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BILL OF COMPLAINT.

Filed March 22, 1933.

In Chancery of New Jersey

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

The complainant, Henry Kueper, of the Town of Montclair, County of Essex and State of New Jersey, respectfully shows unto your honor that:

1. The defendant, Pyramid Bond & Mortgage Corporation, is a Delaware corporation, was heretofore engaged in the business of making mortgage loans and selling stock, bonds and other commercial paper for the purposes of the business aforementioned, having formerly been licensed to do business in the State of New Jersey.

2. In the course of said business, the defendant, Otto Idelberger, was a salesman and/or agent in the employee of the Pyramid Bond & Mortgage Corporation and as such was duly authorized to sell shares of stock issued by the defendant corporation.

3. On or about July 1, 1929, the defendant, Pyramid Bond & Mortgage Corporation, through Otto Idelberger, its duly authorized servant, agent and employee, did solicit the complainant for the purpose of selling to complainant, certain shares of stock in the said Pyramid Bond & Mortgage Corporation, and in so doing, did make to complainant divers representations, among them being: that the Pyramid Bond & Mortgage Corporation was a savings associations, similar to that of building and loan asso-

ciations and savings banks, and that if complainant deposited his money with the defendant corporation, the complainant would reap a greater profit than that which the complainant was receiving by reason of his investment in certain building and loan associations and savings banks in the State of New Jersey, that the said profits which complainant would reap from his investment in the defendant corporation would run from eight per cent. to ten per cent. The defendant, Pyramid Bond & Mortgage Corporation, through its servant, agent and employee, Otto Idelberger, did also represent to complainant that it conducted its business in the same manner as building and loan associations and savings banks, and that any money invested in it or with it could be withdrawn by the complainant at any time the complainant desired, without any cost or loss of profit whatsoever to complainant.

4. The defendant, Pyramid Bond & Mortgage Corporation, through its duly authorized servant, agent, and employee, Otto Idelberger, made the aforementioned representations knowing that the complainant was a foreigner; that complainant had recently arrived in this country from Europe; that complainant was not familiar with the custom of this country; that complainant could neither read, write nor understand the English language and that complainant would not know the difference between a building and loan association, a savings bank and a stock corporation.

5. The defendant, Pyramid Bond & Mortgage Corporation, through its duly authorized servant, agent and employee, Otto Idelberger, did

also mislead complainant by calling to his attention the fact that payments on the stock of said corporation could be made monthly, and that the receipt for said payments were entered in pass books, similar to those used by building and loan associations of the State of New Jersey, and did also use the words "shares" and "stocks" in such a manner as to cause complainant to believe that these words meant the same as when used in connection with savings in building and loan associations and savings banks of the State of New Jersey.

6. The defendant, Pyramid Bond & Mortgage Corporation through its duly authorized servant, agent, and employee, Otto Idelberger, made the aforementioned representations, well knowing that the complainant had certain monies at that time invested in building and loan associations and savings banks, and also knowing that the complainant had invested his money in said building and loan associations and savings banks because the complainant was receiving a profit of four per cent. on his investments from the building and loan associations and savings banks.

7. The complainant was also informed by the said duly authorized servant, agent and employee of the defendant, Pyramid Bond & Mortgage Corporation, that the Pyramid Bond & Mortgage Corporation was a very large organization, doing an extensive business, and because of the attractive offers which the said Pyramid Bond & Mortgage Corporation could make, the said corporation was attracting a great deal of the building and loan and savings bank investors, and that said investors were withdrawing their monies from the building and loan associations and

savings banks, and were investing the same by subscribing to shares of the defendant corporation. At no time did the defendant, Pyramid Bond & Mortgage Corporation, or Otto Idelberger, its servant, agent and employee, explain to complainant that it, or its servant, agent and employee, were actually attempting to induce complainant to purchase stock in the defendant corporation, and did at no time disclose to complainant that if the subscription to the stock was not paid, that complainant would be subjected to law suits to compel the complainant to pay up the amount of money subscribed for in said stock subscription; nor disclose that the defendant company imposed a three per cent. carrying charge on the unpaid balance.

8. The complainant, relying upon the representations made by the said defendant, Otto Idelberger, and being unable to read or write the English language, was induced by the said Otto Idelberger to subscribe his name to certain printed paper forms represented by the defendant, Otto Idelberger, servant, agent and employee of the Pyramid Bond & Mortgage Corporation, to embody the terms and conditions as above represented, and complainant by reason of the aforementioned representations and the inducements offered by the defendant, did withdraw his monies from the building and loan associations and savings banks in which it was invested, and did deliver the same to the defendant, Pyramid Bond & Mortgage Corporation, and did thereafter at various times, pay to the Pyramid Bond & Mortgage Corporation various sums of money, so that up to the present time, the complainant has paid the sum of $2,200.00 to the defendant corporation.

9. Heretofore and at various times during the past year, and after complainant had paid to the defendant corporation the sum of $2,200.00 complainant did find it necessary and did desire to withdraw his said money, and made demands upon the defendant, Pyramid Bond & Mortgage Corporation, to return the same to him at which time complainant was informed by the Pyramid Bond & Mortgage Corporation and Otto Idelberger, its servant, agent and employee, that the monies paid in were on account of a stock subscription, and that the monies could not be withdrawn, and that unless complainant continued his payments, complainant would be obliged to pay the full sum set forth in his stock subscription contract.

10. The complainant subsequently learned that the printed paper form which he had signed as aforementioned was in fact a subscription to shares of the capital stock of the Pyramid Bond & Mortgage Corporation, to be paid off in monthly installment payments, and upon payment in full of the amounts set forth in the subscription contracts, complainant was to receive his share of the capital stock of the said corporation. The complainant did not know until after he had attempted to withdraw his money, that the printed paper form which he had signed was in fact a subscription to purchase stock, and that the representations made by the said Otto Idelberger, servant, agent and employee of the Pyramid Bond & Mortgage Corporation were fraudulent and were not included in the said printed paper form, and that the monies invested by him could not be withdrawn.

11. Complainant thereupon made demands upon the defendant corporation for the return of his money and has rescinded the agreement because of the fraud and misrepresentations made by the defendant, but the defendant, Pyramid Bond & Mortgage Corporation, has failed and refused to return said money or to accept said recission.

12. Prior to institution of this suit, various other law suits have been brought against the defendant, Pyramid Bond & Mortgage Corporation, in the State of New Jersey, and various decrees have been entered against the said defendant, Pyramid Bond & Mortgage Corporation, and other suits are now pending or are about to be instituted against the defendant, Pyramid Bond & Mortgage Corporation, in the State of New Jersey, which said suits are founded on causes of action similar to that of complainant.

13. The defendant, Pyramid Bond & Mortgage Corporation, had and has full knowledge of the various fraudulent representations made by Otto Idelberger, its servant, agent and employee, and was fully aware of the claim of complainant and of the possibility of this suit and of various other suits pendng or about to be started against it for the recission of contracts similar to that signed by the complainant in this action.

14. Since the execution of the contract made by the complainant, and because of the various suits which have been instituted against it in the State of New Jersey, the defendant, Pyramid Bond & Mortgage Corporation, has given up its license to do business in the State of New Jersey, and has withdrawn from this State its registered

agent, thereby manifesting its intention to remove its business and its assets out of the State of New Jersey and out of the jurisdiction of this Court.

15. Upon learning of the commencement of certain law suits against it, and upon learning of the fraudulent representation made by its servant, agent and employee, Otto Idelberger, the Pyramid Bond & Mortgage Corporation did assign, without consideration, all of its assets in the State of New Jersey, to the defendant, Pyramid Enterprises, Inc. of New Jersey, a corporation; all of the stock of same being owned by the defendant, the Pyramid Bond & Mortgage Corporation.

16. The said assignment which has been recorded in various counties in this State, covers among others, numerous bonds, mortgages and other securities in this State.

17. The said assignments were made without consideraton and for the purpose of hindering, delaying and defrauding complainant and other creditors of the Pyramid Bond & Mortgage Corporation.

18. The defendant, Pyramid Bond & Mortgage Corporation, did also cause to be formed, a corporation of the State of Delaware, under the name of Pyramid Associates Inc., all of the stock of which belongs to and is controlled by the Pyramid Bond & Mortgage Corporation, and did cause to be conveyed to the said Pyramid Associates, Inc., all of the real estate bought in or acquired under foreclosure of mortgages held by the Pyramid Bond & Mortgage Corporation.

19. The said Pyramid Associates, Inc., is a dummy corporation and all the land and premises conveyed to it under foreclosures as aforementioned, are the property of the Pyramid Bond & Mortgage Corporation, and are held in trust by the Pyramid Associates, Inc. for the defendant, Pyramid Bond & Mortgage Corporation.

20. The said defendant, Pyramid Bond & Mortgage Corporation, is a foreign corporation, organized under the laws of the State of Delaware, and now has no registered agent in this State upon whom service of process may be had, but has real and personal property, moneys and affects, rights and credits in the counties of Union and Essex within the State of New Jersey.

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

1. That the defendants, Pyramid Bond & Mortgage Corporation, Pyramid Enterprises, Inc. of New Jersey, Pyramid Associates, Inc., and Otto Idelberger, and each of them, do answer the within bill of complaint without oath, and each and every allegation therein contained.

2. That the State's injunction order do issue out of and under the seal of this honorable court, restraining and enjoining the defendant, Pyramid Bond & Mortgage Corporation, from instituting any suit at law or otherwise to enforce and compel the aforementioned defendants to pay the balance of the subscription price aforesaid.

3. That this Court decree that the complainant's subscriptons to stock was procured by the defendants from the complainant through frau-

dulent representations, and with intent to induce the complainant to purchase said stock without the knowledge or consent of the complainant of the true nature of the said transaction.

4. That this Court do order and decree that the said subscription is null and void, and be set aside.

5. That this Court do further decree that the said defendants do repay to complainant the money paid in by complainant, pursuant to said subscription aforementioned.

6. That this Court do further decree that the assignments made by the defendant, Pyramid Bond & Mortgage Corporation, to the Pyramid Enterprises, Inc. of New Jersey were made without consideration and were fraudulent, and that the same be set aside and made null and void.

7. That this Court do decree that the conveyance of the land and premises on foreclosure of mortgages of the Pyramid Bond & Mortgage Corporation which have been conveyed to the Pyramid Associates, Inc. are in fact the property of the defendant, Pyramid Bond & Mortgage Corporation, and that this Court do declare that the same are held in trust by the defendant, Pyramid Associates, Inc. for the Pyramid Bond & Mortgage Corporation.

8. That the State's injunction order do issue out of and under the seal of this court, restraining and enjoining the Pyramid Enterprises Inc. of New Jersey, and Pyramid Associates, Inc. from selling, assigning, or conveying any of its property in the State of New Jersey, until the further order of this Court.

9. That this Court issue a writ of sequestration, directed to a Master in Chancery, commanding such Master in Chancery to take into his possession the property of the Pyramid Bond & Mortgage Corporation, and to hold the same subject to the orders and decrees of this Court.

10. That this Court do order and decree that the sequestrator may take into his possession any and all goods and chattels, rights and credits, moneys and effects, land and buildings, anywhere in the State of New Jersey, owned by the Pyramid Enterprises, Inc. of New Jersey, or Pyramid Associates, Inc. and to hold the same subject to the orders and decrees of this Court.

11. Complainant further prays that he may have such other and final relief as this Court shall deem fair and proper.

And your complainant will ever pray, etc.

IRVING PILTCH,
Solicitor of complainant.

M. S. MAURER,
Of counsel with complainant.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } SS.:

HENRY KUEPER, of full age being duly sworn according to law, on his oath deposes and says:

I am the complainant in the within matter.

The defendant, Pyramid Bond & Mortgage Corporation, is a Delaware corporation, and on July 1, 1929 was engaged in the business of making mortgage loans and selling stocks, bonds and other commercial paper for the purposes of the business aforementioned, having been licensed

to do business in the State of New Jersey at that time.

The defendant, Otto Idelberger, was a salesman and agent in the employ of the Pyramid Bond & Mortgage Corporation, and as such was employed for the purpose of, and was duly authorized to sell shares of stock issued by the defendant corporation. On or about the first day of July, 1929, the defendant corporation, through its duly authorized agent, Otto Idelberger, did solicit me, for the purpose of selling me, certain shares of stock in the said Pyramid Bond & Mortgage Corporation, and in so doing, did make to me divers representations, among them being: That the Pyramid Bond & Mortgage Corporation was a savings association, similar to that of a building and loan association or savings bank, and that if I deposited my money with the defendant corporation, I would reap a greater profit than that which I was obtaining by reason of my investment in a certain building and loan association of the State of New Jersey; that the said profits which I would reap from my investment in the defendant corporation would run from eight per cent. to ten per cent. The defendant corporation, through its said agent, Otto Idelberger, did also represent to me, that the said Pyramid Bond & Mortgage Corporation conducted its business in the same manner as building and loan associations and savings banks, and that any money invested by me with the said Pyramid Bond & Mortgage Corporation could be withdrawn by me at any time I do desire, without any cost or loss of profit whatsoever, to me.

The defendant corporation, through its duly authorized agent and employee, Otto Idelberger,

made the aforementioned representations knowing that I was a foreigner; that I had recently arrived in this country from Europe; that I was not familiar with the customs of this country; that I could neither read, write nor understand the English language and that I would not know the difference between the building and loan association, a savings bank and a stock corporation.

The defendant, Otto Idelberger, did also mislead me by calling to my attention the fact that payments into said corporation could be made monthly and that the receipt for said payments were entered in pass books, similar to those used by building and loan associations of the State of New Jersey, and did also use the words "shares" and "stocks" in such a manner to cause me to believe that these words meant the same as when used in connection with the savings in building and loan associations of the State of New Jersey.

The defendant, Otto Idelberger, made the aforementioned representations well knowing that I had certain monies at that time invested in a savings bank at Elizabeth, New Jersey, and also knowing that I had invested my money in the said savings bank because I was receiving a profit or return of four per cent. on my investment, and could at any time upon short notice withdraw my investment, from The Harmonia Savings Bank of Elizabeth.

I was also informed by the defendant, Otto Idelberger, that the Pyramid Bond & Mortgage Corporation was a very large organization, doing an extensive business, and because of the attractive offers which the said Pyramid Bond & Mortgage

Corporation could make, the said corporation was attracting a great deal of the building and loan and savings bank investors, and that said investors were withdrawing their monies from the building and loans and savings banks, and were investing the same with defendant corporation.

The defendant, Otto Idelberger, did at no time explain to me that he was actually attempting to induce me to purchase stock in the defendant corporation, nor that there was a thirty per cent. carrying charge on the unpaid balance.

I relied upon the representations made by the defendant, Otto Idelberger, and being unable to read or write the English language, was induced by the defendant, Otto Idelberger, to subscribe my name to a certain printed paper represented by the said defendant, and I did by reason of the representations aforementioned and the inducements offered by the defendant, Otto Idelberger, withdraw from The Harmonia Savings Bank of Elizabeth, New Jersey, the sum of $200.00 and did deliver the same to the defendant, Otto Idelberger, and did thereafter at various times pay to defendant corporation, various sums of money so that up to the present time I have paid the sum of $2,200.00 to the defendant corporation.

On or about the 27th day of January, 1933, and after I had paid in the sum of $2,200.00, I did find it necessary to withdraw my money, and made a demand upon the defendant corporation to return the same, but I was then informed by the agents of the said corporation that the monies paid in were on account of a stock subscription of $2,200.00, and that the monies could not be

withdrawn and that I would be unable to withdraw the full sum of $2,200.00.

I subsequently learned that the printed paper which I signed as aforementioned was in fact a subscription to fifty (50) shares of common A stock of the Pyramid Bond & Mortgage Corporation, the cost of which was $1,400.00 and fifty (50) shares of Common B stock, the cost of which was $800.00, to be paid off at the rate of $20.00 per month, and upon the payment in full of the aforementioned sum of $2,200.00, I was to receive fifty (50) shares of common A stock and fifty (50) shares of common B stock of the said corporation. I did not know until after I attempted to withdraw my money that the printed paper which I signed was in fact a subscription to purchase stock, and that the representations made by the defendant's agent, Otto Idelberger, were fraudulent and were not included in the said subscription, and that the monies invested by me could not be withdrawn as represented by the defendant, Otto Idelberger.

I thereupon made demands upon the defendant corporation for the return of my money and have rescinded the agreement because of the fraud and misrepresentations of the defendant, Otto Idelberger, but the defendant, Pyramid Bond & Mortgage Corporation, has failed and refused to return said money or to accept said rescission.

Prior to the instituting of this suit, various other law suits have been brought against the defendant, Pyramid Bond & Mortgage Corporation, in the State of New Jersey, and various decrees have been entered against the said defendant, Pyramid Bond & Mortgage Corporation, and other suits are now pending or are

about to be instituted against the defendant, Pyramid Bond & Mortgage Corporation, in the State of New Jersey, which said suits are founded on causes of action similar to that of my own.

The defendant, Pyramid Bond & Mortgage Corporation, had and has full knowledge of the various fraudulent representations made by its agent, Otto Idelberger, and by other agents and servants in its employ, and was fully aware of my claim, and of the possibility of this suit and of various other suits pending or about to be started against it for the rescission of contracts similar to the one signed by me in this action.

Since the execution of the contract made by me, and because of the various suits which have been instituted against it in the State of New Jersey, the defendant, Pyramid Bond & Mortgage Corporation, has given up its license to do business in the State of New Jersey, and has withdrawn from this State its registered agent, thereby manifesting its intention to remove its business and its assets out of the State of New Jersey and out of the jurisdiction of this court.

Upon learning of the commencement of certain law suits against it, and upon learning of the fraudulent representations of its agent, Otto Idelberger, and other agents in its employ, the Pyramid Bond & Mortgage Corporation did assign, without consideration, all of its assets in the State of New Jersey, to the defendant, Pyramid Enterprises Inc. of New Jersey, a corporation of the State of New Jersey, which is a dummy corporation; all of the stock of same being owned by the defendant, Pyramid Bond & Mortgage Corporation.

The said assignment which has been recorded in various counties in this State, cover among

others, numerous bonds, mortgages and other securities in this State.

The said assignments were made without consideration and for the purpose of hindering, delaying and defrauding me and other creditors of the Pyramid Bond & Mortgage Corporation.

The defendant, Pyramid Bond & Mortgage Corporation, did also cause to be formed, a corporation of the State of Delaware, under the name of Pyramid Associates, Inc., all of the stock of which belongs to and is controlled by the Pyramid Bond & Mortgage Corporation, and did cause to be conveyed to the said Pyramid Associates, Inc. all of the real estate bought in or acquired under foreclosure of mortgages held by the Pyramid Bond & Mortgage Corporation.

The said Pyramid Associates, Inc. is a dummy corporation and all the land and premises conveyed to it under foreclosures as aforementioned, are the property of the Pyramid Bond & Mortgage Corporation, and are held in trust by the Pyramid Associates, Inc. for the defendant, Pyramid Bond & Mortgage Corporation.

The said defendant, Pyramid Bond & Mortgage Corporation is a foreign corporation, organized under the laws of the State of Delaware, and now has no registered agent in this State upon whom service of process may be had, but has real and personal property, moneys and effects, rights and credits in the Counties of Union and Essex within the State of New Jersey.

HENRY KUEPER.

Sworn and subscribed to before
me this 9th day of March, 1933.

SAMUEL ROUS,
An Attorney at Law of New Jersey.

NOTICE TO DISMISS BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

Between HENRY KUEPER, *Complainant,* *and* PYRAMID BOND & MORTGAGE CORPORATION, *et als.*, *Defendants.*	*On Bill, etc.* *Notice.*

To the complainant or Irving Piltch, his solicitor:

TAKE NOTICE that on Tuesday the 2nd day of May, 1933, at 10 A. M. or as soon thereafter as counsel can be heard, we will move before the Chancellor, at the Chancery Chambers, 1060 Broad street, Newark, New Jersey, to strike out and dismiss the bill of complaint herein on the following grounds:

1. That it does not set up any cause or causes of action against the defendants, Pyramid Bond & Mortgage Corporation, Pyramid Enterprises, Inc. of New Jersey, Pyramid Associates, Inc. or any of them.

2. That the complainant has an adequate remedy at law.

3. That this Court has no jurisdiction to grant the relief prayed for in the bill of complaint against said defendants or any of them.

4. That the bill of complaint is multifarious, and that the causes of action, if any therein set forth cannot be conveniently tried in one suit.

Notice to Dismiss Bill of Complaint.

5. That the Court cannot grant the relief prayed for under one bill.

And Take Further Notice that at said time and place we will move to strike out the following:

All of paragraphs 12, 13, 14, 15, 16, 17, 18 and 19, on the grounds that said allegations are scandalous, irrelevant, impertinent and immaterial.

Dated, April 19, 1933.

ISRAEL B. GREENE,
Of Counsel with the Defendants
other than Otto Idelberger.

Notice to Dismiss Bill of Complaint.

NOTICE.

IN CHANCERY OF NEW JERSEY.

Between HENRY KUEPER, *Complainant,* *and* PYRAMID BOND & MORTGAGE CORPORATION, *et als.*, *Defendants.*	*On Bill, etc.* *Notice.*

To the complainant, or Irving Piltch, his solicitor:

TAKE NOTICE, that on Tuesday the 2nd day of May, 1933, at 10 A. M., or as soon thereafter as counsel can be heard, I will move before the Chancellor, at the Chancery Chambers, 1060 Broad street, Newark, New Jersey, to strike out and dismiss the bill of complaint herein as against the defendant, Otto Idelberger on the following grounds:

1. That it does not set up any cause of action as against the defendant, Otto Idelberger.

2. That the complainant has an adequate remedy at law.

3. That the bill of complaint does not pray for any relief as against the defendant, Otto Idelberger, which this Court can grant.

4. That this Court has no jurisdiction to grant the relief prayed for in said bill as against the defendant, Otto Idelberger.

Dated: April 19th, 1933.

FREDERICK H. SAMUELS,
Solicitor of Defendant, Otto Idelberger.

OPINION OF VICE-CHANCELLOR.

IN CHANCERY OF NEW JERSEY.

Between

HENRY KUEPER,
Complainant,

and

PYRAMID BOND & MORTGAGE CORPORATION, *et als.*,
Defendants.

Opinion.

(Decided June 27, 1933.)

Appearances:

Mr. Irving Piltch, solicitor for complainant.

Mr. Israel B. Greene, solicitor for defendants Pyramid Bond & Mortgage Corporation, Pyramid Enterprises, Inc., and Pyramid Associates, Inc.

Mr. Frederick H. Samuels, solicitor for defendant Otto Idelberger.

When the primary right is legal and the jurisdiction of the law courts is concurrent and the remedy at law is adequate, certain and complete equity remains passive.

STEIN, *V.-C.*

This is a motion to strike the bill of complaint, the allegations of which are that on or about July 1, 1929, complainant was induced to subscribe for shares of the capital stock of the defendant Pyramid Bond & Mortgage Corporation by fraudulent and deceitful representations of a salesman of the corporation. Relying upon said representations, the complaint alleges that

complainant paid the sum of $2,200, and he now rescinds and demands return of his money. Other paragraphs of the bill set forth that other suits of a similar nature have been brought and that the Pyramid Bond & Mortgage Corporation in anticipation of such suits conveyed its assets to subsidiary corporations.

Where the complainant, as here, has rescinded a purchase of stock and seeks a decree solely for the repayment of the money paid because of the fraudulent and deceitful representations, the cause is one in which a recovery may be had in an action at law. Crater *v.* Binninger, 33 N. J. L. 513; Smith *v.* Duffy, 57 N. J. L. 679. Inherently, equity has jurisdiction in all cases of fraud. Eggers *v.* Anderson, 63 N. J. Eq. 264. But as was said by Vice-Chancellor Backes in Commercial, &c., Co. *v.* Southern Surety Co., 100 N. J. Eq. page 92 at page 96, "its doors have not been as freely open to all manner of fraud since the law courts have taken upon themselves to grant relief in some cases of fraud. When the primary right is legal, as it is here, and the jurisdiction of the law courts is concurrent, and if the remedy at law is adequate, certain and complete equity remains passive. Equity remains inactive only in that class of fraud that are recognized and remediable at law." The Vice-Chancellor assumed jurisdiction in the case cited because it involved equitable fraud as distinguished from legal fraud.

Where, as here, no remedy under a bill in equity is sought or is proper other than the return of money paid or damages on the purchase of stock or other personal property, and the payment of the money was induced by fraud or false representations which are actionable at

law, and the assessment of damages may be made by a jury as well as by a court of equity, the jurisdiction in such cases should not be exercised if the objections to the jurisdiction are taken in time. Kruger *v.* Armitage, 58 N. J. Eq. 357, 44 A. 167.

The fact that the complainant seeks to have certain alleged fraudulent conveyances set aside does not justify the retention of the bill. That relief is ancillary to the primary relief sought by the bill, namely, the rescission of the contract and the repayment of the money. Again, the complainant having already rescinded the contract according to the allegations of his complaint, he has converted himself into the position of a creditor, and cannot maintain a suit to set aside the alleged fraudulent conveyances until he acquires a lien on the defendant's assets by judgment at law. Gross *v.* Pennsylvania Mortgage & Loan Company, 146 Atlantic 328.

Motion to strike bill of complaint is granted.

ORDER STRIKING BILL OF COMPLAINT.

Filed July 11, 1933.

IN CHANCERY OF NEW JERSEY.

Between HENRY KUEPER, *Complainant,* *and* PYRAMID BOND & MORTGAGE CORPORATION, *et als.*, *Defendants.*	*On Bill, etc.* *Order.*

The defendants having moved, on due notice to the complainant, to strike out and dismiss the bill of complaint filed herein on the ground among others that the complainant has an adequate remedy at law, and the Court having heard argument of Israel B. Greene and Frederick H. Samuels, solicitors of the defendants, in support of said motion, and Irving Piltch, solicitor of the complainant in opposition thereto; and the Court being of the opinion that complainant has an adequate remedy at law, it is on this 11th day of July, 1933,

ORDERED, ADJUDGED AND DECREED that the bill of complaint filed herein be and the same is hereby struck out and dismissed with costs.

Respectfully advised,

ALFRED A. STEIN,
V.-C.

APPLICATION FOR RE-ARGUMENT.

IN CHANCERY OF NEW JERSEY.

Between HENRY KUEPER, *Complainant,* *and* PYRAMID BOND & MORTGAGE CORPORATION, *et als.*, *Defendants.*	*On Bill, etc.* *Application for Re-Argument.*

To Israel B. Greene, Esq.,
Lefcourt Building,
Newark, N. J.

SIR:

PLEASE TAKE NOTICE, that I shall apply to his Honor Alfred A. Stein, Vice-Chancellor, at the Chancery Chambers held in the District Court Room in the City Hall at Long Branch, Monmouth County, on Wednesday, July 26th, 1933, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for a re-argument of the above-entitled matter and for an order to vacate the order heretofore made dismissing the complaint.

IRVING PILTCH,
Solicitor of Complainant.

HARRY KALISCH,
Of Counsel.

OPINION OF VICE-CHANCELLOR.

COURT OF CHANCERY OF NEW JERSEY.

March 9, 1934, Elizabeth, N. J.

Israel B. Greene, Esq.,
1172 Raymond Boulevard,
Newark, New Jersey.

Kalisch & Kalisch, Esqs.,
1172 Raymond Boulevard,
Newark, New Jersey.

In re: Kueper vs. Pyramid Bond
& Mortgage Corporation.

Dear Sir:

I have heretofore entertained a motion to vacate the order made in this cause striking the complainant's bill. Upon considering the briefs submitted on the motion I have now come to the conclusion that the order should be vacated. True, the bill in the instant case alleges facts which would constitute fraud at law, and, of course, in equity, but the requirements with reference to fraud in equity being less exacting, it may very well be that upon the proofs at law the complainant would not have that complete remedy which is vouchsafed him in equity. The courts of equity have the inherent power to relieve against all fraud, and while it is true that its doors have been at times closed to complainants it was so only where the remedy was plainly adequate at law.

Yours truly,

ALFRED A. STEIN.

AAS/RCW.

ORDER VACATING ORDER.

Filed March 13, 1934.

IN CHANCERY OF NEW JERSEY.

Between

HENRY KUEPER,
Complainant,

and

PYRAMID BOND & MORTGAGE CORPORATION, *et als.*,
Defendants.

On Bill, etc.

Order.

It appearing that an Order was made on the 11th day of July, 1933, dismissing the bill of complaint filed herein on the ground that complainant had an adequate remedy at law, and that application being made on due notice to the defendant, to vacate said Order, and the Court having heard argument of Harry Kalisch and Irving Piltch, solicitors of complainant in support of said motion and, Israel B. Greene in opposition thereto, and the Court being of the opinion that complainant did not have an adequate and complete remedy at law and that said order dismissing said bill of complaint should be vacated, it is on this 13th day of March, 1934,

ORDERED, ADJUDGED AND DECREED that said order dismissing said bill of complaint be and the same is hereby vacated and the defendants have 20 days from the service of this order to file an answer, and it is further ordered that the

motion to dismiss the bill be and the same is hereby denied.

Respectfully advised,

ALFRED A. STEIN,
V.-C.

Notice of Appeal.

NOTICE OF APPEAL.

Filed April 1, 1934.

95-385.

IN CHANCERY OF NEW JERSEY.

Between	
HENRY KUEPER, *Complainant,*	*On Bill, etc.*
and	*Notice of Appeal.*
PYRAMID BOND & MORTGAGE CORPORATION, *et als., Defendants.*	

The defendants, Pyramid Bond & Mortgage Corporation, Pyramid Enterprises, Inc., Pyramid Associates, Inc., and Otto Idelberger, hereby appeal from the order or decree made in the above-entitled cause on the 13th day of March, 1934 by the Chancellor on the advice of Vice-Chancellor Alfred A. Stein, and from the whole and every part thereof, to the Court of Errors and Appeals, in the last resort in all causes.

Dated, March 31, 1934.

ISRAEL B. GREENE,
Solicitor for and of Counsel with Defendants, Pyramid Bond & Mortgage Corporation, Pyramid Enterprises, Inc., and Pyramid Associates, Inc.

FREDERICK H. SAMUELS,
Solicitor for and of Counsel with Defendant, Otto Idelberger.

Notice of Appeal.

Copy served on solicitor of complainant April 1, 1934.

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

ISRAEL B. GREENE,
Of Counsel with Defendants, Pyramid Bond & Mortgage Corporation, Pyramid Enterprises, Inc. and Pyramid Associates, Inc.

ISRAEL B. GREENE,
Of Counsel with Defendant, Otto Idelberger.

PETITION OF APPEAL.

Filed April 19, 1934.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between HENRY KUEPER, *Complainant-Respondent,* *and* PYRAMID BOND & MORTGAGE CORPORATION, *et als.*, *Defendants-Appellants.*	*On Appeal from Court of Chancery.* *Petition of Appeal.*

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

1. Your petitioners find themselves aggrieved by an order or decree made in the Court of Chancery by his Honor Luther A. Campbell, Chancellor of the State of New Jersey, on the advice of Vice-Chancellor Alfred A. Stein, bearing date the 13th day of March, 1934, in a certain cause in the said Court of Chancery, wherein Henry Kueper was complainant and your petitioners, Pyramid Bond & Mortgage Corporation, Pyramid Enterprises, Inc. Pyramid Associates, Inc. and Otto Idelberger were defendants, in these respects, to wit: That said order or decree ordered, adjudged and decreed that the previous order of said Court in said cause, made on the 11th day of July, 1933, dismissing the complainant's bill of complaint, be vacated, that the motion of your petitioners, the defendants in said cause to strike out said bill of

complaint be denied, and that your petitioners have 20 days from the service of the order appealed from to file their answer to said bill of complaint.

2. Petitioners appeal from the said order of the Chancellor, which decreed as aforesaid, on the ground that the same is erroneous in that:

(a) The bill of complaint does not set up any cause or causes of action against your petitioners, or any of them.

(b) The complainant has an adequate remedy at law.

(c) The Court of Chancery has no jurisdiction to grant the relief prayed for in said bill of complaint.

(d) Assuming that the Court of Chancery has jurisdiction, it should have dismissed the bill and remitted the complainant to his remedy at law, as a matter of sound judicial discretion.

(e) The bill of complaint does not pray for any relief as against petitioner, Otto Idelberger, which the Court of Chancery could grant.

Your petitioners therefore pray that the said order or decree of the said Chancellor may be reversed and set aside and for nothing holden in the respects aforesaid, and that your peti-

tioners may have such relief in the premises as to this Court shall seem proper.

ISRAEL B. GREENE,
Sol'r. for and of Counsel with Defendants-appellants, Pyramid Bond & Mortgage Corporation, Pyramid Enterprises, Inc., Pyramid Associates, Inc.

FREDERICK H. SAMUELS,
Sol'r. for Defendant-Appellant, Otto Idelberger.

ISRAEL B. GREENE,
Of Counsel.

Service acknowledged by complainant's solicitor, April 18, 1934.

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

New Jersey Court of Errors and Appeals

Between

HENRY KUEPER,
Complainant-Respondent,

and

PYRAMID BOND & MORTGAGE CORPORATION, *et als.*,
Defendants-Appellants.

On Appeal from Court of Chancery.

BRIEF OF DEFENDANTS-APPELLANTS.

Statement.

(Italics ours unless otherwise stated.)

This appeal brings up for review an order made by Vice-Chancellor Stein, denying the defendants' (appellants') motions to dismiss the complainant's bill of complaint, and vacating a previous order made by him, dismissing the bill of complaint.

The bill of complaint (Case pp. 1-10) sets up an action of *fraud and deceit* in the sale of stock. It alleges that on or about July 1, 1929 complainant was induced to subscribe for shares of the capital stock of the defendant, Pyramid Bond & Mortgage Corporation by fraudulent and deceitful representations of one Idelberger, a salesman of the corporation; that relying upon said representations complainant paid the sum of $2,200 to the corporation, and that upon discovery of the fraud, he rescinded the purchase and demanded the return of his money. Other paragraphs of the bill set forth that other suits of a similar nature have been brought, and that

the corporation, in anticipation of said suits, conveyed its assets to subsidiary corporations.

The bill prays that the defendants be decreed to repay said money to complainant; that the subscription contract be declared void, and that the conveyances to the subsidiary corporations be set aside.

On motion of the defendants, Vice-Chancellor Stein dismissed the bill of complaint, *because the complainant had an adequent remedy at law* (Case p. 23). In his opinion, the Vice-Chancellor said (Case pp. 20-22):

> "Where the complainant, as here, has rescinded a purchase of stock and seeks a decree solely for the repayment of the money paid because of the fraudulent and deceitful representations, the cause is one in which a recovery may be had in an action at law. Crater *v.* Binninger, 33 N. J. L. 513; Smith *v.* Duffy, 57 N. J. L. 679. Inherently, equity has jurisdiction in all cases of fraud. Eggers *v.* Anderson, 63 N. J. Eq. 264. But as was said by Vice-Chancellor Backes in Commercial, &c., Co. *v.* Southern Surety Co., 100 N. J. Eq. page 92 at page 96, 'its doors have not been as freely open to all manner of fraud since the law courts have taken upon themselves to grant relief in some cases of fraud. When the primary right is legal, as it is here, and the jurisdiction of the law courts is concurrent, and if the remedy at law is adequate, certain and complete equity remains passive. Equity remains inactive only in that class of fraud that are recognized and remediable at law.' The Vice-Chancellor assumed jurisdiction in the case cited because it involved equitable fraud as distinguished from legal fraud.
>
> "Where, as here, no remedy under a bill in equity is sought or is proper other than the return of money paid or damages on the purchase of stock or other personal prop-

erty, and the payment of the money was induced by fraud or false representations which are actionable at law, and the assessment of damages may be made by a jury as well as by a court of equity, the jurisdiction in such cases should not be exercised if the objections to the jurisdiction are taken in time. Kruger *v.* Armitage, 58 N. J. Eq. 357, 44 A. 167.

"The fact that the complainant seeks to have certain alleged fraudulent conveyances set aside does not justify the retention of the bill. That relief is ancillary to the primary relief sought by the bill, namely, the rescission of the contract and the repayment of the money. Again, the complainant having already rescinded the contract according to the allegations of his complaint, he has converted himself into the position of a creditor, and cannot maintain a suit to set aside the alleged fraudulent conveyances until he acquires a lien on the defendant's assets by judgment at law. Gross *v.* Pennsylvania Mortgage & Loan Company, 146 Atlantic 328.

"Motion to strike bill of complaint is granted."

Upon a reargument of the cause, the Vice-Chancellor changed his mind; vacated the order of dismissal, and denied the defendants' motions to strike the bill (Case pp. 26, 27). His reason for this action is contained in a letter written to counsel for the parties, reading as follows:

"COURT OF CHANCERY
OF NEW JERSEY.

March 9, 1934, Elizabeth, N. J.

Israel B. Greene, Esq.,
1172 Raymond Boulevard,
Newark, New Jersey.

Kalisch & Kalisch, Esqs.,
1172 Raymond Boulevard,
Newark, New Jersey.

In re: Kueper *v.* Pyramid Bond
& Mortgage Corporation.

Dear Sir:

I have heretofore entertained a motion to vacate the order made in this cause striking the complainant's bill. Upon considering the briefs submitted on the motion I have now come to the conclusion that the order should be vacated. *True, the bill in the instant case alleges facts which would constitute fraud at law,* and, of course, in equity, *but the requirements with reference to fraud in equity being less exacting, it may very well be that upon the proofs at law the complainant would not have that complete remedy which is vouchsafed him in equity.* The courts of equity have the inherent power to relieve against all fraud, and while it is true that its doors have been at times closed to complainants it was so only where the remedy was plainly adequate at law.

Yours truly,
ALFRED A. STEIN."

AAS/RCW.

It is respectfully submitted that the order appealed from is erroneous because the complainant has an adequate remedy at law, and further because the appellants are entitled to a trial by jury at law.

ARGUMENT.

1.

The case so far as the right of recovery is concerned is predicated upon fraud and deceit. This was conceded by the Vice-Chancellor in his first opinion, wherein he said "* * * *the cause is one in which a recovery may be had in an action at law* * * *" (Case p. 21, ll. 14-16) and in his second opinion wherein he said "*True, the bill in the instant case alleges facts which would constitute fraud at law* * * *" (Case p. 25, ll. 25-27). The only reason assigned by the Vice-Chancellor for vacating the order of dismissal and reinstating the bill, is that the complainant ought not to hazard the burden of proof at law when the requirements in equity are less exacting, *although there is nothing in the bill suggesting any such hazard.*

The general question of the jurisdiction of equity in cases of fraud, where there is also a remedy at law, is a much vexed one; so much so that it remarked in Pom. Eq. Jur. 4th Ed. Sec. 910 that it is impossible to formulate any universal rules concerning the extent or the exercise of such jurisdiction. The same authority states (Sect. 912) that the English doctrine upholds the jurisdiction of equity over every case of fraud, and he proceeds to show that such jurisdiction was due *to the original want of power in the law courts to relieve from fraud,* their jurisdiction in such matters being later developed. *Want of an adequate remedy at law,* and not the fraud itself, is therefore the basis of equity jurisdiction in these matters.

Much of the confusion which has resulted in the cases is due to the failure of the Courts to recognize this fundamental principle, namely,

that equity took jurisdiction in matters of fraud, *not because they involved fraud,* but because *there was no adequate remedy at law.*

Other factors which have added to the confusion are the lack of an authoritative definition of what constitutes an adequate remedy at law, and our American deep-rooted notion of a right of trial by jury.

On the whole, the English Court of Chancery has been much more logical and consistent in the maintenance of its jurisdiction in matters of fraud than our own Courts. But it is noteworthy that even the English Courts did not take jurisdiction of every kind of fraud. Thus in *Newham* v. *May,* 13 Price 749, Chief Baron Alexander said,

> "It is not in every case of fraud that relief is to be administered by a Court of Equity. In the case for instance of a fraudulent warranty on the sale of a horse, or any fraud upon the sale of a chattel, no one I apprehend ever thought of filing a bill in equity."

Prior to the decision of this Court in *Eggers* v. *Anderson,* 63 N. J. E. 624, our Court of Chancery uniformly held that it had jurisdiction in all matters of fraud, excepting fraudulent wills, and that the mere fact that there was an adequate remedy at law was no objection the exercise of its jurisdiction. But in *Eggers* v. *Anderson* we note a definite departure from the prior decisions, for in that case this Court, although conceding that the Court of Chancery had general jurisdiction in all matters of fraud, nevertheless held that, *"when the remedy at law is plain, adequate and complete, the Court of Chancery is reluctant to exercise the jurisdiction, and will not do so unless the administration of justice would thereby evidently be facilitated."*

The same rule is reiterated in *Commercial Casualty Co.* v. *Southern Surety Company,* 100 N. J. E. 92, affirmed in 101 N. J. E. 738, where Vice-Chancellor Backes said:

> "Inherently, equity has jurisdiction in all cases of fraud. Eggers *v.* Anderson, 63 N. J. Eq. 246, 49 A. 578, 55 L. R. A. 570. But its doors have not been as freely open to all manner of fraud since the law courts have taken upon themselves to grant relief in some cases of fraud. *When the primary right is legal, as it is here, and the jurisdiction of the law courts is concurrent, and if the remedy at law is adequate, certain and complete equity remains passive.* Equity remains inactive only in that class of fraud that is recognized and remediable at law. A misrepresentation without intent to deceive will not sustain an action at law for deceit, while in equity an untruthful representation of a material fact, though there be no moral delinquency, is deemed to be fraudulent. Eibel *v.* Von Fell, 55 N. J. E. 670, 38 A. 261; Straus *v.* Norris, 77 N. J. E. 33, 75 Atl. 980."

In the last cited case the Vice-Chancellor took jurisdiction primarily because the case involved *equitable fraud;* but in the course of his opinion he * * * made an observation, which if read independently of the context, might nullify the rule laid down in the *Eggers* case, for he said,

> "But the complainants are not reduced to the single and narrow ground assigned in their bill in maintaining their suit in this Court. (Referring to the charge of equitable fraud.) The concurrent jurisdiction of the law courts to relieve against deceitful representations does not abridge equity's jurisdiction to grant relief on that score, and even though it be, as contended, that the bill discloses that all the representations were deceitfully made IT MAY BE THAT THE COMPLAINANTS WOULD NOT BE

ABLE TO PROVE THAT THE MISREPRESENTATIONS WERE KNOWINGLY FALSE, BUT COULD ONLY PROVE THEY WERE MATERIAL AND UNTRUE—a defense in equity only. THE COMPLAINANTS ARE NOT TO BE PUT TO THE HAZARD AT LAW WHEN THE REQUIREMENTS IN EQUITY ARE LESS EXACTING." (Capitals ours.)

In the case last cited the bill *expressly alleged that the complainants were unable to establish that certain of the representations were made deceitfully, although the bill charged fraud and deceit.* In view of this allegation, the statement of the Vice-Chancellor that the Court of Equity had jurisdiction is undoubtedly correct, although the excerpt from his opinion above quoted appears to be broader than the necessities of the case required, and was obviously intended as an answer to an objection to the jurisdiction raised by the defendant. But if the statement of the Vice-Chancellor that the "*complainant is not to be put to the hazard at law when the requirements in equity are less exacting,*" is to be accepted as a principle of law at its face value, without reference to the facts involved in that case, an absurd result will follow; for, in every fraud case there is a possibility that the plaintiff may not be able to prove legal fraud. There are uncertainties in every case. There is always a danger that the complainant may not be able to establish legal fraud. If this broad statement of Vice-Chancellor Backes, torn from its context, is to be accepted as a criterion in the determination of the jurisdictional question, then we may as well discard the *Eggers* case and revert back to the jurisdiction of the English Court of Chancery before the common law courts granted relief in matters of fraud, and permit the

Court of Chancery to take jurisdiction of every case involving fraud, except perhaps fraudulent wills. That Vice-Chancellor Backes never intended to convey such an idea is indicated by his later decisions to be presently mentioned.

Krueger v. *Armitage,* 58 N. J. E. 357, is on all fours with the case at bar. In that case the complainant purchased of defendant certain shares of stock and paid therefor partly in cash and gave a mortgage for the balance of the price, at the request of the vendor, to a third party. He was induced to make the purchase by the false and fraudulent representations of the defendant, and filed a bill to recover the money paid, etc. The defendant objected to the complainant's right to relief in a Court of Equity, praying the benefit of a demurrer. Vice-Chancellor Emery in dismissing the bill said (58 E. 360):

> "In support of the jurisdiction the settled rule is relied on that equity has jurisdiction concurrent with law in cases of fraud, and it is insisted that cases of false representations, inducing purchases or investments in stock, are included within the concurrent jurisdiction. *But where, as here, the right relied on is a right recognizable at law and the remedy sought is purely pecuniary and legal, the jurisdiction in equity, even if it be concurrent with that of courts of law, will not be exercised where the remedy at law is adequate, certain and complete.* The settled principles adopted by the American courts are stated in 2 Pom. Eq. Jur. pp. 410, 914, &c., and the cases there collected. The doctrine of some of the English cases, where bills in equity have been entertained in cases of fraud in the sales of personal property for the simple recovery of the same damages which might be recovered in an action at law, has not been followed in the

American courts, which have regarded the assumption of such jurisdiction as a deprivation of the right of trial by jury, where such trial affords an adequate and complete remedy. The reason of the jurisdiction assumed by courts of equity in England, was that equity originally took jurisdiction in the absence of any jurisdiction at law. Slim *v.* Croucher, 1 DeG., F. & J. 518, 527, 528; and see Buzard *v.* Houston, 119 U. S. 347, 352 for Mr. Justice Gray's comments on the English doctrine.

"In the present case, the bill was not filed for discovery in aid of a suit at law and prayed an answer without oath, and the whole case therefore, so far as relates to the question of false representations and damages, is purely one for a trial by jury. In all of the cases in this state to which I have been referred by counsel, where the equitable jurisdiction in cases of fraud in the sale of personal property has been sustained, the necessity of some equitable remedy or relief beyond the recovery of the money paid or damages has been disclosed. *But where no remedy under a bill in equity is sought or is proper other than the return of money paid or damages on the purchase of stock or other personal property, and the payment of the money was induced by fraud or false representations which are actionable at law, and the assessment of damages may be made as well by a jury as by a court of equity, the jurisdiction in such cases should not be exercised if the objections to the jurisdiction are taken in time.*"

The *Krueger* case was cited with approval by this Court in *Eggers* v. *Anderson, supra.*

In *Polehumus* v. *Hollander Trust Co.,* 59 N. J. E. 93, affirmed 61 E. 654, Vice-Chancellor Reed said,

"But the recovery of money made by the inducement or false representations is not

> within the scope of modern equity jurisdiction. Krueger *v.* Armitage, 13 Dick. Chan. Reports 357."

In *Suburban Homes Co.* v. *West Orange*, 104 N. J. E. 228, Vice-Chancellor Backes said,

> "The remedy for the recovery of money fraudulently or otherwise unlawfully acquired and retained though anciently invented by equity has long since been provisionally relinquished to the law courts as those courts gradually extended relief in such affairs—the provision being that the remedy be adequate—and jurisdiction will not be exercised except in circumstances calling for this court's aid where the remedy at law is inadequate. *Recovery of a fixed sum of money is common to the law courts, and Krueger* v. *Armitage,* 58 E. 357, *is an apt illustration of the rule.*"

In *Allen* v. *Kreitler*, 106 N. J. E. 402, the same learned Vice-Chancellor, said (p. 408):

> "For the misconduct laid to the Fidelity Union Trust Company extra its trust, the remedy is at law in tort for deceit. *The law courts have exclusive jurisdiction in cases of deceit. Krueger* v. *Armitage,* 58 E. 357."

Both of the cases last cited were decided by Vice-Chancellor after the decision in the *Commercial Casualty case, supra,* and aid its interpretation.

We submit that the mere fact that the proof requirements in equity are less exacting than at law, can furnish no basis for retaining a cause, which is remedial at law, unless it is made to appear *in the bill* that the complainant cannot or may not be able to establish legal fraud, as in the *Commercial Casualty Insurance Co.* case, *supra.* To hold otherwise would permit the Court of Chancery to retain jurisdiction in

every case of fraud, and thus emasculate the rule laid down in *Eggers* v. *Anderson, supra.* In the case at bar there is not the slightest suggestion that the complainant may not be able to establish legal fraud. If there was any danger in this respect, it would have been alleged in the bill. The Court cannot assume a hazard which does not appear in the bill.

This view was adopted by the United States Supreme Court in *Phoenix Mutual Life Insurance Co.* v. *Bailey* 16 Wall. 616, 20 L. ed. 501, where the Court stated tersely what Mr. Pomeroy is pleased to call the American doctrine, saying:

> "Where a party if his theory of the controversy is correct, had a good defense at law, to 'a purely legal demand,' he should be left to that means of defense, as he has no occasion to resort to a court of equity for relief *unless he is prepared to allege and prove some special circumstances to show that he may suffer irreparable injury if he is denied a preventive remedy.*"

Under the circumstances, it is respectfully submitted that as a matter of law, and in the exercise of judicial discretion, the learned Vice-Chancellor should have dismissed the bill of complaint and remitted the complainant to his remedy at law.

2.

The complainant will undoubtedly contend that this Court should take jurisdiction because here, in addition to the claim for the repayment of the money, the complainant seeks to nullify the subscription contract, and that such relief can be granted only in the Court of Equity. The infirmity inherent in this argument is that this *extra* relief is based upon and is solely related to the

complainant's right to rescind the sale; and it is apparent that a judgment at law, in favor of the plaintiff, will as effectually nullify the subscription contract as a decree, to that effect, in this court. A different situation might be presented if the complainant's case rested upon equitable fraud, which is not remedial at law. In other words, the complainant does not need a decree of this Court declaring the subscription contract a nullity in order to sustain his case at law, founded as it is upon fraud and deceit. As pointed out by Vice-Chancellor Emery in the *Krueger* v. *Armitage* case, *supra,* there must be disclosed "*necessity* of some equitable remedy or relief beyond the recovery of the money paid or damages * * *" before equity will exercise jurisdiction.

Professor Pomeroy (Pom. Eq. Jur. 4th Ed. Vol. II, p. 1902) in speaking of the modern American doctrine, says:

> "The doctrine is settled that the exclusive jurisdiction to grant purely equitable remedies, such as cancellation, will not be exercised, and the concurrent jurisdiction to grant pecuniary recoveries does not exist, in any case where the legal remedy, either affirmative or defensive, which the defrauded party might obtain, would be adequate, certain and complete. * * *"

Among the cases cited by Professor Pomeroy, in support of his pronouncement is *Krueger* v. *Armitage, supra.*

The *Krueger* case was cited with approval in this court in the *Eggers* case, except as to an unsupported statement, not material here.

In *Johnston* v. *Swanke,* 107 N. W. 481, the Wisconsin Supreme Court held that (Note 1):

> "Fraud in the procurement of a contract is not of itself sufficient to take a case out of

> the rule that equity will not interfere to procure its cancellation if there is an adequate remedy at law."

The leading case of *Buzzard* v. *Houston,* 119 U. S. 347, 30 L. Ed. 451, affords an excellent precedent in support of the rule that a mere prayer for the cancellation of an instrument procured by fraud and deceit, will not sustain a bill in equity, where the primary right to relief is legal, and where the remedy at law is adequate. In that case a bill in equity was filed for the purpose of having annuled an assignment of a contract for the sale of cattle, and for the reinstatement of the *status quo* of the parties, the bill alleging fraud and deceit, and praying for equitable relief. In dismissing the suit the Supreme Court speaking through Mr. Justice Gray said,

> "The present bill states a case for which an action of deceit would be maintained at law and would afford full and complete remedy * * *. If the plaintiffs should be ordered to be reinstated in all their rights under that agreement * * * the only relief which they could have in this suit would be a decree for damages to be assessed by the same rules as an action at law * * *. If the exchange of the contracts was procured by the fraud alleged, it would be no more binding in law than in equity, and in an action of deceit the plaintiffs might treat the assignment of the contract with Mosty as void, and upon delivering up that contract to the defendant, recover full benefits for the non-performance of the original agreement * * *."

It is true that in the *Buzzard* case Justice Gray called attention to the Federal Judiciary Act, which provides that

> "Suits in equity shall not be sustained in either of the Courts of the United States in

> any case where plain, adequate and complete remedy may be had at law."

But as pointed out by the learned Justice the Statute is but declaratory of what was always the law, and was intended merely to emphasize the rule and to impress it upon the attention of the courts. It is interesting to note that the *Buzzard* case was referred to and cited with approval by Vice-Chancellor Emery in the *Krueger* case, *supra.*

As we construe the authorities above cited, they hold that where the primary right of a complainant is remedial at law, the mere prayer for some equitable relief, which is not essential to the successful prosecution of the complainant's claim, will not be seized upon by a court of equity for the purpose of asserting jurisdiction; in other words merely asking for something which one doesn't need, will not entitle him to litigate in a Court of Equity.

Cases such as *Aetna Life Insurance* v. *Sussman,* 162 A. 133, and *New York Life Ins. Co.* v. *Steinman,* 103 N. J. E. 403, which were cited by the respondents, in the court below are not in point because in these cases the remedies at law were clearly inadequate. In both of these cases the insurers brought suits to cancel policies within the two year contestable period, and after the death of the insured. The beneficiaries of the decedents studiously sat back and waited for the two-year period to elapse, so as to deprive the insurers of their defenses. The insurers had no remedy at law because no suits were pending at law. Their only remedy was in equity to cancel the policies before the two-year contestable periods elapsed.

The respondent will probably call the Court's attention to Vice-Chancellor Howell's remark in *Schoenfield* v. *Winter,* 76 N. J. E. 511, in which he said that in the *Krueger* case "There does not appear to have been any prayer for the rescission of the contract, which possibly differentiates the case * * *"; but we fail to see merit in this comment for two reasons: In the first place, it is apparent that the *Krueger* case, like the case at bar, was predicated upon a rescission of a contract, and secondly, because there is nothing in the opinion of Vice-Chancellor Emery in the Krueger case from which it might be inferred that he would have reached a different conclusion if the bill had contained a prayer for rescission. It should be noted that the *Schoenfield* case cites and rests upon the case of *Morse* v. *Nicholson,* 55 N. J. E. 705 (1897) which was decided before the *Eggers* case.

3.

The fact that the complainant seeks to have certain alleged conveyances set aside, does not justify the retention of the bill. That relief is ancillary to the primary relief sought by the bill, namely, the rescission of the contract and the repayment of the money. The bill does not allege that the Pyramid Bond & Mortgage Corporation is insolvent or unable to satisfy any money decree which may be made in the cause. An inquisition into the business transactions of the company, at this time, is no more proper, than it would be for a law court to entertain supplementary proceedings in advance of judgment, because it would be putting the "cart before the horse." Then again, the complainant having already rescinded the contract, according to the allegations of the bill of complaint, he has

converted himself into the position of a creditor, and cannot maintain a suit to set aside the alleged fraudulent conveyances until he acquires a lien on the defendant's assets by judgment at law. *Gross* v. *Pennsylvania Mortgage & Loan Company,* 146 Atl. 328. This view was adopted by the learned Vice-Chancellor in the Court below and was not challenged by the complainant.

CONCLUSION.

It is, therefore, respectfully submitted that the decree appealed from be reversed with instructions that the bill of complaint be dismissed with costs and a reasonable counsel fee.

FREDERICK H. SAMUELS,
Solicitor of Defendant-Appellant,
Otto Idelberger.

ISRAEL B. GREENE,
Of Counsel.

ISRAEL B. GREENE,
Solicitor for and of Counsel with Defendants-Appellants, Pyramid Bond & Mortgage Company, Pyramid Enterprises, Inc. of New Jersey, Pyramid Associates, Inc.

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

New Jersey Court of Errors and Appeals

Between HENRY KUEPER, *Complainant-Respondent,* *and* PYRAMID BOND & MORTGAGE CORPORATION, a corp., *et als.*, *Defendants-Appellants.*	*On Appeal from Court of Chancery.*

BRIEF OF COMPLAINANT-RESPONDENT.

(Italics ours unless otherwise stated.)

Statement.

This is an appeal from Vice-Chancellor Stein's order, denying defendants (appellant's) motion to dismiss the complainant's bill of complaint. The bill sets forth that on July 1st, 1929, the complainant was induced to subscribe for and purchase a number of shares of the capital stock of the defendant, Pyramid Bond & Mortgage Corporation, by the fraudulent and deceitful representations of one, Idelberger, a stock salesman of the defendant, Pyramid Bond & Mortgage Corporation; that relying upon said representations and believing them to be true, the complainant paid the sum of $2,200 to the Pyramid Bond & Mortgage Corporation, and that upon discovery of the fraud he rescinded the purchase and demanded the return of his money, which the defendants have refused to repay.

The bill states the foregoing facts and prays besides discovery that an *injunction issue restraining and enjoining the defendant, Pyramid*

Bond & Mortgage Corporation, from instituting another suit at law or otherwise to enforce and compel the aforementioned complainant to pay the balance of the subscription price aforesaid, and further prays that this Court decree that the complainant's subscription to the stock was procured by the defendant from the complainant through fraudulent representations and with intent to induce the complainant to purchase the stock, without the knowledge or consent of the true nature of the said transaction, and further that this Court do order and decree that the said subscription be declared to be null and void and be set aside, and that defendant repay to complainant the money paid in by complainant pursuant to said subscription aforesaid, and that certain assignments of assets made by the defendant, Pyramid Bond & Mortgage Corporation to the Pyramid Enterprises, Inc., of New Jersey were made without consideration and were fraudulent and that the same be set aside and made null and void, and that the conveyance of the land and premises on foreclosure of mortgages of the Pyramid Bond & Mortgage Corporation which have been conveyed to the Pyramid Associates, Inc., are in fact the property of the defendant, Pyramid Bond & Mortgage Corporation, and that this Court do declare that the same are held in trust by the defendant, Pyramid Associates, Inc., for the Pyramid Bond & Mortgage Corporation; and *that the said Pyramid Enterprises, Inc., and Pyramid Associates, Inc., be enjoined from selling and assigning or conveying any of its property in the State of New Jersey, until the further order of this Court, and that a writ of sequestration,* directed to a Master in Chancery, commanding such Master in Chancery to take into his possession the property of the defendant, Pyramid Bond

& Mortgage Corporation, and to hold the same subject to the orders and decrees of this Court, and that this Court do order and decree that the sequestrator may take into his possession any and all goods and chattels, rights and credits, etc., in the State of New Jersey, owned by the Pyramid Enterprises, Inc., of New Jersey or Pyramid Associates, Inc., and to hold the same subject to the orders and decrees of this Court, and further such other and final relief as this Court shall deem fair and proper.

ARGUMENT.

1.

Defendants maintain that complainant has an adequate remedy at law. This view, however, is not at all in harmony with the very citations relied upon by defendants in support of their appeal. The first authority offered by defendants is *Commercial Casualty Insurance Co.* v. *Southern Insurance Co.*, 135 Atl. Rep. 513; defendants in their brief content themselves with a reference to only a small part of the opinion in that case, neglecting that which unmistakably supports the complainant's views. Defendants in their brief quote from the opinion in that case at p. 513 as follows:

> "Inherently, equity has jurisdiction in all cases of fraud. Eggers *v.* Anderson, 63 N. J. Eq. 264, 49 A. 578, 55 L. R. A. 570. But its doors have not been as freely open to all manner of fraud since the law courts have taken upon themselves to grant relief in some cases of fraud. When the primary right is legal, as it is here, and the jurisdiction of the law courts is concurrent, and if the remedy at law is adequate, certain and complete equity remains passive. Equity remains inactive only in that class of fraud

> that is recognized and remediable at law. A misrepresentation without intent to deceive will not sustain an action at law for deceit, while in equity an untruthful representation of a material fact, though there be no moral delinquency, is deemed to be fraudulent. Eibel *v.* Von Fell, 55 N. J. Eq. 670, 38 A. 201; Straus *v.* Norris, 77 N. J. Eq. 33, 75 A. 980; Cowley *v.* Smyth, 46 N. J. Law, 380, 50 AM. Rep. 432. The law courts not having as yet taken upon themselves to relieve against wrongs resulting from misrepresentations fraudulent in conscience only, courts of equity continue to perform that function."

But defendants fail to mention that part of the case which is in support of complainant's bill in the instant case. On the same page of the case appears the following:

> "The misrepresentations in this respect, it will be noted, are twofold. So much as representation that Bell was a man worth at least $1,400,000 was an affirmation of a fact, not of opinion, and if untrue, though *ingenuously* made, would be condemned *in equity only;* the added representation that Bell was *known* by him (the agent) to be worth far in excess of that amount, and not less than $10,000,000 or $11,000,000, was an affirmation of a fact, that is, that the fact was known to him, and, if untrue, was a deceit and redressible at law. *If, at law the complainants should establish the first, and not the second,* their defense would fail, whereas, in equity, if they proved the first, and not the second, they would prevail. In this respect the *jurisdiction of the law courts is obviously not equal to the occasion; not on par with equity's remedy.*"

But it might be objected that in the instant case since complainant's bill alleges facts constituting fraud at law, it must be assumed that complainant can prove fraud at law as alleged

in his bill, hence his remedy is at law. Not so, for the very case quoted from above, holds on pages 513-514 as follows:

> "But the complainants are not reduced to the single and narrow ground *assigned in their bill* in maintaining their suit in this court. The concurrent jurisdiction of the law courts to relieve against deceitful representations does not abridge equity's jurisdiction to grant relief on that score, *and even though it be, as contended, that the bill discloses* that all the misrepresentations were deceitfully made, it may be that the complainants would not be able to prove that the misrepresentations were knowingly false, but could only prove that they were material and untrue—a defense in equity only. *The complainants are not to be put to the hazard at law when the requirements in equity are less exacting.* In Schoenfeld *v.* Winter, 76 N. J. Eq. 511, 74 A. 975, on demurrer to a bill to rescind a contract on the ground of deceitful misrepresentation and to restrain an action at law in assumpsit arising out of the contract (78 N. J. Law, 92, 73 A. 42), Vice-Chancellor Howell overruled the demurrer, holding that—
>
> "While the bill sets out a common-law action for deceit, this does not interfere with the jurisdiction of equity. In order to set aside a contract founded in fraud, it is only necessary in equity to prove that the representation upon which the action is founded is false, that it is material, and that damage has ensued; while at the common law the proof must go to the extent of satisfying the jury that the defendant knew that the statement relied upon was false. It will therefore be seen at a glance that the remedy in equity is much broader and much more efficient than the remedy at law could be. It was held in Morse *v.* Nicholson, 55 N. J. Eq. (10 Dick.) 705 (38 A. 178) that in a case where the jurisdiction of the courts of law and equity for the redress of frauds was

> concurrent, the court of equity should entertain the cause, and determine it upon its merits, provided that adequate relief could not be obtained at law; and this, I take it, is a general rule which ought to be applied in the discretion of the court to cases of fraud where there are concurrent remedies."

And in *Schoenfeld* v. *Winter,* 76 N. J. Eq. 511, this principle is approved. The bill in that case was filed to procure a decree rescinding a contract alleged to have been made between the defendant, Winter and two partners, one of whom is dead, the complainant being the survivor. The contract related to the purchase and sale of personal property and a lease. At the time of the filing of the bill a motion was made for a preliminary injunction to restrain an action at law arising out of the contract relation. This motion was denied upon the ground that the Supreme Court had practically decided that the action was properly brought. A demurrer is now interposed to the bill upon the ground principally that the cause of action set out therein is one which is cognizable in the courts of common law.

The opinion in that case reads as follows:

> "The bill sets out a cause of action which would undoubtedly be triable in the common law courts in an action for deceit. It alleges that the contract was induced by representations which were false, and which the defendant knew were false at the time the contract was made. These allegations are admitted by the demurrer, *and while the bill sets out a common law* action for deceit, this does not interfere with the jurisdiction of equity. In order to set aside a contract founded in fraud, it is only necessary in equity to prove that the representation upon which the action is founded is false, that it is material, and that damages has ensued; while at the com-

> mon law the proof must go to the extent of satisfying the jury that the defendant knew that the statement relied upon was false. It will therefore be seen at a glance that the remedy in equity is much broader and much more efficient than the remedy at law could be. It was held in Morse *v.* Nicholson, 55 N. J. Eq. (10 Dick.) 705, that in a case where the jurisdiction of the courts of law and equity for the redress of frauds was concurrent, the court of equity should entertain the cause and determine it upon its merits, provided that adequate relief could not be obtained at law."

And in the very recent case of *Aetna Life Insurance Co. of Hartford* v. *Sussman,* 162 Atl. Rep. 133, Vice-Chancellor Fallon, reiterated word for word the language employed in the above opinion, and cites with approval *Schoenfeld* v. *Winter, supra,* and *Commercial Casualty Ins. Co.* v. *Southern Ins. Co., supra.*

And in *New York Life Ins. Co.* v. *Steinman,* 103 N. J. Eq. 403, Vice-Chancellor Leaming in his opinion says as follows:

> "The existence of a complete defense, based on fraud, in a court of law, falls short of and does not ordinarily constitute such an adequate remedy for the defendant as should impel a court of equity to refuse to entertain a bill filed by the defrauded party for cancellation and surrender of the contract, since the opportunity to make that defense may be lost, or the ability to make it may be weakened, by studied delay of the other party; and, further, that mere defense at law does not embrace the equitable relief of cancellation or surrender of a contract." See Morgan Realty Co. *v.* Pazan, 102 N. J. Eq. 33, 139 A. 712. It appears to me that unless this court retains jurisdiction of the case sub judice complainant will not only be deprived of adequate relief, but there will be nothing to estop the defendant from bringing

> suits against the complainant at any time during the defendant's life in this or other jurisdictions which may prove vexatious to complainant."

2.

Defendant on page 7 of his brief says that the jurisdiction in the case cited by him (*Commercial Casualty Ins. Co.* v. *Southern Ins. Co.*), was assumed principally because it involved equitable fraud as distinguished from legal fraud. He says as follows:

> "The jurisdiction in the case last cited was assumed principally because it involved equitable fraud as distinguished from legal fraud."

But this is in direct conflict with the opinion itself, which says on page 513:

> "And, even though it be, as contended, that the bill discloses that all the misrepresentations were deceitfully made, it may be that the complainants would not be able to prove that the misrepresntations were knowingly false, but could only prove that they were material and untrue—a defense in equity only. The complainants are not to be put to the hazard at law when the requirements in equity are less exacting."

So that the bill in that case discloses legal fraud and not equitable fraud, yet the bill was held because the complainant was not to be put to the "hazard of proving legal fraud when the requirements in equity were less exacting." It here appears that the Court concerns itself with the *difficulty* of proving that the bill alleges "fraud at law." It affords relief against the difficulty of proving fraud at law which requires the element of scienter, whereas equity does not require proof of scienter.

We maintain, therefore, that defendants in their brief has wholly misinterpreted the opinion in *Commercial Casualty Ins. Co.* v. *Southern Ins. Co.* Furthermore, that case cites with approval *Schoenfeld* v. *Winter,* and in its opinion quotes the following from that case p. 514.

> "While the *bill sets out a common law action for deceit,* this does not interfere with the jurisdiction of equity. In order to set aside a contract founded in fraud, it is only necessary in equity to prove that the representation upon which the action is founded is false, that it is material, and that damage has ensued; while at the common law the proof must go to the extent of satisfying the jury that the defendant knew that the statement relied upon was false. It will therefore be seen at a glance that the remedy in equity is much broader and much more efficient than the remedy at law could be. It was held in Morse *v.* Nicholson, 55 N. J. Eq. (10 Dick.) 705, 38 A. 178, that in a case where the jurisdiction of the courts of law and equity for the redress of frauds was concurrent, the court of equity should entertain the cause, and determine it upon its merits, provided that adequate relief could not be obtained at law; and this, I take it, is a general rule which ought to be applied in the discretion of the court to cause of fraud where there are concurrent remedies."

How then can it be said that the Court assumed jurisdiction in the *Commercial Casualty Ins. Co.* v. *Southern Ins. Co.,* case, because it involved equitable jurisdiction?

I am now considering this matter merely from the standpoint of what appeared in the bill in that case; the bill itself presented a case of fraud and deceit recognized by the courts of law, still the court of equity took jurisdiction as the remedy at law was not adequate and com-

plete. Of course, I do not subscribe to the doctrine that in all cases of fraud where the jurisdiction is concurrent that equity will hold the bill. There are cases in this State that hold that where the remedy sought is only pecuniary damages, the proper tribunal is the court of law. *Krueger* v. *Armitage,* 58 N. J. Eq. 357 and *Polhemus* v. *Holland Trust Co.,* 59 N. J. Eq. 93.

The Krueger case (*supra*), however, was merely a bill for pecuniary damages and did not ask for *rescission* or other equitable relief.

In fact Vice-Chancellor Howell in *Schoenfeld* v. *Winter,* 76 N. J. Eq. p. 512, in commenting upon the Krueger case and comparing it with the case then in hand said:

> "In Krueger *v.* Armitage the complainant filed his bill to recover damages accruing out of what was claimed to be a fraudulent sale of stock. There does not appear to have been any prayer for the recission of the contract, which possibly differentiates the case from the one in hand."

The complainant in the instant case does ask for rescission and also an injunction restraining the defendants from instituting suit at law for the balance of the purchase price of the stock, money damages and in addition prays that the Court issue a writ of sequestration and that the defendants be restrained and enjoined from selling, assigning or conveying any of their property in the State of New Jersey. Surely these matters come exclusively within the jurisdiction of the court of equity.

3.

It is further maintained by the defendants in the instant case that since the complainant himself rescinded the contract he has converted himself into the position of a creditor and consequently he cannot maintain a suit to set aside the alleged fraudulent conveyance until he acquires a lien on defendants' assets; citing *Haston* v. *Castner,* 31 N. J. Eq. 697, and *Gross* v. *Pennsylvania Mortgage & Loan Co.,* 146 Atl. 328.

These authorities and the principles they enunciate are utterly alien to the subject in hand. The two cases cited involve creditors bills and not bills for rescission of a contract.

In *Pearlman* v. *Krasner,* 142 Atl. Rep. 180, which is on all fours with the instant case, the complainant was induced to invest in capital stock of a corporation by false representation of stockholders as to the company's financial condition, and the *purchaser of the stock rescinded* and filed his *bill to confirm the rescission,* and Vice-Chancellor Backes in his opinion recognized the right of complainant to file his bill for rescission after he himself had rescinded. He says beginning at p. 180:

> "The answer is that it was in existence when the complainant rescinded and filed his bill to confirm the rescission. In view of the meagreness of the assets, the representation was material, and, the complainant having chosen to rescind the contract, as was his right, he is entitled to recover from the company and the individual defendants, who deceived him for the benefit of the company to their advantage."

If the complainant in the instant case by rescinding the contract became a creditor as is

contended by the defendant, why was not that also true in the Pearlman case, just quoted from. Complainant rescinded before filing his bill in that case and Vice-Chancellor Backes refers to the bill as a bill to confirm the rescission; and again in *Hubbard* v. *International Mercantile Agency,* 59 Atl. Rep. 24, it appeared that the officers of a corporation induced the complainant to purchase shares of the capital stock upon the representation that none of the stock had been sold for a price less than par; that this statement was untrue, shares having been sold out of the treasury stock of the company for less than par; that as soon as the complainant discovered the untruth he sought to *rescind his contract of purchase and demanded the return of his money,* which the defendants at first offered to return, but afterwards refused. The prayer of the bill was that the contract for the purchase of said shares may be decreed to be rescinded and that the defendants, or some of them, be required to repay to the complainant the amount he paid for the stock. The Court on p. 25 says:

> "The right to appeal to this court for the annulment of this agreement, and, as an incident thereto, the restitution of the money thus unlawfully obtained, seems to be clear, even if a remedy exists at law. The complainant being here for the purpose of having the contract he was fraudulently induced to enter into set aside, this court has ample power to administer complete relief, etc. It follows that the demurrer is not well taken and I shall advise that it be overruled."

Here it also appears that the complainant had rescinded before filing his bill for rescission, yet the Court did not in that case, hold that the complainant had converted himself into a creditor, but entertained the bill.

In *Stramke* v. *George A. Raker & Co. Inc.*, 156 Atl. Rep. 640, which presented a case similar in facts and principle to the instant case, Vice-Chancellor Bigelow held the bill saying on page 642:

> "But nothing in the contract contained would have been notice to him that any of the representations were false, and so I do not think he was called upon to take action until December, when he did inform defendant, in effect, that he rescinded, etc.
>
> There should be a decree for complainant pursuant to the prayer of the bill."

4.

We have confined ourselves to answering defendants' brief, which we think failed to present to the Court all of the cases on the subject. Furthermore, in the very cases which were offered, the opinions were only partially disclosed, resulting in a distortion of the principles laid down.

In addition to the cases already offered for your consideration, we beg leave to present some authorities which we believe establish beyond doubt complainant's right to relief in equity.

Defendant has contended that because the ground upon which the jurisdiction of this Court is invoked may avail the complainant in an action at law and constitute a valid defense in a suit at law, that therefore, complainant should be left to his remedy at law. This contention, however, is in conflict with all the authorities in this State.

In the case of *Morgan Realty Co.* v. *Pazan*, 139 Atl. Rep. page 712, the Court says on page 715:

> "This court is empowered to restrain the prosecution of the defendant's action at law,

> in order to cause the paper writing in question, which is the subject matter of the controversy, to be surrendered and cancelled. Citing (Metler's Admrs. *v.* Metler, 18 N. J. Eq. 270; Gallagher *v.* Lembeck & Betz Eagle Brewing Co., 86 N. J. Eq. 188; Cornish *v.* Bryan, 10 N. J. Eq. 146; Chase *v.* Chase, 50 N. J. Eq. 143, 24 Atl. 914); and the mere fact that the ground upon which the jurisdiction of this court is invoked may avail the party in an action at law, and constitute a valid defense by plea or otherwise, is not a sound objection to the court's exercising this power. Particularly where, as in this case, equitable elements are involved which the law courts cannot adequately apply, and which must be applied in order that full and complete justice may be done."

And in the case of *Chase's Exr.* v. *Chase,* 24 Atl. page 914; Vice-Chancellor Van Fleet said on page 915:

> "There can be no doubt, however, that this court has power, in a proper case, to decree that a bond or other instrument shall be surrendered for cancellation, even though a successful defense may be made at law against a recovery on it."

And in the case of *Smith* v. *Smith's Admr.*, 30 N. J. Eq. 567:

> "The power of this court to decree the surrender of an invalid or worthless bond, or other instrument, even though a complete defence at law exists, cannot be questioned at this day. If a suit at law has already been brought, this court will not arbitrarily or causelessly change the forum of litigation, but if adequate relief cannot be given at law, or if the defence is of a character that cannot be urged at law without embarrassment and hazard, this court will take jurisdiction and give suitable relief"

In the opinion last cited from it appears that if a suit at law had already been brought the

court of equity would not intervene if adequate relief could be given at law. In the instant case it will be remembered that no suit at law was brought to recover the balance of the subscription price for the stock purchase. The bill in the instant case prays that an injunction issue restraining and enjoining the defendant from instituting any suit at law or otherwise to enforce and compel the complainant to pay the balance of the subscription price aforesaid.

And in the case of *Kunz* v. *Barnegat Pines Realty Co.*, 156 Atl. P. 417, the opinion states:

> "Counsel for the defendant below, argues that the Court of Chancery was without jurisdiction to grant the relief sought, and that the only remedy was an action at law for recovery of the moneys paid by the complainant to the defendant.
>
> But we think that contention is not well founded. The case stated by the bill and supported by the proofs is one of fraudulent imposition. The gravamen of the complainant's bill was that the defendant had in bad faith, amounting to fraud or misrepresentation, delivered to the complainant a deed which was far from a compliance with its contract, and which he accepted in ignorance of the true situation. No doubt, in such case, the Court of Chancery may properly assume jurisdiction where, as here, it is necessary for the purpose of administering justice. In a case such as this, an action at law for the return of the purchase price would afford but partial relief to the complainant. A refusal of the Court of Chancery to assume jurisdiction would leave the contract outstanding and the title of the land in the complainant. *For his own protection, if he makes out a case after full hearing, he is entitled to have the contract and deed canceled, and so be relieved of any obligation thereunder, and is also entitled to a return of the purchase money paid.*"

And in the case of *Chapin Publicity Co.* v. *Saybrook Holding Corp.*, 147 Atl. page 481, Justice Parker says as follows:

> "That the landlord concealed that knowledge, not merely passively, but actively, is shown by the testimony that Silverman requested Williamson to draft the clauses about a roof sign 'because he had never had any application for any roof sign erection, and was not familiar with its terms. This seems to have been a palpable falsehood, and directly calculated to lead the complainant into contracting for a roof privilege which defendant well knew the municipality authority would not permit it to exercise. *In our judgment, complainant's right to rescind was and is clear, on the authorities cited; and with that right goes the equitable right to a judicial cancellation of the lease, and a permanent injunction against present and future claims for rent, as part of the complete relief which only equity can afford in such cases; and incidental thereto, a decree for the return of the money already paid, with interest and costs.* Eggers v. Anderson, 63 N. J. Eq. 264, 49 A. 578, 55 L. R. A. 570; Schoenfeld *v.* Winter, 76 N. J. Eq 511, 74 A. 975, affirmed 79 N. J. Eq. 219, 81 A. 1134; Erdmann v. Gregg, 90 N. J. Eq. 363, 107 A. 479; Commercial Casualty Ins. Co. *v.* Southern Surety Co., 100 N. J. Eq. 92, 135 A. 511, affirmed 101 N. J. Eq. 738, 138 A. 919."

CONCLUSION.

We feel that there should be an affirmance of the order made by Vice-Chancellor Stein vacating a previous order made by him, since it so plainly appears that the brief of defendants is in direct conflict with the established rules of this State. Furthermore it cannot injure the defendant since he can make his application to dismiss the bill after complainant has put in his

evidence, and if it then appears that the complainant is not entitled to equitable relief the Court can deal with the question then.

In conclusion it may not be amiss to state that Vice-Chancellor Backes has now before him some twenty cases arising out of the same contract with the same defendants, but different complainants; one of these cases has already been decided by Vice-Chancellor Backes and involves the same facts set out in the bill in the instant case and a motion to dismiss was denied, and after final hearing a decree was rendered for the complainant. The balance of the cases that have come before Vice-Chancellor Backes have been retained over a motion to strike the bill in each case upon the same grounds set forth in the instant case; complainants and defendants have presented their evidence and a similar motion to dismiss at the completion of the case was denied.

We respectfully submit that complainant is entitled to an order sustaining the order to retain the bill in the Court of Chancery, and the appeal be dismissed with costs and a reasonable counsel fee.

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