. The defendant, Kantor, denies making an arrangement to pay the complainants $1,700.00 in cash the latter part of December and $900.00 some other time. He denies his client did not have the money. He admits, however, that on January 5, 1928 Stonaker called for the

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bond and mortgage and he refused to give them up saying that he, Stonaker, owed Kantor $100.00 for services. He further admits that he placed the mortgage on record subsequent to that demand and refusal, setting up a lien of $100.00 for counsel fees. The defendant set up the defense that he was not a proper party defendant and not being the mortgagee, he had no power to cancel the mortgage of record. The answer also set up the defense that he alleged two distinct causes of action and that it failed to set forth an equitable cause of action. The defendant as a futher defence set forth that the bill failed to allege a demand for the cancellation before the institution of the suit; that interest was to run from the date of the loan; that the money was to be paid when the house was completed; and that the house was not completed as represented; that the mortgagee was ready to turn over the money upon the completion of the house and offered to give two-thirds of the mortgage loan and the balance when the house was completed; that the mortgagee had made no profit upon the money and that the complainants had refused to pay any interest agreed upon.

Before the answer was filed upon the return of the rule to show cause an order was entered in the presence of the defendant, Kantor, directing that he and Esther Cohen turn over to the complainants the agreement for the sale of their property, their deed of the two lots and all other papers left by the complainants at the office of Sol Kantor. This order was made on the 29th day of February, 1928 and duly filed of record. This order was complied with by the defendant, Sol Kantor. In the printed statement of this case, this order does not appear.

On March 30, 1928 an order was advised in the presence of the defendant, Sol Kantor, restraining him and Esther Cohen and their servants and agents from transferring, assigning or otherwise

negotiating the mortgage of the complainants. Subsequent to the filling of the answer a motion was made by the complainants to strike out the answer. Upon hearing of this motion the court ordered that the answer be stricken out and directed that the court costs and counsel fees be taxed against both defendants, and ordered a counsel fee of $150.00 to be taxed as part of the costs as against both defendants. It was further ordered that the defendant, Esther Cohen, cancel the mortgage of the complainants of record. This order was made and entered on April 11, 1928. On April 12, 1928 the final decree was entered which ordered both defendants to cancel the mortgage of record and ordered Esther Cohen to pay the costs of the suit to be taxed with the counsel fee of $150.00 In accordance with the terms of the order, a copy of the final decree was served upon Esther Cohen and she complied with the terms of the order regarding the cancellation and paid over to the complainants half of the court costs and counsel fees. A copy of the final decree was served upon the defendant, Sol Kantor. The complainants through their attorney struck out the words "and Sol Kantor" from that part of the order cancelling the mortgage and inserted the words "Sol Kantor" in that part of the final decree concerning the court costs and counsel fees. This was done by the attorney for the complainants upon the assumption that he had made these corrections in the original final decree before it was signed. To make certain, however, that the final decree as served conformed exactly with the final decree, and to make certain that a true copy had been served upon the defendant, Sol Kantor, he directed a letter to the Clerk in Chancery on April 16, 1928 directing that he forward to the attorney for the complainants a copy of the final decree. In due course the Clerk in Chancery forwarded a copy of the final decree to the solicitor for the complainants. After comparing the final decree with the copy served upon

the defendant, Sol Kantor, he found that the copy as served upon the defendant, Sol Kantor, was not a true copy of the order and was not in conformity with the directions of the Court contained in the order dismissing the answer as to counsel fees. In the order dismissing the answer, there was a specific command that the court costs and counsel fees be paid by both defendants. A notice of the motion to amend the final decree was then duly made and a petition filed, setting up that the name of Sol Kantor had been inadvertently left out of the final decree. This point was specifically argued before the court in the presence of Sol Kantor, and the court over the vigorous objections of the defendant, Sol Kantor, ordered him to pay one-half of the court costs and counsel fees. The defendant, Sol Kantor, appeared in court to contest the right of the complainants to amend the final decree. The defendant, Sol Kantor, had his day in court and the court signed the amended decree directing him specifically to pay one-half of the court costs and counsel fees. A true copy of this amended decree was then served upon the defendant, Sol Kantor, and from this amended final decree this appeal is taken.

ARGUMENT

POINT 1.

No exception was taken by appellant to the order striking out answer, final decree and amended final decree from which this appeal is taken. The record does not disclose any exception taken by the appellant. It is well settled in law that there must be an error in the proceedings of the trial court and the error must have been called to the attention of that court, and an exception to the court's ruling must have been taken. (Kargman vs. Carlo 85 N. J. L. 632.

Leiferant v. Progressive Agen 98 N. J. L. 526.
Thibodean v. Hamley 95 N. J. L. 180.

POINT 2.

The order dismissing answer, final decree and amended final decree have been complied with and this appeal is being taken from that part of the amended final decree pertaining to costs and counsel fees and involves therefore a matter which was discretionary. (Defiance Fruit Co. v. Fox 76 N. J. L. 482. Evans vs. Adams 15 N. J. L. 373. Cook v. American Smelting Co. 99 N. J. L. 81. Eames v. Stiles 31 N. J. L. 490.)

POINT 3.

Where an order has been executed and its object attained and there is nothing upon which a judgment of reversal could operate, the appeal will be dismissed.

The appellant set up a demand for $100.00 for services—tantamount to a lien—and the lien for services was destroyed by his compliance and acquiescence with the order of February 29, 1928 when he turned over the bond and mortgage held by him for services rendered. This was done without taking any exception to the order.

He relinquished his claim and there is nothing upon which judgement of reversal could operate.

Coryell v. Holcombe 9 N. J. L. 650.

POINT 4.

The Chancellor did not err in striking out the answer of the defendant, Kantor ,as the answer did not set up a just, equitable and meritorious defense. The Chancellor did not err in granting relief against the defendant, Kantor, as there was relief that the complainants could have against

him. The appellant is a proper party defendant for the reason that he is charged with the refusal to deliver up the bond and mortgage to the complainants after demand had been made for the same. The defendant, Kantor, admits in his answer that the complainant made a demand for these papers which he admitted were left with him, together with other papers and he further admits that he refused to turn over the papers to the complainant because he, the defendant, Kantor, was not paid by the complainant for services rendered. (Vide Paragraph 13 and 14 in answer of defendant, Kantor.)

The relief prayed for in the bill of complaint was for cancellation of the mortgage, money damages, and such other relief in the premises as the nature of the case may require and shall be agreeable to equity and good conscience. The complainant was faced with a set of facts brought about by two persons, each of whom was obstructing him in securing those things to which he was equitably entitled. The defendant, Cohen, held a mortgage through her attorney, Kantor, in the amount of $3,000.00 which she, through her attorney, refused to deliver up to the complainant and in fact, after a demand for the return of the same was made, she through her attorney caused it to be recorded. Not a cent of money had been paid on account of this mortgage. The defendant, Kantor, refused to deliver up the bond and mortgage to the complainants after a demand had been made upon him for the same, because he claimed there was due and owing to him the sum of $100.00. The Court of Chancery was petitioned, therefore, by the complainant to grant the complainants relief. Relief against the defendant, Kantor, was obtained when he complied with and acquiesced in the order directing him to turn over to the complainants the bond and mortgage and other papers held by him. He made no objection and took no exception to this order and

therefore he is not in a position to appeal to this court as he has waived his right to have it reviewed (Vide Ewal vs. Ortynski 76 N. J. E. 291.)

POINT 5.

That the Chancellor did not err in granting a mandatory injunction against the defendant before a final hearing. In so far as the defendant, Kantor, was concerned, there was a direct admission on his part that his sole interest in the case was his lien for services and that he held the bond and mortgage in his possession and refused to turn the same over to the complainant until he had received his fee for services, to wit: $100.00. The court ordered him to turn over all papers that he had in possession including the bond and mortgage. He acquiesced in that order. He made no objection and took no exception. Therefore, on the authority cited above, he has waived his right to have it reviewed by this court.

POINT 6

The Chancellor did not err in amending the final decree as the said amendment was recognized by the Court as being only a typographical error and that the amended final decree was one which lay in the discretion of the Chancellor, to wit: a matter of awarding costs and counsel fees. It is also to be noted that the amended final decree carried out the previous order of the court made on April 11, 1928 in which the answer was dismissed and court costs and counsel fees were ordered as provided for in the amended final decree. The amended final decree did not grant any new relief but restated relief that had already been granted. (Vide Augmented state of case page5.)

POINT 7

The defendant, Kantor , was not taxed costs and counsel fees contrary to Rule 139 of the Court of Chancery, as the inadvertance mentioned by him was in a typographical error which came into existence only after the relief appealed from was granted. The statute does permit the taxing of costs and counsel fees against an unsuccessful party. It is in the discretion of the court to award costs or not. (Vide 1 Compiled Statute 442 Section 84; Beball vs. N. Y. and N. J. Water Co. 87 N. J. E. 390; McCloskey vs. Bowden, 89 Atlantic 528. As to counsel fees, see 1 Compiled Statues 445 Section 91.)

POINT 8.

The defendant, Kantor, was personally ordered by the Court after argument thereon by the defendant, Kantor, himself, that the costs and counsel fees should be taxed as against both defendants. The record in this case clearly discloses that the defendant, Kantor, was in court, argued the motion on counsel fees, and was personally directed by the court that he was to pay his share of the costs and counsel fees. The defendant, Kantor, was given due and proper notice of the motion to amend the final decree. The notice to amend the decree was served on him on May 1, 1928, and he was notified personally by the complainant through his solicitor that the return day was May 8, 1928. The defendant, Kantor, appeared in court to argue the motion and actually addressed the court on the motion. On page 40 of the state of the case is the copy of the final decree amended and it specifically recites that the cause was heard in the presence of Joseph F. Deegan, solicitor of the complainants and Sol Kantor, solicitor per se. The argument in the defendant's brief is for the most part based upon a certain mortgage which has already been de-

VOID

clared by the court and which has been cancelled of record and is not in any way at the present time connected with this appeal. The defendant, Kantor, fails to realize that he acted not as an agent for the defendant, Cohen, but for himself alone, when he refused to turn over the bond and mortgage and demanded a fee for services and insisted upon holding the bond and mortgage until his claim had been paid. The court passed upon that phase of the case when it ordered him to give up possession of these documents. He acquiesced in that order and did not enter any kind of an objection. A perusal of the complaint shows fraud on its face. It was admitted that no money had been paid on account of the mortgage at any time, and that the mortgage was on record as bearing interest from October 14, 1927. The court ordered the cancellation of the mortgage and it was acquiesced in and no appeal was ever taken by the mortgagee from the order of the court. The defendant, Cohen, acquiesced in the order of the court and paid the costs and counsel fees. The defendant, Kantor, might have retained the bond and mortgage if he had a valid lien for services, but this question is not before the court now since it has already been decided without any objection whatever being taken.

In view of the record in the case we submit that there is no cause for the reversal of the amended final decree and respectfully urge that the appeal be discharged and the amended final decree be affirmed.

JOSEPH F. DEEGAN,
Solicitor for and of counsel with
Complainant-Respondents.

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New Jersey Court of Errors and Appeals

Between:

WILLIAM STONAKER and GERTRUDE STONAKER
Complainant-Respondents,

and

ESTHER COHEN and SOL KANTOR,
Defendant-Appellant.

ON APPEAL FROM CHANCERY.

SPECIFICATION OF POINTS.

JOSEPH F. DEEGAN,
Solicitor for and of Counsel with Complainants.

SOL KANTOR,
Defendant-Appellant, Per Se.

New Jersey Court of Errors and Appeals

Between:

WILLIAM STONAKER and GERTRUDE STONAKER

Complainant-Respondents,

and

ESTHER COHEN and SOL KANTOR,

Defendant-Appellant.

On Appeal from Chancery.

SPECIFICATION OF POINTS.

The following is a specification of points upon which the appellant Sol Kantor, means to rely upon at the argument of the above cause.

1. That the Chancellor erred in striking out the answer of this defendant, as the same set up just, equitable and meritoreous defenses.

Holt v. *Creamer* 34 N. J. E. 181
Muir v. *Newark Savings* 16 N. J. E. 537,
Pattison v. *Skillman* 43 N. J. E. 392,
Brindley v. *Lawton* 53 N. J. E. 259,
Marshman v. *Conklin* 21 N. J. E. 546,

Walker v. *Hill's Executors* 21 N. J. E. 191.

41 Corpurs Juris page 385 sec. 199; page 472 sec. 378 16 cyc. page 126.

2. That the Chancellor erred in granting relief against the defendant Sol Kantor, as there was no relief that the complainants could have against this defendant.

Walker v. *Hill's Executors* 21 N. J. E. 191,
Marshaman v. *Conklin* 21 N. J. E. 546,
Pattison v. *Skillman* 43 N. J. E. 392.

3. That the Chancellor erred in amending the final decree, as the said amendment did not aid the relief allowed complainants; as complainants secured the cancellation of the mortgage before the notice to amend.

Dorsheimer v. *Robrack* 24 N. J. E. 33.

4. That the Chancellor erred in granting a mandatory injunction against this defendant, before final hearing.

Bailey v. *Schnitzius* 45 N. J. E. 178,
Allman v. *Union Brotherhood* 79 N. J. E. 150,
22 Cyc. 954 section (11)
Delaware R. R. v. *Central Stockyards* 43 N. J. E. 71.

5. That as the amended final decree could no longer grant relief to complainants, it could not tax costs and counsel fees; as against this defendant.

6. That this defendant was taxed costs and counsel fees contrary to rule 139 of the Court of Chancery as complainants admit their own negligence.

7. That the stature does not permit the taxing of costs and counsel fees against an unsuccessful party.

Chapter 116 laws of 1915 section 6.

9. That this defendant was never served with any order striking out the answer.

8. As the original final decree did not tax this defendant with costs or counsel fee; the complainants by taking from the co-defendant Esther Cohen a cancellation of the mortgage and half costs and counsel fees before the application to amend said decree; thereby released this defendant from the payment of any costs or counsel fees for which he may have been liable for, if at all.

10. That defendant was not given due and proper notice of the motion to amend the final decree.

11. That complainants served upon this defendant an untrue copy of the original final decree.

SOL KANTOR,
Defendant-Appellant, Per Se.