INDEX.

Amended Bill of Complaint.

(Filed March 22, 1938.)

121–175.

In Chancery of New Jersey

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

The complainants, Winifred Holt Ackerman of Wayne, Pennsylvania, and Florence Holt Wittpenn of Newark, New Jersey, Executrices of the last will and testament of Della R. Holt, deceased, by their amended bill of complaint respectfully show that:

1. On March 15, 1929, James B. Davidson, John W. Davidson and Walter R. Davidson, being indebted to Wilbur E. Holt in the sum of $15,500, executed to him a bond of that date to secure that sum payable on March 15, 1931 with interest at the rate of six per cent per annum, payable quarterly from the date of the bond.

2. To secure payment of the bond, the said James B. Davidson, John W. Davidson and Walter R. Davidson executed to said Wilbur E. Holt a mortgage of even date with the bond; and thereby conveyed to him in fee, the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon, was recorded in the Register's Office of Essex County in Book B-67 of Mortgages, page 96

3. The mortgaged premises are described as follows:

All that tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Newark, County of Essex, and State of New Jersey.

BEGINNING in the southerly line of Fulton Street at a point therein distant one hundred sixty-six feet and four inches easterly from the easterly line of Broad Street, thence running along said southerly line of Fulton Street, north eighty-three degrees eleven minutes, east twenty-five feet and one inch to a point in range with the easterly side of the frame building standing upon the premises hereby described and which point is also in range with the westerly side of the brick building adjoining on the east; thence, running south seven degrees forty-nine minutes east along the easterly side of the building standing upon the premises hereby described, which line also runs along the westerly side of building adjoining on the east, one hundred and five feet eleven and one-half inches; thence, south eighty-three degrees eleven minutes west, twenty-three feet, eight inches; thence north eight degrees forty-five minutes west, one hundred and six feet to the southerly line of Fulton Street aforesaid and place of BEGINNING.

4. On March 15, 1929, James B. Davidson, John W. Davidson and Walter R. Davidson, being indebted to Wilbur E. Holt in the sum of $15,000, executed to him a bond of that date to secure that sum payable on March 15, 1931 with interest at

the rate of six per cent per annum, payable quarterly from the date of the bond.

5. To secure payment of the bond, the same James B. Davidson, John W. Davidson and Walter R. Davidson executed to said Wilbur E. Holt a mortgage of even date with the bond; and thereby conveyed to him in fee, the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage having been first duly acknowledged and the certificate of acknowledgment fully endorsed thereon, was recorded in the Register's Office of Essex County in Book B-67 of Mortgages on pages 98-99.

6. The mortgaged premises are described as follows:

> All that tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Newark, County of Essex and State of New Jersey.
>
> BEGINNING in the southerly line of Fulton Street at a point distant one hundred and ninety-one feet two inches easterly from the corner formed by said line and the easterly line of Broad Street; thence, running along Fulton Street north eighty-three degrees east twenty-four feet five inches; thence south eight degrees forty-five minutes east one hundred and six feet; thence south eighty-three degrees west twenty-five feet; thence, north eight degrees forty-five minutes west one hundred and six feet to Fulton Street and the place of BEGINNING.

7. Both bonds and mortgages contained an agreement that if any installment of interest should remain unpaid for 30 days after the same should fall due, then the whole principal sum with all unpaid interest, should, at the option of the mortgagee, his representatives or assigns, become immediately due.

8. The mortgages also contained an agreement that the mortgagors, their heirs and assigns, would keep the buildings upon the mortgaged premises insured against loss or damage by fire in a sum not less than an amount approved by the mortgagee and would assign the policy of insurance to the mortgagee, his representatives or assigns; and in default of so doing that the mortgagee, his representatives or assigns, should be entitled to effect such insurance and the premiums paid for the same by the mortgagee, or his assigns, with interest at six per centum per annum, should be a lien on said land added to the amount of the mortgage debt and secured by the mortgage.

9. On December 22, 1929 said Wilbur E. Holt died leaving a will wherein he appointed George S. Pollard and Robert S. Pollard executors thereof. The will, on January 10, 1930 was admitted to probate by the Surrogate of Essex County and letters testamentary thereon were issued by him to the said George S. Pollard and Robert S. Pollard. By written assignment dated December 31, 1931 said George S. Pollard and Robert S. Pollard as executors as aforesaid, assigned said bonds and mortgages to Della R. Holt, which assignment having been duly acknowledged and the cer-

tificate of acknowledgment duly endorsed thereon was recorded in the Register's Office of Essex County in Book 228 of Assignments of Mortgages, page 26.

In March, 1937, Della R. Holt died leaving a will wherein she appointed Winifred Holt Ackerman and Florence Holt Wittpenn executrices thereof. The will, on May 27, 1937 was admitted to probate by the Surrogate of Essex County and letters testamentary thereon were issued by him to said Winifred Holt Ackerman and Florence Holt Wittpenn.

10. On September 27, 1937, James B. Davidson and Bernice B. Davidson, his wife, John W. Davidson, and Anna P. Davidson, his wife, and Walter R. Davidson and Florence D. Davidson, his wife, conveyed the land first described herein, by deed of that date to the Guardian Realty Corporation, a corporation of New Jersey, in fee, which deed was on September 29, 1937, recorded in the Register's Office of Essex County in Book, O-92 of Deeds for said county page 297. Under the terms of the said deed, the Guardian Realty Corporation assumed payment of the complainants' mortgage.

11. On September 27, 1937, James B. Davidson and Bernice B. Davidson, his wife, John W. Davidson and Anna P. Davidson, his wife, and Walter R. Davidson and Florence D. Davidson, his wife, conveyed the land secondly described herein, by deed of that date, to the Guardian Realty Corporation, a corporation of New Jersey, in fee, which deed was on September 29, 1937 recorded in the Register's Office of Essex County in

Book O-92 of Deeds for said county page 296. Under the terms of the said deed the Guardian Realty Corporation assumed payment of the complainants' mortgage.

Any interest which said Guardian Realty Corporation has in said lands, is subject to the lien of the complainants' mortgage.

12. Roy H. Smith is in possession of a portion of the premises first mentioned in the bill of complaint herein, by lease or otherwise.

Any interest which the said Roy H. Smith may have in said lands is subject to the lien of the complainants' mortgage.

13. Barbara Brehm is in possession of a portion of the premises first mentioned in the bill of complaint herein, by lease or otherwise.

Any interest which the said Barbara Brehm may have in said lands is subject to the lien of the complainants' mortgage.

14. Hazel Waterman is in possession of a portion of the premises secondly mentioned in the bill of complaint herein, by lease or otherwise.

Any interest which the said Hazel Waterman may have in said lands is subject to the lien of the complainants' mortgage.

15. On September 15, 1937, a quarter years' interest at the rate of 5% fell due on complainants' bond and mortgage first mentioned in the bill of complaint, and remained unpaid for more than thirty days thereafter and no payment thereof has yet been made. Complainants have elected that the whole principal sum with all interest unpaid shall now be due.

15a. On September 15, 1937, a quarter years' interest at the rate of 5% fell due on complainants' bond and mortgage secondly mentioned in the bill of complaint, and remained unpaid for more than thirty days thereafter and no payment thereof has yet been made. Complainants have elected that the whole principal sum with all interest unpaid shall now be due.

16. Said James B. Davidson, John W. Davidson and Walter R. Davidson, the Guardian Realty Corporation, Roy H. Smith and Barbara Brehm, or one of them have always been in possession of the mortgaged premises first mentioned.

17. Said James B. Davidson, John W. Davidson and Walter R. Davidson, the Guardian Realty Corporation, and Hazel Waterman have always been in possession of the mortgaged premises secondly mentioned.

18. The whole amount of principal with interest thereon from June 15, 1937 is due upon complainants' bonds and mortgages.

Complainants are without adequate remedy in the courts of law and therefore pray:

1. That James B. Davidson, John W. Davidson and Walter R. Davidson, the Guardian Realty Corporation, Roy H. Smith, Barbara Brehm and Hazel Waterman, who are defendants to this suit may answer this bill of complaint and each statement therein made.

2. That an account may be taken of the amount due on complainants' mortgages:

3. That the defendants, or one of them, may be decreed to pay complainants the amount so found due, with interest and costs, by a short day, to be appointed by this Court; and that in default of such payment, they and each of them be debarred and foreclosed of all equity of redemption in said lands; or

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

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

SANDMEYER & MEISNER,
Solicitors and Counsel with Complainants.

Answer of Defendants.

(Filed May 10, 1938.)

IN CHANCERY OF NEW JERSEY.

121–175.

Between

WINIFRED HOLT ACKERMAN AND FLORENCE HOLT WITTPENN, Executrices of the last will and testament of Della R. Holt, deceased,

Complainants,

and

JAMES B. DAVIDSON, *et als.*,

Defendants.

On Bill, Etc.

Answer of the Defendants, James B. Davidson, John W. Davidson and Walter R. Davidson.

These defendants, James B. Davidson, John W. Davidson and Walter R. Davidson, answering the bill of complaint say:

1. They deny so much of paragraph one of the complaint as states that the said defendants, on March 15, 1929, were indebted to Wilbur E. Holt, in the sum of $15,000, and admit the balance of the said paragraph.

2. They admit paragraph two of the bill of complaint.

3. They admit paragraph three of the bill of complaint.

4. They deny so much of paragraph four of the complaint as states that the defendants, on March 15, 1929, were indebted to Wilbur E. Holt,

in the sum of $15,500 and admit the balance of the said paragraph.

5. They admit paragraph five of the bill of complaint.

6. They admit paragraph six of the bill of complaint.

7. They admit paragraph seven of the bill of complaint.

8. They admit paragraph eight of the bill of complaint.

9. They have no knowledge or information sufficient to form a belief as to the allegations in paragraph nine and therefore put the complainants to their proof.

10. They admit paragraph ten of the bill of complaint.

11. They admit paragraph eleven of the bill of complaint with the exception of that portion which reads: "Any interest which said Guardian Realty Corporation has in said lands, is subject to the lien of complainants' mortgage," which latter portion is denied.

12. They have no knowledge or information sufficient to form a belief as to the allegations in paragraph twelve and therefore put the complainants to their proof.

13. They have no knowledge or information sufficient to form a belief as to the allegations in

paragraph thirteen of the complaint and therefore put the complainants to their proof.

14. They have no knowledge or information sufficient to form a belief as to the allegations in paragraph fourteen of the complaint and therefore put the complainants to their proof.

15. They deny paragraph fifteen of the bill of complaint.

15A. They deny paragraph fifteen-A of the bill of complaint.

16. They admit paragraph sixteen of the bill of complaint.

17. They admit paragraph seventeen of the bill of complaint.

18. They deny paragraph eighteen of the bill of complaint.

19. Each of the mortgages set forth in the complainants' said bill of complaint and sought to be foreclosed was given by these defendants to the said Wilbur E. Holt, in payment of the purchase price of the lands and premises described in the said particular mortgages, and conveyed by the said Wilbur E. Holt to these defendants concurrently with the execution and delivery of the said mortgages, and the defendants were induced to accept said conveyances and to execute said mortgages through the fraud of said Wilbur E. Holt, in that Wilbur E. Holt, acting by and through his agent, Sidney Smith, wilfully and fraudulently represented to these defendants, be-

fore the execution of said conveyances and mortgages, that certain vacant land adjoining said premises, being a strip of land of approximately twenty-five feet in width, was an open public highway and street, and that the premises mentioned in the bill of complaint each had an easement and right of way of egress and ingress over the said adjoining strip of land, which representations were known to the said Wilbur E. Holt to be false and were made to induce these defendants to purchase said lands and to execute said mortgages; whereas the said representations were false in that the strip of land was not in fact an open public highway and street, but on the contrary was privately owned, and the said premises mentioned in the bill of complaint did not have an easement and right of way of egress and ingress over the said adjoining strip of land; and defendants, relying upon said misrepresentations, accepted the said conveyances and executed the said purchase money mortgages.

BRAELOW AND TEPPER,
Solicitors for and of Counsel with Defendants, James B. Davidson, John W. Davidson and Walter R. Davidson.

Notice of Motion to Strike Answer.

(Filed June 2, 1938.)

IN CHANCERY OF NEW JERSEY.

121–175.

WINIFRED HOLT ACKERMAN AND FLORENCE HOLT WITTPENN, Executrices of the last will and testament of Della R. Holt, deceased, Complainants, *vs.* JAMES B. DAVIDSON, *et als.*, Defendants.	On Bill, Etc. Notice of Motion to Strike Answer.

To Defendants James B. Davidson, John W. Davidson and Walter R. Davidson or Messrs. Braelow and Tepper, solicitors of defendants.

Sirs:

Take notice that on June 7, 1938 at the hour of ten o'clock in the forenoon or as soon thereafter as counsel can be heard, at the Chancery Chambers, 1060 Broad Street, Newark, New Jersey, I shall apply to the Chancellor for an order striking out the answer filed by you in the above entitled cause for the following reasons:

1. Those portions of the answer contained in paragraph 1, which denies the indebtedness between the defendants and Wilbur E. Holt in the sum of $15,500 as of the date of the execution of the bond described in the bill of complaint is sham and untrue; paragraph 4, which denies the in-

debtedness between the defendants and Wilbur E. Holt in the sum of $15,000 as of the date of the execution of the bond described in the bill of complaint; and that portion of paragraph 11 which denies any interest which said Guardian Realty Corporation has in said lands is subject to the lien of the complainants' mortgages, and paragraph 15A and paragraph 18 are sham and untrue in point of fact.

2. Paragraph 19 of the answer is frivolous.

3. The answer filed in the foregoing suit contains allegations of defense which are not true in point of fact and sham, allegations which do not constitute any defense to the allegations of the bill of complaint and are frivolous and was filed by defendants for the purpose of hindering and delaying complainants in the prosecution of their suit in equity.

And take notice that on the argument of the motion the affidavit hereto annexed will be used.

SANDMEYER & MEISNER,
Solicitors of Complainants.

Affidavit of Florence Holt Wittpenn Annexed to Motion to Strike.

IN CHANCERY OF NEW JERSEY.

121–175.

WINIFRED HOLT ACKERMAN AND FLORENCE HOLT WITTPENN, Executrices of the last will and testament of Della R. Holt, deceased, Complainants, *vs.* JAMES B. DAVIDSON, *et als.*, Defendants.	On Bill, Etc. Affidavits.

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

FLORENCE HOLT WITTPENN, of full age, being duly sworn according to law, upon her oath, deposes and says:

1. I am one of the executrices of the last will and testament of Della R. Holt, deceased, and one of the complainants named in the bill of complaint filed in the foregoing suit in chancery.

2. I know of my own knowledge that for many years prior to the institution of the foregoing suit in Chancery the defendants, James B. Davidson, John W. Davidson and Walter R. Davidson paid to Wilbur E. Holt, deceased and after his death to Della R. Holt, deceased and after her death to the executrices of her last will and testament, interest on the sums of money represented

and secured by the mortgages described in the bill of complaint filed in the foregoing action and that up to and until September 15, 1937, the said interest on the mortgages aforesaid was paid in full and that interest due upon the said mortgages described in the bill of complaint falling due upon September 15, 1937 and all interest falling due upon the mortgages aforesaid from and after the 15th day of September, 1937 have not been paid nor has any amount been paid on account thereof and the whole amount of principal with interest from the aforesaid date to the present date remains unpaid due and owing. I am informed that taxes for the year 1937 remain unpaid and that the properties have been allowed to go without repairs and have greatly depreciated in value.

3. On June 24, 1937 a letter was sent by Davidson Brothers enclosing a check in payment of interest due up to and including June 15, 1937 on the two mortgages described in the bill of complaint. While the letter addressed as it was to William E. Sandmeyer one of the solicitors of the complainants in the foregoing suit was not signed individually but was signed in typewriting "Davidson Brothers" and the check enclosed with said letter was in payment of the interest aforesaid was deposited by this deponent and paid in the regular course. The letter aforesaid reads as follows:

Affidavit of Florence Holt Wittpenn.

June 23, 1937

Mr. W. E. Sandmeyer
Lefcourt Building
Newark, New Jersey

Dear Sir:

We send you herewith check in the sum of $381.25 in payment of interest to Della R. Holt, as follows:

Mortgage 15 Fulton Street, Newark,
N. J. 3 months interest on $15,500
due June 15, 1937 @ 5%.....$193.75
Mortgage 17 Fulton Street, Newark,
N. J. 3 months interest on $15,000
@ 5% due June 15, 1937.....$187.50
Kindly acknowledge receipt and oblige.

Yours very truly,
DAVIDSON BROTHERS.

JD:ML

4. On June 28, 1937 a letter was received by William E. Sandmeyer, aforesaid, written on behalf of Davidson Brothers and signed by John Davidson. The following is a copy of the aforesaid letter:

June 28, 1937

William E. Sandmeyer, Esq.
Lefcourt Building
Newark, New Jersey

Re: 15-17 Fulton Street

Dear Mr. Sandmeyer:

We acknowledge receipt of your letter of June 24th with respect to the above property.

Affidavit of Florence Holt Wittpenn.

As you are probably aware we have been carrying this property ever since we have had it, at a sacrifice and loss, and as things are not very good with us we cannot at this moment discuss the question of amortization payments. We should be glad to take the same up with you within the space of the next sixty days or so.

Trusting this will meet with your approval, we are,

Sincerely yours,

DAVIDSON BROTHERS.

JD:ML (signed) John Davidson

5. At no time since the qualification of the complainants as executrices of the last will and testament of Della R. Holt, deceased has any claim been made and brought to my attention concerning any failure of consideration in the mortgages described in the bill of complaint or for any partial failure thereof or for any fraud or deceit concerning them or the conveyance to secure the purchase money of which the said mortgages were given. At the time in 1929 when the answering defendants purchased the premises covered by the mortgages described in the bill of complaint from Wilbur E. Holt, deceased, the said defendants were represented by counsel, the title to the premises purchased by them was examined and all of the facts concerning the title and the alleged easement was revealed to them at that time and they were in full possession of knowledge concerning the title purchased by them, they bought the properties and from that time in 1929 until the foreclosure proceedings in the foregoing suit in

equity was filed no complaint has ever been made either to Wilbur E. Holt, Della R. Holt or these complainants concerning any deceit, misrepresentation or failure of consideration in the original transaction. On the other hand, at all times since 1929 the defendants have paid interest on said mortgages without question and have always acknowledged the debts to secure which the mortgages described in the bill of complaint were given, and have never made claim to any defense for failure of consideration or fraud in the inducement of said mortgages.

6. By two deeds, both dated September 27, 1937 defendants James B. Davidson, John Davidson and Walter R. Davidson and their respective wives conveyed the premises covered by the mortgages described in the bill of complaint to Guardian Realty Corporation and in both conveyances the premises described in the respective deeds were conveyed to defendant Guardian Realty Corporation expressly subject to the liens of the mortgages described in the bill of complaint.

FLORENCE HOLT WITTPENN.

Sworn and subscribed to before me this 31st day of May, 1938.

JULIUS P. LITWACK,
An Attorney at Law of N. J.

Answering Affidavits.

(Filed June 20, 1938.)

Affidavit of James B. Davidson.

IN CHANCERY OF NEW JERSEY.

121–175.

Between

WINIFRED HOLT ACKERMAN AND FLORENCE HOLT WITTPENN, Executrices of the last will and testament of Della R. Holt, deceased,

Complainants,

and

JAMES B. DAVIDSON, *et als.*,

Defendants.

On Bill, Etc.

Answering Affidavits.

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

JAMES B. DAVIDSON, of full age, being duly sworn, according to law, upon his oath, deposes and says that:

1. I am a practicing dental surgeon of the State of New Jersey, and have been such for the past thirty years, and am one of the defendants in the above entitled cause.

2. The original negotiations covering the purchase of the premises sought to be foreclosed, under this action, were entered into by me, on behalf of myself and my brothers, John W. David-

son and Walter R. Davidson, also co-defendants in this action.

3. On or about the 12th day of March, 1929, the proposal to purchase the said premises was made to me by one Sidney Smith, a real estate broker, acting on behalf, and as agent, of Wilbur E. Holt, the owner of the premises herein concerned and the predecessor in ownership of the mortgages sought to be foreclosed.

4. He described the premises to me and represented to me that the strip of land, of approximately twenty feet, in width, which adjoined the premises involved to the westward, was an open public highway and alley and that the premises which he was offering for sale to me, on behalf of Wilbur E. Holt, enjoyed a perpetual right of way for egress, ingress and regress over the said premises, and that they enjoyed the right to have the same perpetually open for light, air and prospect.

5. He also pointed out to me the advantages which would enure and accrue to the said premises by reason of the said open public alley and by reason of the said right of way, etc., particularly specifying the fact that the adjoining premises had been purchased by the Fox theatre people for the purpose of erecting a large theatre on the premises, and that they would undoubtedly find it desirable to acquire these premises and the rights of egress, and ingress in the adjoining land.

6. He also pointed out to me that the existence of this public alley to the westward of these premises actually made this a corner piece of property with all of the advantages that accrue therefrom.

ourselves with respect to this right of way, we having assumed all along that these representations concerning the right of way and the existence of an open public alley, and that the land which we were buying was in fact a corner, were all true.

15. I hereby state that I fully believed the said representations made to me by Sidney Smith, on behalf of Wilbur E. Holt, and that I relied upon them in coming to the conclusion that I desired to purchase the aforesaid premises with my brothers and to pay the consideration therefor, and to make, execute and deliver the purchase money mortgages thereon.

16. Up to a comparatively short time ago I was always under the belief that this land was an open public alley and that the premises were in fact a corner. I did not learn that the said open strip of land was not in fact a public alley and that the adjoining premises did not enjoy a right of way over the same until I was informed of this fact sometime toward the end of last year by my brother, John W. Davidson, who advised me that he had been down to the tax office upon some tax question and discovered, much to his surprise, that the alley was not a public lane, and there were no rights of way or easements in favor of our premises over the adjoining strip of land.

17. The said premises without the rights of egress and ingress, air, light and prospect over the adjoining piece of land, and without being a corner are substantially reduced in value, and since the principal value represented by the premises involved is a land value, and since it is self-

evident that land upon a corner may be worth seventy-five or one hundred per cent more than would be a similarly situated inside piece, I feel that we are entitled to an offset against the mortgages involved by reason of the said misrepresentations.

18. I have read the affidavit filed by Florence Holt Wittpenn in this matter and I wish to state that at the time during which she says interest was regularly paid on the said mortgage I had no knowledge of the falsity of the representations made by Wilbur E. Holt, through his agent, Sidney Smith, and that no interest was paid on these mortgages after my discovery that the said statements were false.

19. I deny that the properties have been allowed to go without repairs and have greatly depreciated. As a matter of fact we have spent on this property, in maintenance, improvement and repair, the sum of $5,300.91, within the eight year period of our ownership of the same, as evidenced by our books, this figure being taken from an audit made of the same by I. M. Pogash, a certified public accountant, of the City of Newark, New Jersey.

JAMES B. DAVIDSON.

Sworn and subscribed to before me
this 20th day of June, 1938.

MEYER Q. KESSEL,
An Attorney at Law of New Jersey.

Affidavit of John W. Davidson.

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

JOHN W. DAVIDSON, of full age, being duly sworn, according to law, upon his oath, deposes and says that:

1. I am one of the defendants in the above entitled cause of action.

2. I purchased the premises involved in this case, together with my brothers, James B. Davidson and Walter R. Davidson, under the following circumstances. My brother, Doctor James B. Davidson, advised my brother Walter R. Davidson and me that the premises had been offered for sale to him on behalf of the owner Wilbur E. Holt, through an agent of the owner, whose name was Sidney Smith, and that we could probably buy the same for approximately $72,000, and that the premises involved constituted a corner at the junction of Fulton Street, Newark, and an adjoining open public alley. He further said that he had made an appointment for all of us to meet Mr. Smith at the premises the following morning. We kept that appointment, and there were present at the premises my two brothers, the said Sidney Smith and myself.

3. While we were there my brother stated, in the presence of all of us, that Mr. Smith had informed him that the open strip of land adjoining the premises involved, on the westerly side, was a public alley and would remain forever open, and that in any event the premises which he was offering for sale to us enjoyed a perpetual right of way

for egress and ingress to the said property and in addition thereto would remain forever open so as to permit the enjoyment of air and light on the westerly side of the premises. My brother Walter and I both questioned Mr. Smith with respect to these statements and he repeated them and informed us that they were true and that we could rely upon this. I asked him how he knew these statements to be true and he told me that the owner, Wilbur E. Holt, had told him so.

4. There was then a lot of conversation by Mr. Smith in which he pointed out the advantages of the property, laying particular stress upon the fact that it was a corner and that being a corner it would be very useful to the Fox theatre people who had acquired the premises to the rear and would undoubtedly some day wish to purchase this particular parcel to acquire the rights of egress and ingress that it enjoyed.

5. The alley in question was not fenced nor finished and there was nothing to indicate that it was not a public alley.

6. In coming to the conclusion that I wished to purchase these premises I absolutely relied on these statements made by the said Sidney Smith.

7. We then and there concluded an oral agreement with the said Sidney Smith to buy the said premises for the sum of $72,500, the purchase price to be made up as follows:

$10,000 by assuming a first mortgage on a portion of the premises

$12,000 by assuming another first mortgage on the balance of the premises

$5,000 represented by a second mortgage on part of the said premises
$15,000 to be paid in cash
$30,500 by two purchase money mortgages on the aforesaid premises, to the said Wilbur E. Holt.

8. It is these two mortgages that are the subject matter of the above suit.

9. We were informed by Mr. Smith that we had to take title and pay the purchase price within twenty-four hours or we would lose the premises. We told him that this appeared to us to be a very short time and that we would like more time to check on his statements, but he informed us that we could rely on the truth of everything that he had said; that these statements were true; and that we need not be concerned with respect to them.

10. In response to the urgings of the said Sidney Smith we arranged to close and did close the transaction within approximately twenty-four hours, and we paid the $15,000 in cash and made, executed and delivered the said purchase money mortgages of $30,500 in aggregate, one mortgage being for $15,000 and the other for $15,500; which mortgages are the identical ones that are attempted to be foreclosed in this action.

11. At the time of the closing of the said title there was no discussion between our counsel and ourselves with respect to this right of way, we having assumed all along that these representations concerning the right of way and the existence of an open public alley, and that the land

which we were buying was in fact a corner, were all true.

12. I hereby state that I fully believed the said representations made to me by Sidney Smith, on behalf of Wilbur E. Holt, and that I relied upon them in coming to the conclusion that I desired to purchase the aforesaid premises with my brothers and to pay the consideration therefor, and to make, execute and deliver the purchase money mortgages thereon.

13. Up to a comparatively short time ago I was always under the impression and belief that this land was an open public alley and that the premises we had bought were in fact a corner. I did not learn that said open strip of land was not in fact a public alley and that the adjoining premises did not enjoy right of way over the same until I had occasion to make some inquiry about tax assessments on the premises involved, and then learned from the municipal authorities in the City of Newark that the open land in fact was not an alley. I have since learned also from my counsel that these premises involved do not enjoy any easements or rights in the adjoining strip of land, and as a matter of fact the strip of land never was an open alley or lane and no easement existed over it in favor of the premises which we purchased.

14. The said premises without the rights of egress and ingress, air, light and prospect over the adjoining piece of land, and without being a corner are substantially reduced in value, and since the principal value represented by the premises involved is a land value, and since it is self-

evident that land upon a corner may be worth seventy-five or one hundred per cent more than would be a similarly situated inside piece, I feel that we are entitled to an off-set against the mortgages involved by reason of the said misrepresentations.

15. I have read the affidavit filed by Florence Holt Wittpenn in this matter and I wish to state that at the time during which she says interest was regularly paid on the said mortgage I had no knowledge of the falsity of the representations made by Wilbur E. Holt, through his agent, Sidney Smith, and that no interest was paid on these mortgages after my discovery that the said statements were false.

19. I deny that the properties have been allowed to go without repairs and have greatly depreciated. As a matter of fact we have spent on this property, in maintenance, improvement and repair, the sum of $5,300.91, within the eight year period of our ownership of the same, as evidenced by our books, this figure being taken from an audit made of the same by I. M. Pogash, a certified public accountant, of the City of Newark, New Jersey.

JOHN W. DAVIDSON.

Sworn and subscribed to before me
this 20th day of June, 1938.

I. B. ROSENGARTEN,
A Notary Public of New Jersey.

Affidavit of Walter R. Davidson.

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

WALTER R. DAVIDSON, of full age, being duly sworn, according to law, upon his oath, deposes and say that:

1. I am one of the defendants in the above entitled cause of action.

2. I purchased the premises involved in this cause, together with my brothers, James B. Davidson and John W. Davidson, under the following circumstances. My brother, Doctor James B. Davidson, advised my brother, John W. Davidson, and me that the premises had been offered for sale to him, on behalf of the owner Wilbur E. Holt, through an agent of the owner, whose name was Sidney Smith, and that we could probably buy the same for approximately $72,500, and that the premises involved constituted a corner at the junction of Fulton Street, Newark, and an adjoining open public alley. He further said that he had made an appointment for all of us to meet Mr. Smith at the premises the following morning. We kept that appointment, and there were present at the premises my two brothers, the said Sidney Smith and myself.

3. While we were there my brother stated, in the presence of all of us, that Mr. Smith had informed him that the open strip of land adjoining the premises involved, on the westerly side, was a public alley and would remain forever open, and that in any event the premises which he was offering for sale to us enjoyed a perpetual right of way

for egress and ingress to the said property and in addition thereto would remain forever open so as to permit the enjoyment of air and light on the westerly side of the premises. My brother John and I both questioned Mr. Smith with respect to these statements and he repeated them and informed us that they were true and that we could rely upon this. My brother, John Davidson, asked him how he knew these statements to be true and he told us that the owner Wilbur E. Holt, had told him so.

4. There was then a lot of conversation by Mr. Smith in which he pointed out the advantages of the property, laying particular stress upon the fact that it was a corner and that being a corner it would be very useful to the Fox theatre people who had acquired the premises to the rear and would undoubtedly some day wish to purchase this particular parcel to acquire the rights of egress and ingress that it enjoyed.

5. The alley in question was not fenced nor finished and there was nothing to indicate that it was not a public alley.

6. In coming to the conclusion that I wished to purchase these premises I absolutely relied on these statements made by the said Sidney Smith.

7. We then and there concluded an oral agreement with the said Sidney Smith to buy the said premises for the sum of $72,500, the purchase price to be made up as follows:

$10,000 by assuming a first mortgage on a portion of the premises

$12,000 by assuming another first mortgage on the balance of the premises
$5,000 represented by a second mortgage on part of the said premises
$15,000 to be paid in cash
$30,500 by two purchase money mortgages on the aforesaid premises, to the said Wilbur E. Holt.

8. It is these two mortgages that are the subject matter of the above suit.

9. We were informed by Mr. Smith that we had to take title and pay the purchase price within twenty-four hours or we would lose the premises. We told him that this appeared to us to be a very short time and that we would like more time to check on his statements, but he informed us that we could rely on the truth of everything that he had said; that these statements were true; and that we need not be concerned with respect to them.

10. In response to the urgings of the said Sidney Smith we arranged to close and did close the transaction within approximately twenty-four hours, and we paid the $15,000 in cash and made, executed and delivered the said purchase money mortgages of $30,500 in aggregate, one mortgage being for $15,000 and the other for $15,500; which mortgages are the identical ones that are attempted to be foreclosed in this action.

11. At the time of the closing of the said title there was no discussion between our counsel and ourselves with respect to this right of way, we having assumed all along that these representa-

tions concerning the right of way and the existence of an open public alley, and that the land which we were buying was in fact a corner, were all true.

12. I hereby state that I fully believed the said representation made to me by Sidney Smith, on behalf of Wilbur E. Holt, and that I relied upon them in coming to the conclusion that I desired to purchase the aforesaid premises with my brothers and to pay the consideration therefor, and to make, execute and deliver the purchase money mortgages thereon.

13. Up to a comparatively short time ago I was always under the belief that this land was an open public alley and that the premises were in fact a corner. I did not learn that the said open strip of land was not in fact a public alley and that the adjoining premises did not enjoy a right of way over the same until I was informed of this fact sometime toward the end of last year by my brother, John W. Davidson, who advised me that he had been down to the tax office upon some tax question and discovered, much to his surprise, that the alley was not a public lane, and there were no rights of way or easements in favor of our premises over the adjoining strip of land.

14. The said premises without the rights of egress and ingress, air, light and prospect over the adjoining piece of land, and without being a corner are substantially reduced in value, and since the principal value represented by the said premises involved is a land value, and since it is self-evident that land upon a corner may be worth seventy-five or one hundred per cent more than

would be a similarly situated inside piece, I feel that we are entitled to an off-set against the mortgages involved by reason of the said misrepresentations.

15. I have read the affidavit filed by Florence Holt Wittpenn in this matter and I wish to state that at the time during which she says interest was regularly paid on the said mortgage I had no knowledge of the falsity of the representations made by Wilbur E. Holt, through his agent, Sidney Smith, and that no interest was paid on these mortgages after my discovery that the said statements were false.

16. I deny that the properties have been allowed to go without repairs and have greatly depreciated. As a matter of fact we have spent on this property, in maintenance, improvement and repair, the sum of $5,300.91, within the eight year period of our ownership of the same, as evidenced by our books, this figure being taken from an audit made of the same by I. M. Pogash, a certified public accountant, of the City of Newark, New Jersey.

WALTER R. DAVIDSON.

Sworn and subscribed to before me this 20 day of June, 1938.

I. B. ROSENGARTEN,
A Notary Public of New Jersey.

Opinion of Vice-Chancellor.

COURT OF CHANCERY OF NEW JERSEY.

Chambers of
MAJA LEON BERRY
Vice-Chancellor

Toms River, N. J.
July 14, 1938.

Sandmeyer & Meisner
11 Commerce Street
Newark, N. J.

Braelow & Tepper
Industrial Office Building
1060 Broad Street
Newark, N. J.

Gentlemen:

I have examined the pleadings in *Ackerman, et als.* v. *Davidson, et al.*, and the affidavits submitted on the motion to strike the answer, and while there is no doubt in my mind but that the defense of fraud in the inception of a purchase money mortgage is a proper defense in a suit to foreclose it, I am of the opinion that the defense should be set up by way of counterclaim rather than by answer. Vice-Chancellor Stevens so held in Kuhnen *v.* Parker, 56 Equity 286, and that was the procedure adopted in Emery *v.* Hansen, 107 Equity 117. True, a breach of covenant against encumbrances was there involved and under Vice-Chancellor Stevens' decision the defense should have been by way of answer instead of by counterclaim, he making a distinction between defenses based upon breaches of covenant in a deed and fraud in the inception of the mortgage. In Emery

v. Hansen, the Court of Errors and Appeals approved of the consideration of the defense although advanced by way of counterclaim instead of answer "in view of liberalizing changes in the practice"; and if the instant case were before the Court on final hearing the defense of fraud pleaded by way of answer would be considered. However, as the matter is before the Court on a preliminary motion addressed to the answer itself I think that the portion of the answer setting up the defense of fraud should be stricken with leave to the complainant to amend by attaching to the answer a counterclaim including this defense.

Counsel for the complainant argues that the answer should be stricken because of the falsity of the allegations of fraud therein contained and because of the lack of authority of the agent who sold the property to the mortgagors to make any representations touching the existence of an easement or the existence of an alley abutting the property conveyed. The difficulty with this argument is that in the answer it is alleged that the representations which it is claimed were fraudulent were made by the grantor through his agent, and that those representations were false to the knowledge of the grantor at the time when made. On this motion the facts thus alleged must be taken as true unless contradicted by affidavit and there are no contradicting affidavits. It is true that the defendants' affidavits opposing the motion to strike state that the representations were made by the grantor's agent; and those affidavits do not disclose that the agent was other than a special agent, or had any authority to make the alleged representations. And assuming the condition of the property conveyed to have been as stated in

complainants' brief, and assuming the truth of the other facts therein stated which are not supported by affidavit, it would be a strain on the court's credulity to believe that the alleged misrepresentations were made. However, on a motion such as this, we must accept the pleadings as they stand and we cannot depend upon conjecture. On the authority of Curtis-Warner *v.* Thirkettle, 99 N. J. Eq. 806, affirmed 101 N. J. Equity 269, Emery *v.* Hansen, 107 N. J. Eq. 117, and cases therein cited, the motion to strike the answer, except as to the latter portion thereof, as hereinabove indicated, is denied. The latter portion of the answer will be stricken with leave to amend by adding a counterclaim as suggested.

In defendants' brief many of the cases are cited from the Atlantic Reporter, instead of the official reports. This is a violation of the Chancery Rules, and counsel for defendants is admonished to observe the rules in this respect hereafter.

Very truly yours,

MAJA LEON BERRY.

Order to Strike Portion of Answer with Leave to Amend.

IN CHANCERY OF NEW JERSEY.

121–175.

WINIFRED HOLT ACKERMAN and FLORENCE HOLT WITTPENN, Executrices of the Estate of Della R. Holt, deceased,
Complainants,

vs.

JAMES B. DAVIDSON, *et al.*,
Defendants.

On Bill, Etc.

Order to Strike Portion of Answer With Leave to Amend.

A motion having been made by complainants to strike certain portions of the answer of defendants James B. Davidson, John W. Davidson and Walter R. Davidson upon due and legal notice and the Court having considered the affidavits filed by the respective parties and the argument of the counsel and it appearing that the answer filed by the foregoing defendants is improper in part, but that defendants should have an opportunity to set up the affirmative matter therein contained by way of counterclaim, it is on this 11 day of October, 1938

ORDERED that paragraph 19 of the aforesaid answer filed herein, be and the same is hereby stricken out with leave to the defendants within twenty days from the date hereof to file in lieu thereof an amended answer and counterclaim, and it is further

ORDERED that the said complainants have ten days from the service upon them of a copy of the

said amended answer and counterclaim, within which to reply to said answer and answer said counterclaim or to take such other steps, with respect thereto, as they may be advised.

Respectfully advised,

MAJA LEON BERRY,
Vice-Chancellor.

LUTHER A. CAMPBELL,
Chancellor.

Notice of Appeal.

(Filed November 1, 1938.)

The defendants, James B. Davidson, John W. Davidson and Walter R. Davidson, hereby appeal from the interlocutory order made by the Chancellor on the advice of Vice-Chancellor Maja Leon Berry, on the 11th day of October, A. D., 1938, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated: October 31, 1938.

BRAELOW AND TEPPER,
Solicitors for and of Counsel with Defendants, James B. Davidson, John W. Davidson and Walter R. Davidson.

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

JOSEPH C. BRAELOW,
Of Counsel with Defendants.

Petition of Appeal.

(Filed November 19, 1938.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

WINIFRED HOLT ACKERMAN and FLORENCE HOLT WITTPENN, Executrices of the Estate of Della R. Holt, deceased, Complainants-Respondents, *vs.* JAMES B. DAVIDSON, JOHN W. DAVIDSON and WALTER R. DAVIDSON, Defendants-Appellants.	On Appeal From the Court of Chancery. Petition of Appeal.

To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes.

The Petition of James B. Davidson, John W. Davidson and Walter R. Davidson, the defendants-appellants in the above-entitled cause, respectfully shows that:

1. Petitioners find themselves aggrieved by an Interlocutory Order made in the Court of Chancery, by his Honor, Luther A. Campbell, Chancellor of the State of New Jersey, on the advice of his Honor, Maja Leon Berry, Vice-Chancellor, bearing date the 11th day of October, A. D., 1938, in a certain cause in said Court of Chancery, wherein the said Winifred Holt Ackerman and Florence Holt Wittpenn, Executrices of the Estate of Della R. Holt, deceased, were complain-

ants, and the said James B. Davidson, John W. Davidson and Walter R. Davidson, were defendants, in this respect, to wit: That the said Order adjudges "that paragraph 19 of the aforesaid answer filed herein, be and the same is hereby stricken out with leave to the defendants within twenty days from the date hereof to file in lieu thereof an amended answer and counterclaim," and "that the said complainants have ten days from the service upon them of a copy of the said amended answer and counterclaim, within which to reply to said answer and answer said counterclaim or to take such other steps, with respect thereto, as they may be advised."

2. And petitioners appeal from the Order of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that:

a. The Court erred in striking paragraph 19 of the Answer of the defendants-appellants, James B. Davidson, John W. Davidson and Walter R. Davidson.

b. The Court erred in denying to the defendants-appellants the right to set up the matter contained in paragraph 19 of the Answer of the defendants, James B. Davidson, John W. Davidson and Walter R. Davidson, by means of an Answer.

c. The Court erred in denying to the defendants-appellants the right to set up by way of Answer the defense of fraud.

d. The Court erred in permitting the defendants-appellants to raise the question of fraud only by means of counterclaim.

e. The Court erred in denying to the defendants-appellants, James B. Davidson, John W. Davidson and Walter R. Davidson, the right to raise by Answer the defense of fraud, although the Court permitted these defendants-appellants to raise the same matter by means of counterclaim.

Petitioners therefore pray that the said Order of the said Chancellor may be, in the particulars aforesaid, reversed, set-aside and for nothing holden, and that petitioners may have such other relief in the premises as to this Court shall seem proper.

BRAELOW AND TEPPER,
Solicitors of Defendants-Appellants,
James B. Davidson, John W. Davidson
and Walter R. Davidson.

JOSEPH C. BRAELOW,
Of Counsel.

Service of a copy of the within Petition of Appeal is hereby acknowledged this 18th day of November, 1938.

SANDMEYER & MEISNER,
Solicitors of Complainants-Respondents.

New Jersey Court of Errors and Appeals

WINIFRED HOLT ACKERMAN and FLORENCE HOLT WITTPENN, Executrices of the Estate of Della R. Holt, deceased, Complainants-Respondents, *vs.* JAMES B. DAVIDSON, JOHN W. DAVIDSON and WALTER R. DAVIDSON, Defendants-Appellants.	On Appeal from the Court of Chancery.

BRIEF OF DEFENDANTS-APPELLANTS.

(Figures in parenthesis refer to pages of the State of the Case.)

Facts.

James B. Davidson, John W. Davidson and Walter R. Davidson, the defendants-appellants herein, purchased from Wilbur E. Holt two parcels of land located in the City of Newark. In partial payment thereof, they executed two purchase money mortgages which are the subject matter of the present foreclosure proceedings.

Wilbur E. Holt died testate and his executors assigned the mortgages to Della R. Holt. Della R. Holt died and her executrices are the complainants-respondents here.

The three Davidsons conveyed the property to Guardian Realty Company, who now owns the same and who is not participating in this appeal.

After certain alleged defaults in the terms of the mortgages, complainants filed the bill of fore-

closure herein and joined the three Davidsons, the appellants herein, as parties, presumably to charge them with liability on the bonds accompanying the mortgages aforementioned, in accordance with the provisions of R. S. 2:65-2. (1-8.) The Davidsons filed answer (9-12) alleging that Wilbur E. Holt, the original owner, by agent, knowingly made false representations as to the existence of a public highway adjoining the conveyed premises, and that the false representations were made to induce the Davidsons to purchase the property and execute the mortgages to their great damage.

A motion to strike the answer of the Davidsons (13-14) was made and the Court of Chancery entered an order (39-40) striking the portion of the answer alleging fraudulent representations, but permitting the Davidsons to set up the same material by way of counterclaim. From this order the Davidsons prosecute this appeal.

ARGUMENT.

The portion of the answer alleging fraudulent representations should not have been struck out.

There is clearly no privity of any kind between the Davidsons, the appellants herein, and the complainants, and for that reason it is submitted that it would be improper for the Davidsons to file an affirmative counterclaim against the complainants-respondents.

It is fundamental law, and is recognized in the 72d, 73d and 74th Chancery Rules that an affirmative right must exist against a person in order to file a counterclaim against said person.

There is a very long line of cases in New Jersey dealing with the right of a defendant purchase money mortgagor, to set up fraud by way of abatement of the claim of a purchase money mortgagee, or his assignee.

It is submitted that this court has on occasions said that the right way to set up this is by way of counterclaim, and on other occasions by way of answer. Frankly, these defendants-appellants are not certain as to which remedy should be pursued. They feel that not being in privity with complainants-respondents, they cannot maintain an affirmative counterclaim against said complainants-respondents.

It is submitted that this Court has, in more recent times under the liberalized practice, permitted defendants to elect their procedure. These defendants-appellants fear that if they should conform to the order of the Chancellor requiring them to pursue the method of counterclaim in lieu of the method of answer, this Court might, in the meantime, once and for all, settle the practice as proceeding by answer; and these defendants-appellants, therefore, consider themselves obliged, for their protection, to appeal for a final determination on this issue. To a certain extent, these defendants-appellants are performing a service to the legal profession, as it is hoped that this appeal will finally dispose of the proper procedure to be followed in this type of case.

All defendants to a foreclosure procedure are forever bound as to the amount of the debt by the decree therein. The cases are collected in *Usbe Building and Loan Association* v. *Ocean Pier Realty,* Chancery, 1933, 112 N. J. E. 580, 165 Atl. 580. It is therefore essential that the Davidsons get their proper credit in these proceedings, as they cannot get it elsewhere.

Early cases that indicate that the procedure is by way of counterclaim are *Miller* v. *Gregory,* Chancery, 1863, 16 N. J. E. 274, (purchase money mortgage case, not original mortgage parties); *Graham* v. *Berryman,* Chancery, 1868, 19 N. J. E. 29, (reversed on other grounds—not purchase money mortgage case but involving original mortgage parties).

The next case is often cited, *O'Brien* v. *Hulfish,* E. & A. 1871, 22 N. J. E. 471 (original parties to the mortgage involved). *O'Brien* v. *Hulfish* seems to be the basic case on the counterclaim procedure. It is to be noted there that this Court stated:

> "* * * And it may consequently be a subject for consideration whether the rule of pleading requiring a cross-bill may not in many instances be advantageously relaxed."

(Counterclaim is now substituted for cross-bill.)

Parker v. *Jameson,* Chancery, 1880, 32 N. J. E. 222, and *Parker* v. *Hartt,* Chancery, 1880, 32 N. J. E. 225, involved a receiver of one of the original parties and were not purchase money mortgage cases. These two cases should not therefore be conclusive authority for the counterclaim procedure.

Chronologically, next come *Dayton* v. *Melick,* Chancery, 1880, 27 N. J. E. 362; Chancery, 1880, 32 N. J. E. 570; *Melick* v. *Dayton,* E. & A. 1881, 34 N. J. E. 245. This case was followed by *McMichael* v. *Webster,* E. & A. 1898, 57 N. J. E. 295, 41 Atl. 714. The *Melick* v. *Dayton* case and the *McMichael* case are flat authorities that the proper way to raise the type of fraud issue involved in the present proceedings is by way of answer, even when the original mortgage parties are involved.

It is stated in the *McMichael* case as follows:

> "In 1871 exceptions to an answer, interposed to a bill for the foreclosure of a purchase-money mortgage, setting up fraudulent representations as to the quantity of title conveyed, were sustained by the chancellor on the ground that such a defense required a cross bill. His action was affirmed in this court. O'Brien *v.* Hulfish, 22 N. J. E. 471. In the opinion of Chief Justice Beasley it was pointed out that, in accord with the strict rules of equity practice, relief in respect to such fraud could only be obtained by an original or cross bill. But as the reason for that practice was that without such a bill the mortgagee was deprived of the benefit of his answer to the charges of fraud, and as the utility of a bill in that respect had been lessened since the passage of the then recent statute authorizing a complainant to waive the verification of an answer by defendant, he suggested that the court of chancery might dispense with a cross bill, and establish a practice of setting up such a defense by answer alone. Afterwards, in 1876, the question came again before the court of chancery upon exceptions to an answer filed to a bill to foreclose a purchase-money mortgage, which set up as a defense a fraudulent representation of the quantity of land agreed to be conveyed. Chancellor Runyon, adverting to the fact that the practice of the court permitted a complainant in a cross bill to call for an answer without oath, and so deprive the complainant in the original bill of any benefit of an answer upon oath, and the further fact that the right to any such deduction could be tried on the answer alone without any prejudice to the complainant, applied the maxim, "*Cessante ratione legis, cessat et ipsa lex,*" and overruled the exceptions. "Dayton *v.* Melick, 27 N. J. E. 362. Upon final hearing of that cause a decree was made for the mortgagee, not for the amount of his mortgage, but for an amount diminished by a deduction representing the difference between

> the quantity of land actually conveyed and that which the purchaser had been induced to believe he would acquire by his purchase, by reason of fraudulent misrepresentations of the seller. Dayton *v.* Melick, 32 N. J. E. 570. That decree was brought to this court by appeal, and two questions were thereby raised: (1) Whether such a defense was properly presented by answer without cross bill; and (2) Whether the proofs established the defense. The decree was reversed, but solely upon the ground that the evidence was insufficient to establish the fact that fraudulent representations had been made. *The practice of permitting a defense of that sort to be interposed by answer alone was expressly approved. Melick* v. *Dayton,* 34 N. J. E. 245. *That practice must be considered as setlled."* (Italics ours.)

Since *Dayton* v. *Melick* and *McMichael* v. *Webster* are cases involving the original mortgage parties, it is strongly urged if answer is permitted as a procedure on the part of the defendant alleging fraud in those cases, it should be permitted in the present case where the defendants are alleging fraud against complainants who were not privy to the mortgages and against whom the mortgagors cannot therefore assert the right to affirmative relief.

In later cases involving the point under review, a counterclaim has been used but in each case its use is understandable. We say that in these later cases since the defendant chose to use the counterclaim proceeding this court has allowed it on the strength of *O'Brien* v. *Hulfish, supra,* without citing the contrary cases of *McMichael* v. *Webster,* and *Dayton* v. *Melick, supra.*

In *Hawthorne* v. *Odenson,* Chancery 1923, 94 N. J. E. 588, 120 Atl. 797, between original parties, the defendant sought the affirmative relief of rescission, which obviously can only be obtained by counterclaim.

In *Curtis-Warner Corporation* v. *Thirkettle*, Chancery, 1926, 99 N. J. E. 806, 134 Atl. 299; affirmed E. & A. 1927, 101 N. J. E. 269, 137 Atl. 408, the defendants raised the fraud question by counterclaim. As to this, we state that an examination by counsel of the briefs of both parties indicate that the procedural question of counterclaim or answer was not in any wise raised. Both parties were apparently satisfied to try the issue on the merits. In addition to this, it is submitted that the learned Vice-Chancellor appreciated the difficulty of permitting a defendant to bring an affirmative action against the mortgagee's assignee with whom he had no privity. This is clear when observing the following from the decision:

> "The present suit is instituted by the assignee of the Philmar Construction Company. The Philmar Construction Company now being out of existence, the complainant has taken over, at least to a large extent, the assets of the mortgagee. Mr. Goldfarb, who was the person most interested in the Philmar Construction Company, is also an officer and stockholder in the complainant company. He had full knowledge of the whole transaction of which this mortgage was a part, and that knowledge will be imputed to the complainant assignee."

Since the procedural point was not raised, the learned Vice-Chancellor was not required to do more than superficially relieve the difficulty that seemed to present itself to his own inquiring mind.

The last important decision of this court involving the situation under review is in *Mortgage & Investment Co.* v. *Romel Realty Co..*, E. & A. 1930, 106 N. J. E. 185, 150 Atl. 424. There the defendant alleged fraud by way of answer and

counterclaim and although from a reading of the case there seems to have been no attack on this procedure, yet this court makes the statement that the proper procedure is:

> "Such a claim may not be asserted as a matter of practice, by way of answer, but may be asserted by cross bill, or under our present practice, by counterclaim,"
>
> Citing *O'Brien* v. *Hulfish, supra.*

A consideration of the last cited case with that of *Dayton* v. *Melick, and McMichael* v. *Webster,* leads us to the inescapable conclusion that this court will in a properly presented matter sustain the proceeding either by counterclaim or by answer. Where a counterclaim has been used it will be sustained by *O'Brien* v. *Hulfish, supra,* and no later case seems to have been tried where the defendant proceeded by answer, in reliance on the unreversed *McMichael* v. *Webster* case.

It is interesting to note that in *Corson* v. *Bailey,* E. & A. 1925, 98 N. J. E. 323, 129 Atl. 145, (between original parties) the defendant set up fraud by way of answer, but the court below found there was in fact no fraud. The procedural point as to the use of the answer was not discussed in the opinion. A counterclaim on another point entirely was found defective.

The same confusion has found its way into our present hand-book on Chancery procedure. In *Kocher & Trier, New Jersey Chancery Practice and Precedents (1924)* in Vol. I, at page 162 appears a form entitled "Answer Alleging Fraud". This answer is an answer of a defendant to a mortgage foreclosure and the separate defense set up is that the defendant was induced to execute the purchase money mortgage and buy the lands, because the complainant mortgagee fraudulently represented that the land contained a cer-

tain number of acres, when, in fact, it did not. Yet, these same authors set forth on page 508 in the same valume that such abatement material indicated above should be set forth by counterclaim, citing *Graham* v. *Berryman, Parker* v. *Jameson* and *Parker* v. *Hartt, supra,* which were prior to the case of *McMichael* v. *Webster.*

The law has been settled in this State that a defendant should set up by way of answer against a foreclosure of a purchase money mortgage, a breach of a covenant against encumbrances as indicated by the case of *Kuhnen* v. *Parker,* Chancery, 1897, 56 N. J. E. 286; 38 Atl. 641. Yet, in the case of *Emery* v. *Hansen,* E. & A. 1930, 107 N. J. E. 117, 151 Atl. 731, it is shown that a counterclaim procedure may also be used, in the case of a covenant against encumbrances.

This Court, permitting relief upon the counterclaim, said:

> "In the present litigation the Vice-Chancellor, properly, in view of the liberalizing changes in the practice, dealt with the claim of damages, on its merits as though properly presented by counterclaim, and we have done the same."

Thus it may be seen that in the case of a breach of covenant against encumbrances where a purchase money mortgage is involved, just as in a case of fraud, there seems to be permitted an optional method of procedure which places the defendant at his election.

In conclusion we respectfully urge that this Court finally resolve that the procedure in this type of case, wherein there is no privity between the complainants and defendants, should be that the defendants be permitted to set up their charge of fraud by way of answer. In any event, they should be allowed to set up their defense by way

of answer in a case where they are only joined as proper parties in a foreclosure proceeding in order to ultimately hold them liable on a deficiency action. Certainly, we respectfully submit that should the Court determine we have elected the wrong procedure, we be permitted to proceed under our answer, inasmuch as no substantial harm could be done to the complainant.

Respectfully submitted,

BRAELOW and TEPPER,
Solicitors for and of Counsel
with Defendant-Appellants.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.
(1201)

New Jersey Court of Errors and Appeals

WINIFRED HOLT ACKERMAN and FLORENCE HOLT WITTPENN, Executrices of the Estate of Della R. Holt, deceased, Complainants-Respondents, *vs.* JAMES B. DAVIDSON, JOHN W. DAVIDSON and WALTER R. DAVIDSON, Defendants-Appellants.	On Appeal from the Court of Chancery.

BRIEF OF COMPLAINANTS-RESPONDENTS.

Facts.

It was in March, 1929, that defendants, James F. Davidson, John W. Davidson and Walter R. Davidson, purchased two parcels of land on Fulton Street, Newark, New Jersey, from Wilbur E. Holt. As a part of the consideration for the conveyances, the said defendants executed two purchase money mortgages.

These mortgages were and still are second mortgages, subject to first mortgages amounting to $22,000.

On December 22nd, 1929, Wilbur E. Holt died testate. In December, 1931, the executors of the estate of Wilbur E. Holt, deceased, assigned the

mortgages in question, to Wilbur E. Holt's widow, Della R. Holt.

In March, 1937, Della R. Holt died testate, and the complainants in the present foreclosure suit are the executors of her estate.

Since March, 1929, the three Davidsons were in complete and exclusive possession and control of the mortgaged premises until the sale of said premises.

After the aforesaid mortgages were in default, on September 27th, 1937, the three Davidsons conveyed the two parcels of land in question to defendant, Guardian Realty Corporation. By the terms of the conveyances, the Guardian Realty Corporation assumed payment of the aforesaid second mortgages and the first mortgages in full.

This suit was brought to foreclose the two second mortgages aforesaid. No answer was filed by Guardian Realty Corporation, or any of the defendants, except the Davidsons, and decrees Pro Confesso were entered against all other defendants.

The answer of the Davidsons is unique in the fact that instead of denying the essential allegations of the bill of complaint and praying to be hence dismissed by the court, the answer in paragraph 19, alleges that Wilbur E. Holt, by his agent, Sidney S. Smith, in 1929 knowingly made false representations concerning the existence of a public highway adjoining the conveyed premises, and that the false representations (knowingly) were made to induce the Davidsons to purchase the property and execute the mortgages. There is no allegation in the answer, of damage to the answering defendants by reason of the false representations, or that

the land purchased under the alleged inducement of the alleged false representations, was worth less than it would have been had the representations been true, and the answer concludes without any prayer for relief of any character whatsoever.

A motion to strike the answer was made and the court below made an order striking out paragraph 19 of the answer but expressly granting to defendants, leave within twenty days, to file an amended answer and counter-claim.

Argument.

I.

The order appealed from was made in the course of the proper and orderly administration of the Court of Chancery and should be affirmed.

There is no valid reason for the defendants to insist upon pleading their alleged defense, to the mortgages in question, by way of answer alone. They claim the mortgages were induced by fraud. The only equitable result of a complete proof of the charge would be a determination of the extent to which the amounts secured by the mortgages should be reduced.

The court below has decided that, for its purposes in this particular suit, that defense should be pleaded by way of counter-claim and gave defendants ample and generous opportunity to plead that defense by ordering that an amended answer and counter-claim should be filed within twenty days.

It was held by this court in *O'Brien* v. *Hulfish,* 22 N. J. Eq. 471 at page 477 that "the question of enforcing the rules of equity pleading is one which appeals for solution to the Chancery Court alone, for a decision of that court, holding the parties to an observance of the established rules of pleading, cannot, certainly, with any propriety, be called in question here."

Defendants cannot be harmed by the order complained of in this appeal. They discuss (very briefly) lack of privity between themselves and the complainants. But the lack of privity does not affect their alleged defense to the mortgages. If defendants have any defense against the mortgages in question for fraud or otherwise, it matters not that the original mortgagee died and that the present holders came into possession by assignment.

It is well settled that an assignee of a mortgage takes it subject to the mortgagor's equities whether they are open or secret. *Tallman* v. *Walleck,* 54 N. J. Eq. 655.

In *Robeson* v. *Robeson* (E. and A.), 50 N. J. Eq. 465, the opinion of the court below was adopted completely. In that opinion, Vice Chancellor Pitney said on page 466:

> "It is also a well established rule that the assignee of a mortgage, taken years after it has become due, takes it subject to all equities existing between the mortgagor and mortgagee."

And see *Voorhees* v. *Nixon,* 72 N. J. Eq. 791 affirmed 73 N. J. Eq. 673; *Riley* v. *Hopkinson,*

82 N. J. Eq., 469; *Feinberg* v. *Rowan,* 111 N. J. Eq. 138; *Sabatino* v. *D'Aloise,* 107 N. J. Eq. 426; *Davenport* v. *O'Connell,* 117 N. J. Eq. 454 and the last case in this court, *Henion* v. *Monahan,* 110 N. J. Eq. 361 at 363 where Justice Bodine reviewed and collected the cases. And see Revised Statutes 46:9-9.

The 72nd, 73rd, and 74th rules of the Court of Chancery, cited in appellant's brief, do not require that an affirmative right exist before a counter-claim may be used. The 72nd rule provides that any matter, being the proper subject of a cross-bill under the existing practice, may be set up by counter-claim. It always has been the established practice in New Jersey to permit such defenses as claimed by defendants to be pleaded by cross-bill or cross action. The cases on that point are discussed in Point II hereof.

But assume that defendants' fears, as set forth in their brief, were fully realized sometime in the course of this litigation. They would not thereby be deprived of any just and equitable defense. For the court would treat the counter-claim as an answer or a part of the answer or their pleadings would be amended, upon the application at any stage of the proceedings either in Chancery or here on appeal. That was the result reached in the *O'Brien* case, *supra,* in 1871.

II.

Affirmative relief cannot be prayed in a simple answer.

In the suit at bar, the foreclosure bill claims the money secured by the mortgages. The answer of the present defendants declares that they were deluded into making the mortgages and to taking title to the land covered thereby, by the misrepresentations of a real estate agent with whom William E. Holt had listed his property for sale, and while the answer contains no prayers for relief, it is assumed that the effect thereof is to pray that the bill of complaint be dismissed without the payments of money due or claimed to be due on the mortgages, since the defense is pleaded by way of answer. If the effect of the fraud would be to dispense with the payment of all the money named in the mortgages, then the answer, amended to include an appropriate prayer, would be proper, but this does not follow from the fact of fraud, if fraud is proved. The defendants herein, since they are not in a position to rescind the transaction, must seek to have damages assessed or must seek other relief as the circumstances require and this cannot be done by imposing a mere defense to the demand for money. It can be done only by praying the court for affirmative relief. It is obvious, granting everything else, that the pleading is improper. See *O'Brien* v. *Hulfish,* 22 N. J. Eq. 471 and the same case at 475, where Chief Justice Mercer Beasley said:

> "The defendant, as he is not in a situation to rescind the contract, must seek to have

> his damages assessed, and such other relief as the circumstances may require; and this would not be imposing a mere defense to the complainant's demand of the money, but would be asking affirmative relief."

In the suit *sub judice,* the defendants, not being in a position to rescind, must seek to have damages assessed. This is not a pure defense. It is a relief of an affirmative character, and not within the true province of a simple answer.

In *Jacobson* v. *Gasko,* 8 N. J. Misc. 785, Vice Chancellor Backes said:

> "The answering defendant seeks affirmative relief, either to rescind the transaction or to reform the deed for fraud, which can be had only by counter-claim."

In *Parker* v. *Hartt,* 32 N. J. Eq. 225, affirmed 32 N. J. Eq. 844, Vice Chancellor Van Fleet said (at p. 228):

> "* * * if the first ground of the defense were fully proved, I think it would be of no advantage to the defendant in the present condition of the pleadings. He is here by answer alone. I think I am bound to consider the rule firmly established, that to enable a defendant to avail himself of the defense of fraud in the consideration of a mortgage, which does not go to the extent of a complete nullification of the instrument, and does not therefore entitle him to a judgment of dismissal, he must have recourse to a cross-bill. He cannot make it by simple answer."

In *Mortgage and Investment Company of New Jersey* v. *Romel Realty Company,* 106 N. J. Eq.,

page 185, Justice Parker in speaking for the Court of Errors and Appeals (it was Justice Parker, who wrote the opinion for the same court in *Melick* v. *Dayton,* 34 N. J. Eq.) said, at page 190:

> "The law is, of course, settled that a right to rescind for fraud or misrepresentation must be exercised promptly * * * the defendant stands on the conveyance, and claims damages, not on any covenant against encumbrances therein contained * * * but because of alleged misrepresentation preceding and inducing the purchase. Such a claim may not be asserted, as a matter of practice, by way of answer, but may be asserted by cross-bill, or under our present practice, by counter-claim."

In *Emery* v. *Hansen,* 107 N. J. Equity page 117, Justice Parker again writing the opinion for the Court of Errors and Appeals, said at page 122:

> "There may be a technical question of pleading, as to whether the claim for deduction may be set up as a counterclaim, as it is in this case, or should be pleaded by way of answer, as Vice-Chancellor Stevens held in *Kuhnen* v. *Parker, supra.* In *O'Brien* v. *Hulfish, supra,* the decree was affirmed on technical grounds for want of a cross bill, but without prejudice to readjustment of the chancery record to reach the merits of the case. In the present litigation, the vice-chancellor, properly in view of liberalizing changes in the practice, dealt with the claim of damages on its merits *as though properly presented by counter-claim, and we have done the same.*" (Italics ours.)

In *Green* v. *Stone,* 54 N. J. Equity 387, Justice Depue, speaking for the Court of Errors and Appeals said:

> "On a bill filed by a mortgagee to enforce the assumption of the mortgage debt by the grantee of the mortgagor, the defence that the assumption clause was improperly inserted in the deed *should be made by a cross bill,* and the grantor, or his personal representatives in case of his death should be made parties to such cross bill." (Italics ours.)

Huff v. *Burd,* 17 N. J. E. 201;
Vanderveer v. *Holcomb,* 17 N. J. E. 530;
French v. *Griffin,* 18 N. J. E. 279, 281;
Scott v. *Lalor's Executors,* 18 N. J. E. 301;
Parker v. *Jameson,* 32 N. J. E. 222;
De Witt v. *Brands,* 44 N. J. E. 545;
Reversed Brands v. *De Witt,* 44 N. J. E. 545;
Tallman v. *Wallack* (*E. & A.*), 54 N. J. E. 655;
Sun B. & L. Association v. *Gross,* 110 N. J. E. 179.

We think it is clear from the decisions in this State that the function of an answer is to meet the charges of the bill of complaint it answers. It is settled beyond question, that where the defendant seeks any affirmative relief, in addition to meeting the charges of the Bill, he must go beyond his answer before he will be permitted to pray such relief. It was so held in the case of *Pettit* v. *Port Newark National Bank of Newark,* 110 N. J. E. 324, wherein Vice Chan-

cellor Backes, following *Doremus* v. *Paterson,* 70 N. J. E. 296, affirmed 71 N. J. E. 789, said:

> "A counterclaim or cross bill is brought either (1) to obtain a discovery of facts in aid of the defense to the original bill, or (2) to obtain full relief to all parties touching the matters of the original bill."

Also *Hackensack Trust Company* v. *Kelly,* 118 N. J. E. 586, affirmed 120 N. J. E. 596.

The Court of Chancery has held that a charge is inappropriate in an answer, and if the defendant wishes to put in issue the matter charged, it must be alleged in some other way. *Baldwin* v. *Buckminister,* 6 N. J. L. J. 54.

It has held that a defendant cannot pray anything in his answer, but to be dismissed by the court, *Miller* v. *Gregory,* 16 N. J. E. 274, and *Graham* v. *Berryman,* 19 N. J. E. 29.

The authors of New Jersey Chancery Practice and Precedents, Volume 1, Section 271 (Kocher and Trier) say:

> "A defendant cannot in his answer pray any affirmative relief; if he wishes to seek relief against the complainant, he must do so by counterclaim."

Again in Section 294:

> "A defendant cannot in his answer pray anything but to be dismissed by the court. If he has any relief to pray or discovery to seek against the complainant, he must do so by cross bill" (citing cases).

And again in Section 195:

> "In a suit in Equity, defendant cannot obtain affirmative relief unless he files a cross-bill for that purpose" (and see Section 196).

The editor of the title "Equity" in 10 R. C. L. (p. 447) says:

> "The prayer of the answerer should be that the defendant be dismissed with his costs. If he seeks any other affirmative relief whatever, he must file a cross bill."

In the case at bar, the charge asserted in paragraph 19 of the answer, does not constitute an equitable defense against the complainant's demand. The effect of its establishment would not necessarily result in the defendants being dismissed by the court. It is rather a charge or demand upon which may be based a prayer for the affirmative action of a court of conscience and has no place in a pleading which is limited to matters of pure defense.

Defendants contend that since the decisions in *Melick* v. *Dayton,* 34 N. J. E. 245 and *McMichael* v. *Webster,* 57 N. J. E. 295, this court is committed to a rule permitting, in a foreclosure suit, the pleading of fraud, as a ground for reducing the mortgage debt, either by simple answer or by counterclaim at the pleasure of the pleader. Complainants contend this is not the rule for two reasons.

In the first place, the decision in the *Melick* case, *supra,* resulted from an appeal from a decree entered by Chancellor Runyon (*Dayton* v. *Melick,* 27 N. J. E. 362) in a suit to foreclose

a mortgage. Defendant therein, in his answer, admitted making the mortgage but claimed credit for certain payments alleged to have been made, and abatement of the sum secured because he claimed he bought the land at a certain sum per acre and paid more than he should have because complainant represented the land to be larger in area than it actually was. Both claims by defendant were for liquidated amounts. Objection to the answer was overruled by the Chancellor who held that in that particular case, no harm or injustice would result if the issues were tried on bill and answer.

The Court of Chancery having decided the question of equity practice, it was not a matter for this court to reverse. Justice Parker, speaking for this court, was careful to limit the effect of his statement concurring in the order of the Chancellor. At page 249 he said:

> "* * * There is no doubt that the question of *abatement* can be raised by a mortgagor, by answer in foreclosure proceedings, *and under certain states of facts,* deduction from the mortgage will be ordered to the extent of the value of the deficiency." (Italics ours.)

In the *McMichael* case, *supra,* Chief Justice Magie reasoned from *O'Brien* v. *Hulfish, supra,* that it was well established that since the statute authorizing complainant to waive answer under oath, the necessity for cross bill in many instances was gone and suggested that Chancery might, by reason of the foregoing, consider the abolishment of the practice of filing cross bills, and allow such material to be pleaded by answer alone. The Chief Justice concluded that

after *O'Brien* v. *Hulfish, supra,* the Court of Chancery had actually adopted such new practice and the practice had been approved by this court, citing *Dayton* v. *Melick, supra,* and *Melick* v. *Dayton, supra.* Whether or not the Court of Chancery actually did adopt the practice of allowing answers to serve the dual function of defense and cross action, it cannot be said that such change was continued for long. The Court of Chancery, after the *McMichael* case was decided, went back to the old practice, as is abundantly evidenced by the cases cited previously herein.

The Court of Chancery having adopted the practice of requiring cross bills or counterclaims, and in the case *sub judice* ordering that a counterclaim be filed, it is our belief that this court should not reverse the order under review.

In the second place, if it be a fact that this court is committed to a rule allowing a defendant to ask affirmative relief either in a counterclaim or an answer, nevertheless, that rule has no bearing in this appeal. The enforcement of the rules of Equity Pleading, so this court held in *O'Brien* v. *Hulfish, supra,* is solely the province of the Court of Chancery and that court having acted and having enforced those rules by ordering a counterclaim, this Court should not reverse.

If the present pleadings were allowed to stand, would complainants be safe in joining issue with the answer?

The answer does not inform them of anything save the bare facts of the alleged misrepresentation. The answer contains no prayer for relief. Confronted with that allegation, shall complain-

ants prepare to meet a demand for cancellation of the mortgages or a reduction of the amounts secured thereby and if so, to what extent?

Complainants are entitled, before going to trial, to know what it is that defendants seek, what form of relief they pray and in what manner, if any, they were damaged by the alleged misrepresentation, and to what extent.

Defendants' answer does not do this. It is a mere statement of alleged facts without prayer for any kind of relief.

It is respectfully urged that the order appealed from be sustained and that complainants be allowed their costs and complainants' counsel fee on this appeal.

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