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Notice of Appeal.

In Chancery of New Jersey.

79-376

Between

ARTHUR KRAUS,

Complainant,

and

HERMAN F. G. HARTUNG, *et als.*,

Defendants.

On Bill, etc.

Notice of
Appeal.

10

To: MESSRS. HOOD, LAFFERTY & CAMPBELL,
Solicitors for Defendant, Fidelity Union
Trust Company, Trustee, and

MESSRS. McCARTER & ENGLISH,
Solicitors for Defendant, Empire Bond
and Mortgage Corporation.

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Gentlemen:

PLEASE TAKE NOTICE that the complainant,
Arthur Kraus, appeals to the Court of Errors and
Appeals from such parts of a decree made on the
27th day of July, 1931, by the Chancellor upon the
advice of the Honorable Vivian Lewis, Vice-Chan-
cellor, which decrees that the Bill of Complaint in
the above entitled cause be dismissed as against
the defendants, Fidelity Union Trust Company,
Trustee, and Empire Bond and Mortgage Corpora-
tion and also from such part of said decree which
orders that a counsel fee in the sum of Two Hun-
dred (\$200.00) Dollars be allowed to each of the

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Notice of Appeal.

solicitors of the defendant, Fidelity Union Trust Company, Trustee, and Empire Bond and Mortgage Corporation and to be paid by complainant.

Dated: August 21st, 1931.

SAMUEL KOESTLER,
Solicitor for and of Counsel
with Complainant.

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

SAMUEL KOESTLER,
Of Counsel with Complainant.

Petition of Appeal.

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

ARTHUR KRAUS,
Complainant-Appellant,

and

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HERMAN F. G. HARTUNG, *et als.*,
Defendants-Respondents.

On Appeal from Chancery

Petition of Appeal.

*To the Honorable The Court of Errors and Appeals
in the Last Resort in All Causes:*

40 The petition of Arthur Kraus, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by a certain decree made in the Court of Chancery by his Hon-

Petition of Appeal.

or, Edwin Robert Walker, Chancellor of the State of New Jersey, upon the advice of Honorable Vivian Lewis, Vice-Chancellor, bearing date the twenty-seventh day of July, 1931, in the cause wherein the said Arthur Kraus is complainant and Herman F. G. Hartung, *et al.*, are defendants 79-376, in this respect, to wit: That the said decree ad- 10
judges that complainant's bill of complaint be dismissed as against the defendants, Fidelity Union Trust Company, trustee, and Empire Bond and Mortgage Corporation, and also orders that complainant pay to each of said defendants their costs of suit, including a counsel fee of \$200.00. And your petitioner humbly appeals from those parts of said decree and order of the Chancellor which decree and order as aforesaid, upon the ground that 20
the same are erroneous, for that said defendants were and are properly made defendants to said bill of complaint, and that said bill of complaint should not be dismissed as against said defendants, but said defendants should have been decreed to make discovery as prayed by said complainant's bill, and that said order and decree should not have awarded costs and counsel fee to said defendants. Your petitioner therefore prays that the said decree and order of the said Chancellor may be, in the par- 30
ticulars aforesaid, reversed, set aside and for nothing holden.

And that your petitioner may have such relief in the premises as to this honorable Court shall seem meet.

SAMUEL KOESTLER,
Solicitor for and of Counsel
with Appellant.

Bill of Complaint.**IN CHANCERY OF NEW JERSEY.**

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

10 The complainant Arthur Kraus, of the City of New York, County of New York and State of New York, respectfully shows that:

1. On October 27, 1926, Passaic Arms, Inc., a corporation of New Jersey, Preston B. Seaman, Philip Baer, Julia Baer and Joseph A. Siegel, being indebted to A. Edward Baer in the sum of Thirty Thousand (\$30,000.00) Dollars, executed to him a bond of that date to secure that sum, payable April 27, 1927, with interest at the rate of six (6%) per centum per annum, payable at maturity
20 from the date of the bond.

2. To secure payment of the bond, said Passaic Arms, Inc., a corporation of New Jersey, executed to said A. Edward Baer 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
30 first duly acknowledged and the certificate thereof duly indorsed thereon was recorded in the Register's Office of Passaic County, in Book I-15 of Mortgages, page 41 etc.

3. The mortgaged premises are described as follows: ALL that certain tract or parcel of land, situate, lying and being in the City of Passaic, in the County of Passaic and State of New Jersey, described as follows:

40 BEGINNING at a point in the southerly side of

Bill of Complaint.

Passaic Avenue distant 202.84 feet northeasterly from the Easterly corner formed by the intersection of Brook and Passaic Avenues and running thence (1) Southeasterly and parallel with Brook Avenue 280 feet; thence (2) Northeasterly parallel with Passaic Avenue 175.66 feet; thence (3) Northwesterly parallel with the first course 130 feet; thence (4) Southwesterly parallel with the southerly side of Passaic Avenue 58 feet; thence (5) Northwesterly parallel with the first course 150 feet; thence (6) Southwesterly along the southerly side of Passaic Avenue 117.66 feet to the point or place of BEGINNING. 10

4. That the said Bond and Mortgage and all moneys due thereon were by the said A. Edward Baer assigned to the complainant, by assignment bearing date the 27th day of October, 1926, and recorded October 29, 1926 in Book O-4 of Assignments of Mortgages on pages 406 etc., 20

5. On May 1, 1926, Passaic Arms, Inc., a corporation of the State of New Jersey, then being the owner of the lands and premises hereinbefore described, did make, execute and deliver to the Fidelity Union Trust Company, Trustee, its mortgages covering said premises, written in the sum of \$215,000.00, which mortgage, after being duly proven was on June 16, 1926, recorded in Book A.15 of Mortgages for Passaic County on pages 274 etc. 30

6. That at the time of the actual execution and delivery of said mortgage, the said Passaic Arms, Inc., did enter into an agreement in writing with the Empire Bond and Mortgage Company, a corporation of Delaware, recorded in Book B-33 of 40

Bill of Complaint.

Deeds for said County of Passaic on pages 63 etc., wherein reference was made to the aforesaid mortgage of \$215,000.00 to the Fidelity Union Trust Company, Trustee, and to an underwriting agreement made by said Passaic Arms with said Empire Bond and Mortgage Company, under which a
 10 bonus of \$23,650.00 was conditionally credited to said Empire Bond and Mortgage Company, and by which, it did agree to pay out certain portions of said mortgage loan under a schedule of payments incorporated in said agreement, and which, your complainant, is informed to be as follows:

Schedule of Payments.

- 20 1st—\$37,625.00 in payment of fees \$23,650.00
 In payment of interest
 in advance from May 1,
 1926 to April 30, 1927 13,975.00
- 2nd—\$21,000.00 When excavation is completed,
 all walls up to first floor.
- 3rd—\$21,000.00 When all walls are up to and including second floor.
- 4th—\$26,000.00 When all walls are completed up to and including fourth floor.
- 30 5th—\$26,000.00 When all walls are completed including roof, all copper flashings, verge board covering and roofing, all heating, plumbing and electric risers installed.
- 6th—\$12,000.00 When partitions are set, roughing for heating plumbing and electric work completed. All stairs erected and steam boilers set.
- 7th—\$10,000.00 When all plastering is done, bath rooms tiled, bath tubs set.
- 40 8th—\$15,000.00 When standing trim is erected, all doors hung all plumbing fixtures and ra-

Bill of Complaint.

diators set, stairs completed terrazo work done and marble work 50% completed.

- 9th—\$15,000.00 When all finished floors are laid complete all painting and decorating completed, gas ranges and refrigerators in place, marble work completed, chandeliers installed and garage reasonably completed. 10
- 10th—\$27,375.00 When buildings are entirely completed in every respect.

7. That as a matter of fact neither said Fidelity Union Trust Company as Trustee or the Empire Bond and Mortgage Company, a corporation, have in fact paid out upon said mortgage the sum of \$215,000.00 nor any such sum of money but have paid a sum of money for less and that as to the moneys which actually have been paid on said mortgage the lien thereof is prior to the lien of complainant's mortgage, but, as to the moneys which have not in fact been bona fiedly paid and advanced for and towards the erection and construction of said building and on account of said mortgage, the lien of said \$215,000.00 mortgage is subject and subsequent and subordinate to the lien of this complainant's mortgage. 20

8. That on January 17, 1930, James J. Murner, Receiver of Passaic Arms, Inc., conveyed the above described mortgaged premises to Herman F. G. Hartung, by deed dated January 17th, 1930 and recorded on January 17th, 1930 in Book R-35 of Deeds for Passaic County on pages 97 etc. 30

In said deed it was recited however that same is made subject to existing first and second mortgages with interest accrued thereon. The reference to said second mortgage being the mortgage of this complainant. 40

Bill of Complaint.

9. Complainant is informed and believed it to be true that the said Herman F. G. Hartung is married and that his wife is the proper, necessary and material party defendant to this suit, but, notwithstanding due and diligent inquiry, has been made to ascertain the Christian name of such married woman, complainant has not been able to ascertain such Christian name and therefore makes her a party defendant by the name of Mrs. Herman F. G. Hartung.

Any interest which the said Herman F. G. Hartung and Mrs. Herman F. G. Hartung have in said mortgaged premises by reason of said conveyance, is subject and subsequent to the lien of complainant's mortgage.

20 10. That Preston B. Seaman, Philip Baer, Julia Baer and Joseph A. Siegel are made parties defendant to this suit because they have an interest in said mortgaged premises by reason of being obligors on the aforesaid bond now held by the complainant and entitled to have and receive notice of complainant's proceedings for the foreclosure of said mortgage, given as security for the payment of said Bond.

30 Any interest which the said Preston B. Seaman, Philip Baer, Julia Baer, and Joseph A. Siegel, have in said mortgage premises, is subject and subsequent to the lien of complainant's mortgage.

Both bond and mortgage contain 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,

40 representatives or assigns, become immediately due.

Bill of Complaint.

The mortgage also contained an agreement that the mortgagor, heirs and assigns, would keep the buildings on the mortgaged premises insured against loss or damage by fire in a sum and by insurers satisfactory to the mortgagee, and would assign the policy of insurance to the mortgagee, representatives or assigns, and in default of so doing that the mortgagee, representatives or assigns, should be entitled to effect such insurance, and the premiums paid for the same by the mortgagee, or assigns, with interest at per centum per annum, should be a lien on said land added to the amount of the mortgage debt and secured by the mortgage. 10

On April 27th, 1927 interest fell due on complainants bond and mortgage, and remained unpaid for more than 30 days thereafter, and no part thereof has yet been paid. Complainant has elected that the whole principal sum with all unpaid interest shall be now due. 20

Said failed to keep the buildings on said land insured against loss or damage by fire in sufficient sum ; and on complainant caused the same to be insured in the Insurance Company in the sum of for year , and paid the sum of for insurance premium thereon; which sum, with interest at the rate of six per centum per annum, is a lien on said premises added to the amount of the mortgage debt and secured by complainants mortgage, and is prior to the lien of any of the defendants. 30

Said Herman F. G. Hartung has always been in possession of the mortgage premises.

Of the principal sum of \$30,000.00 with interest thereon, from October 27, 1926 is due upon the complainants bond and mortgage. 40

Bill of Complaint.

Complainant is without adequate remedy in the courts of law and therefore pray—

10 1. That Herman F. G. Hartung and Mrs. Herman F. G. Hartung, Fidelity Union Trust Company, Trustee, Empire Bond and Mortgage Company, Preston B. Seaman, Philip Baer, Julia Baer and Joseph A. Siegel, who are the defendants in this suit, may answer this bill of complaint without oath and each statement therein made:

2. That an account may be taken of the amount due on complainant's mortgage:

20 2-A. That the said defendants Fidelity Union Trust Company, Trustee, and the Empire Bond and Mortgage Company, may set forth and discover under oath, what, if any sums of money have been actually paid out and advanced on account of said \$215,000.00 mortgage, when, to whom, and by what means such payments were made, and to render an accounting for any and all sums of money disbursed on account of said mortgage and of all payments received by way of payment or credit on account of principal and interest accruing on said mortgage and upon what sum of money and from what dates interest has been charged as against
30 said mortgage.

3. That the defendants, or one of them, may be decreed to pay complainant 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 payments, they, and each of them, be debarred and foreclosed of all equity of redemption in said lands: or

40 4. That a decree may be made for the sale of

Bill of Complaint.

the mortgaged premises to raise and pay to the complainant the amount so found due on his mortgage, 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. 10

STAMLER & KOESTLER,
Solicitors and Counsel with Complainant.

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Affidavit of Samuel Koestler.
IN CHANCERY OF NEW JERSEY.

10	Between ARTHUR KRAUS, Complainant, and HERMAN F. G. HARTUNG, <i>et als.</i>, Defendants.	{ On Bill, etc. Affidavit.
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State of New Jersey, {
 County of Union, } ss.:

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

20 I am a member of the firm of Stamler and Koestler, the Solicitors of the Complainant in the above entitled cause and the person actually entrusted with the management and conduct of said suit.

30 I am informed and believe it to be true that Herman F. G. Hartung, the owner of the mortgaged premises, is married, and that his wife is the proper, necessary and material party defendant to this suit, but, notwithstanding due and diligent inquiry has been made to ascertain the Christian name of said married woman, deponent has not been able to ascertain such Christian name and therefore she is made a party defendant by the name of Mrs. Herman F. G. Hartung.

SAMUEL KOESTLER.

Sworn and subscribed to before me
 this 14th day of June, 1930.

40 Caroline A. Dender,
 Notary Public
 of New Jersey.

Notice of Motion to Amend Bill.
IN CHANCERY OF NEW JERSEY.

79-376

Between

ARTHUR KRAUS,
Complainant,
and

HERMAN F. G. HARTUNG, *et als.*,
Defendants.

On Bill, etc.

Notice of
Motion to
Amend Bill.

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TO: MESSRS. HOOD, LAFFERTY & CAMPBELL,
Sols. of Defendant Fidelity Union
Trust Co. as Trustee,
763 Broad St., Newark, N. J.

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MESSRS. MCCARTER & ENGLISH,
Sols. of defendants Empire Bond & Mtge.
Corporation and Herman F. G. Hartung,
765 Broad Street, Newark, N. J.

PLEASE TAKE NOTICE that on Monday, the Fifteenth day of September, Nineteen Hundred and Thirty, at ten o'clock in the forenoon of said day (Daylight Saving Time), or as soon thereafter as counsel can be heard, at the Chancery Chambers, in the City of Paterson, we shall make application to his Honor, the Chancellor, for an Order to grant leave to the complainant to amend his Bill of Complaint, by adding thereto the following allegations:

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(a) That in and by said agreement so recorded, as set forth in Paragraph 6 of Complainant's Bill, it is recited that said Passaic Arms, Inc., executed a trust mortgage of \$215,000.00 to the Fidelity Union Trust Company, as Trustee, and the said Empire Bond and Mortgage Corporation had under-

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Notice of Motion to Amend Bill.

10 written and agreed to sell and dispose of the
bonds secured by said trust mortgage, and
that, it was therein agreed, among other
things, that said Empire Bond and Mortgage
Corporation, would, from time to time, pay
and advance in installments, during the con-
struction of the building, to be constructed
upon the mortgaged premises, portions of
said loan of \$215,000.00 secured by the mort-
gage executed by Passaic Arms, Inc., to the
Fidelity Union Trust Company, as Trustee,
as set forth in Paragraph 5 of Complainant's
Bill. By reason of said underwriting agree-
ment, the Empire Bond and Mortgage Cor-
poration has or claims to have an interest
in said mortgage standing in the name of the
Fidelity Union Trust Company Trustee, as
the equitable owner or equitable part own-
er of said mortgage. That the names of the
20 remaining or other holders of said Bonds se-
cured by said mortgage being unknown to
the complainant.

(b) The sole and only purpose and ob-
ject of complainant bringing into this suit
the said Fidelity Union Trust Company,
Trustee, and the Empire Bond and Mortgage
Corporation, is to obtain a judicial determin-
ation as to the amount of money due and ow-
ing on said mortgage of \$215,000.00, so that,
in the event of a Decree being made in this
30 suit for the sale of said mortgaged premises,
complainant can at such sale properly com-
ply with the provisions of Statute which re-
quires to be announced to prospective pur-
chasers the nature of and amount due on
prior encumbrances.

Yours truly,

STAMLER & KOESTLER,
Solicitors for Complainant.

40 Dated: Elizabeth, N. J.
August 28th, 1930.

**Order Granting Complainant Leave to Amend
Bill of Complaint.**

IN CHANCERY OF NEW JERSEY.

79-376

Between

ARTHUR KRAUS,

Complainant,

and

HERMAN F. G. HARTUNG, *et als.*,

Defendants.

On Bill, etc.

Order Grant-
ing Complain-
ant Leave to
Amend Bill
of Complaint.

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This matter being opened to the Court by Messrs. Stamler and Koestler, Solicitors for the Complainant, in the presence of Messrs. Hood, Lafferty & Campbell, Solicitors for the Defendant Fidelity Union Trust Co., Trustee, and Messrs. McCarter & English, Solicitors for the defendants Empire Bond and Mortgage Corporation and Herman F. G. Hartung, upon complainant's Notice of Motion for leave to amend said Bill of Complaint, and it appearing to the Court that said Application should be granted;

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It is thereupon, on this Twentieth day of October, Nineteen Hundred and Thirty, on motion of Stamler and Koestler, Solicitors for the Complainant, ORDERED that leave be and is hereby granted to complainant in the above entitled cause to amend his bill and said bill is amended by adding thereto the following allegations:

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(a) That in and by said agreement so recorded, as set forth in Paragraph 6 of Complainant's Bill, it is recited that said Passaic

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*Order Granting Complainant Leave to Amend
Bill of Complaint.*

Arms, Inc., executed a trust mortgage of \$215,000.00 to the Fidelity Union Trust Company, as Trustee, and the said Empire Bond and Mortgage Corporation had underwritten and agreed to sell and dispose of the bonds secured by said trust mortgage, and that, it was therein agreed, among other things, that said Empire Bond and Mortgage Corporation, would, from time to time, pay and advance in installments, during the construction of the building, to be constructed upon the mortgaged premises, portions of said loan of \$215,000.00 secured by the mortgage executed by Passaic Arms, Inc., to the Fidelity Union Trust Company, as Trustee, as set forth in Paragraph 5 of Complainant's Bill. By reason of said underwriting agreement, the Empire Bond and Mortgage Corporation has or claims to have an interest in said mortgage standing in the name of the Fidelity Union Trust Company, Trustee, as the equitable owner or equitable part owner of said mortgage. That the names of the remaining or other holders of said Bonds secured by said mortgage being unknown to the Complainants.

(b) The sole and only purpose and object of complainant bringing into this suit the said Fidelity Union Trust Company, Trustee, and the Empire Bond and Mortgage Corporation, is to obtain a judicial determination as to the amount of money due and owing on said mortgage of \$215,000.00, so that, in the event of a Decree being made in this suit for the sale of said mortgaged premises, complainant can at such sale properly comply with the provisions of Statute which requires to be announced to prospective purchasers, the nature of and amount due on prior encumbrances.

*Order Granting Complainant Leave to Amend
Bill of Complaint.*

It is Further Ordered that a true copy of said Amendment be served upon the defendants Fidelity Union Trust Company, Trustee, Empire Bond and Mortgage Corporation and Herman F. G. Hartung, or their respective solicitors within five days and that said defendants answer the Bill of Complaint and amendment thereto within twenty days after service of said Amendment. 10

E. R. WALKER,
C.

Respectfully advised:

VIVIAN M. LEWIS,
V. C.

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Notice.

79-376

IN CHANCERY OF NEW JERSEY.

10 	Between ARTHUR KRAUS, Complainant, and HERMAN F. G. HARTUNG, <i>et als.</i> , Defendants.	}	On Bill to Foreclose. Notice.
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To the Complainant, Arthur Kraus.

20 Take Notice: That Fidelity Union Trust Com-
 pany, one of the defendants in the above entitled
 cause will apply to the Chancellor at the Chan-
 cery Chambers in the City of Paterson, County of
 Passaic and State of New Jersey, on Monday, the
 21st day of July, 1930, at the hour of ten o'clock
 in the forenoon, Daylight Saving Time, or as soon
 thereafter as counsel can be heard, for an order
 dismissing the bill of complaint as against it on
 the ground that it is neither a necessary nor a
 proper party to said bill in that:

30 (a) The mortgage of the complainant sought
 to be foreclosed in this cause is subsequent and
 subject to the lien of the mortgage held by said
 defendant, Fidelity Union Trust Company, as
 trustee, and said complainant had both actual and
 constructive notice of said defendant's mortgage
 at the time of the execution and delivery of com-
 plainant's mortgage.

40 (b) Said defendant, Fidelity Union Trust

Notice.

Company, as trustee, has been made defendant to said bill without its consent.

(c) Said bill is filed for the foreclosure of complainant's mortgage, which is a second lien on the property, without praying that the mortgage of said defendant be first paid out of the proceeds of the sale of the property. 10

(d) Said bill of complaint is in effect a bill to redeem filed by the mortgagee of the equity of redemption, but said bill contains no provision of payment of the amount due to said defendant, Fidelity Union Trust Company, on account of its said first and prior lien.

(e) Said defendant, Fidelity Union Trust Company, was not a party to the alleged agreement in writing set forth in paragraph "6" of said bill and neither was complainant, nor does it appear that said agreement was made for the benefit of the complainant. 20

(f) The complainant is not entitled to any discovery from or relief against said defendant.

(g) The said bill is multifarious and joins distinct matters together which should not be united in one bill. 30

HOOD, LAFFERTY & CAMPBELL,

Solicitors for defendant,
Fidelity Union Trust Company.

Notice of Motion.

IN CHANCERY OF NEW JERSEY.

10	Between ARTHUR KRAUS, Complainant, and HERMAN F. G. HARTUNG, <i>et als.</i> , Defendants.	}	On Bill, etc. Notice of Motion.
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To the Complainant, Arthur Kraus:

20 Take Notice that Empire Bond & Mortgage Corporation, one of the defendants herein, appearing specially by leave of this Court first had and obtained for the purpose of this motion, will, on the 21st day of July, 1930, at the Chancery Chambers in the City of Paterson, County of Passaic and State of New Jersey, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, move this Court as follows:

30 1. For an order dismissing the bill of complaint herein as against it on the ground that it is neither a necessary nor a proper party defendant thereto.

40 2. For an order dismissing the said bill of complaint herein as against it on the ground that it is, in effect, a bill to redeem filed by the mortgagee of the equity of redemption, and no offer of payment or provision therefor is made therein as to the amount due to the defendant, Fidelity Union Trust Company, as Trustee, on account of its first and prior lien upon the premises described in the

Notice of Motion.

said bill of complaint and alleged to be covered by the said complainant's mortgage.

3. For an order striking out Paragraphs 6 and 7 of the said bill of complaint as against it on the ground that the allegations therein contained are improper, immaterial and incompetent.

4. For an order striking out Paragraph 6 of the said bill of complaint as against it on the ground that the complainant was not a party to the agreement therein referred to, nor does it appear that said agreement was made for the benefit of the complainant. 10

5. For an order dismissing the said bill of complaint as against it on the ground that the complainant is not entitled to any discovery from, or other relief against it as therein prayed. 20

6. For an order striking out Paragraphs 2A and 3 of the prayer for relief contained in the said bill of complaint on the ground that the said complainant is not entitled to such relief as against it in a suit of this nature.

7. For an order dismissing the said bill of complaint as against it on the ground that it is multifarious and otherwise improper. 30

Dated: July 15, 1930.

MCCARTER AND ENGLISH,
Solicitors for Defendant, Empire Bond
& Mortgage Corporation, specially
appearing for this motion.

Notice of Motion.

IN CHANCERY OF NEW JERSEY.

10	Between ARTHUR KRAUS, Complainant, and HERMAN F. G. HARTUNG, <i>et als.</i>, Defendants.	{	On Bill, etc. Notice of Motion.
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To the Complainant, Arthur Kraus:

20 Take Notice that Herman F. G. Hartung, one of the defendants herein, appearing specially by leave of this Court first had and obtained for the purpose of this motion, will, on the 21st day of July, 1930, at the Chancery Chambers in the City of Paterson, County of Passaic and State of New Jersey, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, move this Court as follows:

30 1. For an order dismissing the said bill of complaint herein as against him on the ground that it is, in effect, a bill to redeem filed by the mortgagee of the equity of redemption, and no offer of payment or provision therefor is made therein as to the amount due to the defendant, Fidelity Union Trust Company, as Trustee, on account of its first and prior lien upon the premises described in the said bill of complaint and alleged to be covered by the said complainant's mortgage.

40 2. For an order striking out Paragraphs 6 and 7 of the said bill of complaint as against him on

Notice of Motion.

the ground that the allegations therein contained are improper, immaterial and incompetent.

3. For an order striking out Paragraph 6 of the said bill of complaint as against him on the ground that the complainant was not a party to the agreement therein referred to, nor does it appear that said agreement was made for the benefit of the complainant. 10

4. For an order dismissing the said bill of complaint as against him on the ground that it is multifarious and otherwise improper.

Dated: July 15, 1930.

McCARTER & ENGLISH,
Solicitors for Defendant, Herman F.
G. Hartung, specially appearing for this motion. 20

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Opinion.

IN CHANCERY OF NEW JERSEY.

	Between	ARTHUR KRAUS, Complainant,	} On Bill, etc. 79-376 Opinion.
10	and	HERMAN F. G. HARTUNG, <i>et als.</i> , Defendants.	

(Syllabus)

- Equity. Parties.* First mortgagee is not a proper party in an action to foreclose a second mortgage.
- 20 *Mortgages.* In an action to foreclose a second mortgage, second mortgagee cannot dispute the amount of the first mortgage when a second mortgage was taken expressly subject to the amount of the first mortgage.

- Messrs. STAMLER & KOESTLER,
Solicitors and of Counsel for Complainant;
- 30 Messrs. HOOD, LAFFERTY & CAMPBELL,
Solicitors for Fidelity Union Trust Company, Defendant;
D. L. CAMPBELL, Esq., of Counsel:
Messrs. McCARTER & ENGLISH,
Solicitors for Defendants, Empire Bond and Mortgage Corporation and Herman F. G. Hartung;
AUGUSTUS C. STUDER, JR., Esq., of Counsel.

Opinion.

LEWIS, V. C.:

This is a suit to foreclose a second mortgage. It is now before the court on a motion made by three defendants to dismiss the bill against them on the ground that they are not proper parties.

Passaic Arms, then the owner of the premises, executed a first mortgage thereon to defendant Fidelity Union Trust Company, one of the moving parties, as trustee, to secure a bond issue of \$215,000.00. This mortgage was duly recorded. The second mortgage sought to be foreclosed of which complainant is the owner is subordinate to this mortgage for it expressly recites that is "subject and subordinate to a mortgage made by Passaic Arms, a corporation of New Jersey, as trustee, dated May 1, 1926 and recorded in the Passaic County Clerk's Office June 17, 1926, for \$215,000.00." 10 20

The amended bill alleges that the owner and Empire Bond and Mortgage Corporation, another of the moving parties, entered into a certain agreement whereby it was agreed that the money realized from the sale of the bonds secured by the first mortgage should be advanced at certain times under certain terms and conditions and further alleges that neither the Fidelity Union Trust Company or the Empire Bond and Mortgage Corporation have paid out the sum of \$215,000.00 but there has been paid out a much less sum. The prayer in the bill, apart from the ordinary one for foreclosure of the second mortgage, is that the two corporation defendants make discovery as to what sums have been paid out and advanced on account of the first mortgage and to render an account of all sums received or disbursed by them under the mortgage. 30 40

Opinion.

The three moving defendants have appeared specially and have not waived any of their rights to have the bill dismissed as against them by the filing of any answer or by asking for any affirmative relief.

- 10 There is no warrant for bringing in these two corporation defendants as they are not proper parties to this suit. The reason advanced by complainant is that by showing the amount due on the first mortgage is less than its face, an announcement of this fact can be made on the foreclosure sale and a larger sum realized at the sale for the equity above the first mortgage. But complainant is not in a position on the facts alleged in the bill to question the amount of the lien of the first mortgage. No suggestion or claim is made that
- 20 any payment has been made on account of it. The first mortgage should not be brought into court to litigate the questions raised by the allegations of the bill.

The principle applicable is that laid down in *Gibon v. Belleville White Lead Co.*, 7 Eq., 531. The Chancellor there said, page 535:

- 30 "A prior mortgagee is not bound to notice the bill of a subsequent mortgagee filed on his mortgage, though he is made a defendant in the bill. The interest mortgaged to a subsequent mortgagee is an interest subject to the prior mortgage. The subject matter of the subsequent mortgage is the property or interest which the mortgagor has remaining in him after having given the first mortgage. This interest thus mortgaged to the subsequent mortgagee is an interest well known and understood, and may be foreclosed or sold under the decree of this court, on a bill
- 40 by the subsequent mortgagee against the

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mortgagor of that interest. The subsequent mortgagee, on filing a bill for the foreclosure or sale of that interest, is not bound to make the prior mortgagee a party to his proceeding.

The prior mortgagee, though made a defendant and served with process in the suit of the subsequent mortgagee, may take no notice of that suit, and file his bill on his own mortgage, and make the subsequent mortgagee a party. This is so from the nature of the different interests mortgaged. If it were not so, the control of the first mortgagee over his own securities, as to the time when he will enforce them, and as to the time and mode of selling the property on execution, might be taken away from him by any person who might choose to make a loan and take a mortgage subject to his." 10

The first mortgage was evidently the ordinary trust mortgage to secure a corporate bond issue. The bond issue was in the present case in the amount of \$215,000.00. It is a well known course of practice to secure the entire bond issue by a mortgage and then dispose of the bonds from time to time on various terms. The entire bond issue takes effect and has validity irrespective of when or how many of the bonds have been placed with investors at the time of execution of the mortgage or subsequently. This rule is laid down in Central Trust Company v. Continental Iron Works, 51 N. J. Eq., 605, where the Court of Errors and Appeals, referring to a mortgage such as that here, quotes with approval the following language from various decisions of other states: 20

"The bonds being for sale on the mortgage, and passing into the hands of unknown bona fide holders, it would be against public policy to allow subsequent liens to interfere with 30 40

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the apparent priority of the mortgage.* * * *
 Aside from these adjudications the bonds of corporations, secured as are these bonds, are dealt with in commercial transactions and are treated, almost without exception, by the Courts as a class by themselves, not subject in all respects to the stricter rules which obtain between natural persons. * * * * If this well established doctrine is shaken, it will destroy the value of millions of securities of railroad and other corporations which have been negotiated on the faith of the priority of the mortgage which secures their issue."

Since the complainant's mortgage was expressly made subject to a lien of \$215,000.00 complainant cannot be heard in this court to question the amount due under the first mortgage. I do not consider that this bill is other than a suit to foreclose the equity of redemption of the second mortgage, and accordingly it falls within the principle laid down in *Hudnit v. Nash*, 16 Eq. 550, to the effect that a first mortgagee is not a proper party to a foreclosure of a second mortgage. In that case the second mortgagee attacked the validity of the first mortgage on the ground it was usurious. The Court of Errors and Appeals held that if the first mortgagee had demurred, instead of answering the bill and asking relief, the court should have dismissed the bill as against him.

The motion will be granted as to the defendants Fidelity Union Trust Company and Empire Bond and Mortgage Corporation. As to defendant Hartung, the third moving party, he appears to have an interest in the equity in the premises and is therefore a proper and even necessary party, so that his motion will be denied with leave to answer.

**Decree Dismissing Bill as to Defendants Fidelity
Union Trust Company, trustee, and Empire
Bond and Mortgage Company.**

79-376

IN CHANCERY OF NEW JERSEY.

Between

ARTHUR KRAUS,

Complainant,

and

HERMAN F. G. HARTUNG, *et als.*,

Defendants.

On Bill, etc.

Decree Dis-
missing Bill,
&c.

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The defendants Fidelity Union Trust Company, trustee, Empire Bond & Mortgage Corporation and Herman F. G. Hartung, having each moved the Court that the bill in the above cause be dismissed as to them; and the matter coming on to be heard in the presence of Daniel L. Campbell, Esq., of counsel with the defendant Fidelity Union Trust Company, trustee; Augustus C. Studer, Jr., Esq., of counsel with the defendants Empire Bond and Mortgage Corporation and Herman F. G. Hartung; and Samuel Koestler, Esq., of counsel with the complainant, and the Court having heard and considered the arguments of the respective counsel, and it appearing to the Court that the bill should be dismissed as against the defendants Fidelity Union Trust Company, trustee, and the Empire Bond and Mortgage Corporation, but not as against the defendant Herman F. G. Hartung;

It is, on this 27th day of July, 1931, ORDERED, ADJUDGED AND DECREED that the complainant's

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Decree Dismissing Bill as to Defendants Fidelity Union Trust Company, trustee, and Empire Bond and Mortgage Company.

bill be and the same hereby is dismissed with costs as to the defendants Fidelity Union Trust Company, trustee, and Empire Bond and Mortgage Corporation; and that the motion of the defendant Herman F. G. Hartung be and the same is
10 hereby denied;

And it is FURTHER ORDERED that the defendant Herman F. G. Hartung have leave to file his answer to complainant's bill on or before the 14th day of September, 1931.

It is FURTHER ORDERED that there be allowed to Daniel L. Campbell, Esq., of counsel with defendant Fidelity Union Trust Company, trustee, a
20 counsel fee of Two Hundred Dollars; and to Augustus C. Studer, Jr., Esq., of counsel with the defendant Empire Bond and Mortgage Corporation, a counsel fee of Two Hundred Dollars, both to be paid by the complainant.

E. R. WALKER,
C.

Respectfully Advised,
VIVIAN M. LEWIS,
V. C.

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New Jersey Court of Errors and Appeals

Between

ARTHUR KRAUS,

Complainant-Appellant,

and

HERMAN F. G. HARTUNG, *et als.*,

Defendants-Respondents.

On Bill, etc.

On Appeal
from Court
of Chancery.

BRIEF FOR APPELLANT.

This appeal brings before the Court an order of the Court of Chancery dismissing a foreclosure bill as against two defendants, the Fidelity Union Trust Company, as trustee, and the Empire Bond and Mortgage Corporation.

The Bill of Complaint, set forth in the Case on page 4, etc., is the usual foreclosure bill, with an added prayer for discovery as to the amount claimed to be due on a prior mortgage. The Bill of Complaint was amended in order to more clearly and expressly set forth the object of said defendants being brought into the suit, as appears from the Notice of Motion to amend the bill, on pages 13 and 14 of the case, and the Order granting the amendment on pages 15 and 16 of the case. The procedure in the case was that the two named defendants gave notice of motion to strike the bill, and that thereafter, but before argument on the motion, the Bill was amended and the motion was then directed to the Bill as amended. This appears from the opinion of Vice-Chancellor

Lewis on page 25, where the learned Vice-Chancellor says: "The amended bill alleges, etc."

The Facts.

As alleged in the Bill of Complaint, Passaic Arms, Inc., a corporation, was the owner of certain property on Passaic Avenue, Passaic, New Jersey, and mortgaged the same to one, A. Edward Baer by instrument dated October 27, 1926; this mortgage was assigned to the complainant. The Bill, by paragraph 5, alleges a prior mortgage made on May 1, 1926 to the Fidelity Union Trust Company, as trustee, for the sum of \$215,000.00; that there appears of record an agreement between the owner of said property, Passaic Arms, Inc. and the Empire Bond and Mortgage Company, in relation to the \$215,000.00 mortgage, by which the Empire Bond and Mortgage Company is to underwrite said mortgage loan and to make payment as against the same in accordance with the schedule as set forth in paragraph 6 of complainant's bill. The allegation then in Paragraph 7 of the Bill is that neither of these defendants have, in fact, paid out \$215,000.00, but a much less sum. The foreclosure bill then goes on in the ordinary course, prays the regular relief and then, by the amendment, has the special paragraphs above referred to. It is contended that these special paragraphs limit the purpose for which these two named defendants have been brought into the case.

The object for which these defendants are brought into the suit is clearly set forth in Paragraph "B" of the amendment in the following language:

"The sole and only purpose and object of complainant bringing into this suit the said

Fidelity Union Trust Company, Trustee, and the Empire Bond and Mortgage Corporation, is to obtain a judicial determination as to the amount of money due and owing on said mortgage of \$215,000.00, so that, in the event of a Decree being made in this suit for the sale of said mortgaged premises, complainant can at such sale properly comply with the provisions of Statute which requires to be announced to prospective purchasers, the nature of and amount due on prior encumbrances."

The prayer of the bill as against these defendants is Paragraph 2-A (Case, page 10) in the following language:

"That the said defendants Fidelity Union Trust Company, Trustee, and the Empire Bond and Mortgage Company, may set forth and discover under oath, what, if any sums of money have been actually paid out and advanced on account of said \$215,000.00 mortgage, when, to whom, and by what means such payments were made, and to render an accounting for any and all sums of money disbursed on account of said mortgage and of all payments received by way of payment or credit on account of principal and interest accruing on said mortgage and upon what sum of money and from what dates interest has been charged as against said mortgage."

Notices of motion of these defendants to strike the Bill, while in different language, are substantially that the first mortgage is not a proper party defendant and that the Bill is in effect a bill for redemption, without offering payment. It is evident from a reading of the Bill and the amendments thereto that these motions were based upon a misconception of the allegations.

THE LAW.

POINT ONE.

Respondents' motions admit pleaded facts.

It must be recalled that the facts stated in the Bill of Complaint show the execution of a mortgage by Passaic Arms, Inc., to Fidelity Union Trust Company, Trustee, written in the sum of \$215,000.00 (Case, page 5, line 30). On the same page, line 40, is alleged the agreement of the Empire Bond and Mortgage Company, the reference to the \$215,000.00 mortgage and underwriting agreement, by which the money secured or to be secured by said mortgage was to be paid out by the underwriting Company, the Empire Bond and Mortgage Company, at certain stated periods. This is followed by the allegation in paragraph 7 of complainant's bill (Case, page 7), *that neither the Fidelity Union Trust Company nor the Empire Bond and Mortgage Company has, in fact, paid out said \$215,000.00, but a much less sum.*

A motion to strike out a bill under Chancery Rule 213 is in the nature of a demurrer. *Schulz v. Ziegler*, 80 N. J. Eq. 199.

A motion to strike out a bill takes the place of a demurrer in the former practice. *Commonwealth Title Ins. & Trust Co. v. N. J. Lime Co.*, 86 N. J. Eq. 450.

On a motion to strike the bill from the files, the averments of the bill can alone be considered, and all such averments must be accepted as true. *Loudenslager v. Pacific Improvement Co.*, 93 N. J. Eq. 218.

The case of *Baum v. Canter*, 104, N. J. Eq. 224, the Court of Errors and Appeals reversed an order striking out a bill of complaint and said, "The averments of the bill for the purpose of the motion must be taken as verity and in the entirety."

Under the rules of law above quoted and stated and approved by this honorable Court, in the case last cited, on the motion to strike out these two respondents admit that they have not in fact paid out the \$215,000.00, and yet the decision of the Court of Chancery would place this second mortgagee in exactly the same position in which the purchaser of the property was placed, as decided by this honorable Court in the case of *Calverley v. Ventnor B. & L. Association*, 107 N. J. Eq. 214. This is certainly inequitable, and without consideration of the other points should lead to a reversal of the order or decree of the Court of Chancery dismissing the bill.

The learned Vice-Chancellor not only disregarded this rule of pleading, but even went farther, and adopted the suggestions in the brief of counsel for the defendants, that the mortgage money had all been paid out and the bonds had been issued and sold. What the complainant asked for and was entitled to get was a discovery under oath, not the unverified and unsupported voluntary statement of counsel in a brief. Furthermore, by paragraph 8 of the bill of complaint, it is shown that a receiver of the Passaic Arms, Inc., conveyed the mortgaged premises to the defendant, Herman F. G. Hartung, and that deed was made subject to existing first and second mortgages, with interest accrued thereon. I feel that a discovery, if ordered by the Court, would undoubtedly disclose that a portion of the \$215,000.00 was used to permit of the purchase in Hartung's

name of the property, subject to complainant's mortgage, and that if complainant is deprived of discovery and compelled to announce the sale subject to a \$215,000.00 mortgage, he will be deprived not only of a very valuable equity, but will probably lose the money due on his mortgage.

POINT TWO.

Parties.

It is elementary that in equity practice there are (1) necessary parties who must be joined, and (2) proper parties who may be joined. It may be conceded by the appellant, for the purposes of this appeal, that these two respondents are not necessary parties. It is appellant's contention that they are proper parties to this suit—that is, that they are properly joined as parties defendant for the limited purpose set forth in the bill of complaint.

In *Finley v. Bank of the United States 11 Wheat*, (24 U. S.) 304, Chief Justice Marshall holds that a prior encumbrancer is ordinarily a necessary party to a suit to foreclose a junior encumbrance, and that the court should grant no decree without his being made a party. This case has, however, been modified by subsequent decisions, including that in *Jerome v. McCarter*, 94 U. S. 734-24 L. Ed. 136 (see *infra*), and the law as generally stated today is that while a prior encumbrancer is a proper party, he is not in all cases a necessary party. This principle is well stated in the case of *Graham v. Oakden*, 51 Utah 476-170 Pac. 451 (1917), as follows: "They (prior encumbrancers) may be proper parties, but not necessary to a valid decree. If they are omitted, the

complaint is not demurrable for defect of parties; if they are included, it is not demurrable for a misjoinder."

In the case of *Jerome v. McCarter*, 94 U. S. 734-24 L. Ed. 136 (1877), the United States Supreme Court considers the status of a prior mortgagee in a foreclosure suit by a junior mortgagee. In this case the junior mortgagee forecloses *without* making the prior encumbrancers parties defendant, and the assignee in bankruptcy of the mortgagor complains of this non-joinder. The Court is therefore faced with the question of whether the prior encumbrancer is a necessary party. The Court says that the fact is established that all of the bonds secured by the prior mortgages are outstanding and due, and that therefore the mortgagor, or one standing in his shoes, could not complain at the failure to join the prior mortgagees. The Court intimates, however, that if there were a substantial doubt respecting the amount due on the prior mortgages their holders would be necessary parties to the suit. The Court says:

"And so, when there is substantial doubt respecting the amount of the debts due prior lien creditors, there is obvious propriety in making them parties, that the amount of the charge remaining on the land after the sale may be determined, and that purchasers at the sale may be advised of what they are purchasing."

The attention of the Court is again called to the fact that the decision in *Jerome v. McCarter* holds merely that where there is no reason to seek any relief whatsoever against a prior mortgagee, the prior mortgagee is not a *necessary* party. The decision of the Court does not in reality consider whether a prior mortgagee is a proper party.

The case of *Jerome v. McCarter*, *supra*, is the affirmance of a cause tried in the Circuit Court for the Eastern District of Michigan, under the name of *Sutherland v. Lake Superior Shipping Canal Railroad and Iron Co.*, Fed Case No. 13643. While the Circuit Court was here concerned primarily with the necessity of joining a prior mortgagee, the following excerpts from the opinion are worthy of note:

"There is nowhere an intimation that prior ones (encumbrancers) may not and should not be impleaded whenever it is necessary to ascertain the amount which is due to them, or there is a substantial doubt as to the property covered by their liens * *"

"It is not enough that a court of equity causes nothing but the interest of the proper party to change owners. Its decree should terminate, and not instigate, litigation. Its sales should tempt men to sober investments, and not to wild speculation. Its process should act upon known and definite interests, and not upon such as admit of no medium of estimation. It has the means of reducing every right to certainty and precision, and is therefore bound to employ these means in the exercise of its jurisdiction."

In *Western Insurance Co. v. Eagle Fire Insurance Co.*, 1 Paige 284, the Court, in overruling a demurrer interposed by a prior encumbrancer to a bill filed by a junior mortgagee, declined to decide the point whether in all cases the court would decree a sale of the property free from encumbrances against the consent of the prior lien holder, but overruled the demurrer, holding that the bill was clearly maintainable for the purpose of making a better title and ascertaining the amount due.

The case of *Quinlan v. Prentice*, 153 App. Div.

140-138 N. Y. S. 216 (1912), follows the dictum laid down in *Jerome v. McCarter*, *supra*. In the Quinlan case, an action was brought to foreclose a third mortgage. The trustee in bankruptcy of the fifth mortgagee moves to have the first mortgagee brought in as a party defendant upon the ground that "While the first mortgage is nominally for \$300,000.00, it is in fact for, and there is only due, \$260,000.00." The Appellate Division holds that the prior mortgagee is a necessary party and must be brought into this suit. The Court says:

"To permit a sale so long as the amount due on alleged prior liens remains uncertain, is to deprive would-be purchasers of knowledge enabling them to bid intelligently; in other words, if the trustee in bankruptcy, in order to protect his lien, bids at the sale, he must either assume that there is due the Hudson Mortgage Co. \$300,000.00, or else take his chances in subsequent litigation having for its object the reduction of that lien to \$260,000.00. This is a position which a court of equity ought not to compel him to take. * * * The rights, interests and equities of all the parties claiming an interest in the mortgaged premises, and the respective priority of their liens thereon should be settled and determined, before any judgment of foreclosure and sale is entered. Otherwise the sale becomes a mere speculation, both as to what is sold and what is purchased."

It is to be noted that the Court said that it would not compel the junior mortgagee to "take his chances in a subsequent litigation" in establishing the reduced amount due on the first mortgage. In New Jersey, because of the decision in *Calverley v. Ventnor B. & L. Association*, ¹⁰⁷~~140~~ N. J. Eq. 214, the junior mortgagee would not even be permitted

to "take his chances in subsequent litigation" but would be concluded by having purchased the property at the foreclosure sale, subject to a \$300,000.00 mortgage.

The decisions in *Jerome v. McCarter* and *Quinlan v. Prentice* would seem to establish the rule that where there is doubt as to the amount due upon the prior mortgage, the prior mortgagee is a *necessary* party to the foreclosure of a junior mortgage. Yet in this appeal the complainant need not establish that the respondents are necessary parties. In deed, complainant may concede, for the purposes of this appeal, that respondents are not necessary parties. If the respondents are merely *proper* parties, then the order of the Court of Chancery is erroneous and should be reversed.

It is true that in some decisions and texts we may come across statements to the effect that prior mortgagees are neither necessary nor proper parties. These expressions, however, should not be taken as a statement of a rule of law, but should be read in connection with the facts of the case in which they are rendered. It will generally be found that in these cases the junior mortgagee has made the senior mortgagee a party defendant for the purpose of forcing a sale free from the lien of both encumbrances. What the court means is that the senior mortgagee is not a proper party *for such purposes*. The confusion that is found in the language of the courts may be seen in the following excerpt from the opinion in *Foster v. Trowbridge*, 44 Minn. 290-46 N. W. 350 (1890) :

"Strictly, a prior mortgagee is not a proper party to an action by a junior mortgagee to foreclose his mortgage, because the proper object of the action is to bar the equities of the mortgagor and rights accruing subse-

quent to the mortgage * * * but prior lienors may consent to become parties to such an action, *or may be made such*, where the object is to ascertain the extent of their claims and to have the premises sold subject thereto, or absolutely to create a fund out of which the several encumbrancers shall be paid in their order; but such purpose or object should clearly appear from the complaint."

The right of the junior encumbrancer to join the senior encumbrancer as a party defendant for the purpose of determining the amount due on the senior mortgage is upheld in the case of *Bexar B. & L. Ass'n. v. Newman*, 25 S. W. 461 (Texas 1893). In that case the complainant, who had subordinated his lien to the mortgage of the building and loan association, forecloses, making the association a party defendant. The Court says:

"The special charge No. 3 was also properly refused. The complainant was not required to pay or tender to the association any moneys as a condition to his relief, whether his was the prior or junior lien * * * If complainant is adjudged to have the prior lien, a foreclosure sale will bar the rights of all parties to the suit. If, however, it should be found that the association holds the prior lien, a different course will follow from the pleadings as they stand. It seems well-settled, that, in a suit by a junior mortgagee, the prior mortgagee cannot be required to submit to a foreclosure against his will. *He may be made a party to the suit for the purpose of having the amount of his mortgage ascertained and determined by the judgment of the court, so that a sale may be made subject to the known amount of his lien.*"

In *Missouri, Kansas, Texas Trust Co. v. Richardson*, 57 Neb. 617-78 N. W. 273 (1899), the Court grants the complainant substantially the same relief as is sought by the appellant in the case at bar. The Court says:

“Complainant acquired its chattel mortgage with knowledge of the fact that it was junior and subordinate to the mortgage for \$6500.00 executed by Opelt to Richardson. It had a right, of course, to proceed by action to enforce its security; and, as an incident to that right it was entitled to bring the Richardsons before the court in order to have the rank of their mortgage and the amount due upon it adjudicated.”

The court remands this case to the District Court with directions “(1) to fix the amount due on the \$6500.00 mortgage and adjudge it to be a first lien on the property; (2) to render a decree foreclosing the complainant’s mortgage.”

POINT THREE.

The New Jersey law.

The learned Vice-Chancellor, in support of his determination cites the cases of *Gihon v. Belleville White Lead Co.*, 7 N. J. Eq. 531 and *Hudnit v. Nash*, 16 N. J. Eq. 550. It is respectfully submitted that neither of these cases supports such a proposition of law, but that an analysis of these cases will show that the junior mortgagee in each of these cases was not entitled to *the relief* sought by the prayers of the respective bills to foreclose.

The learned Vice-Chancellor in his opinion quotes at length from the case of *Gihon v. Belleville White Lead Company*, *supra*, to the effect that a prior mortgagee, though made a defendant in a bill filed by a subsequent mortgagee, is not bound to notice the bill. The language of the Chancellor in this opinion must be taken in connection with the facts of the case. The bill of complaint in that case sets up the prior mortgages and neither admits nor denies their priority; and its prayer is "that the mortgagor be decreed to pay the amount of the complainant's mortgage, or that, in default thereof, the mortgagor and prior mortgagees may be barred and foreclosed from all equity of redemption or claim of, in and to the mortgaged premises; and that the mortgaged premises may be sold, and that out of the proceeds he may be paid the amount of his mortgage." The Chancellor holds that since the junior mortgagee asks nothing to which he is entitled as against the prior mortgages, he should not have brought them into Court, and that their demurrer should be allowed. The Chancellor in his opinion points out

that there may be instances when a subsequent mortgagee may file a bill against a prior mortgagee, and names among them cases where the bill sets up that the prior mortgage is fraudulent or void or has been paid, and asks to have it so decreed. The Court points out that the bill shows nothing against the validity of the prior mortgages and that the junior mortgagee is not entitled to force a *sale of the property free of the first mortgage*. It is obvious that in the *Gihon* case the junior mortgagee was not entitled to any relief whatsoever against the prior mortgagees and they were improperly made parties defendant to his bill.

The case of *Hudnit v. Nash, supra*, is a bill filed in the Circuit Court by a second mortgagee, who names as parties defendant the third mortgagee, the purchasers of the equity of redemption and also the first mortgagee. The bill of the second mortgagee attacks the first mortgage as usurious and seeks to have it declared void; and the third mortgagee and the purchasers of the equity of redemption likewise in their answers attack the first mortgage for usury and seek to have the same declared void. The Court, while finding that the first mortgage is actually tainted with usury, refuses to declare the same void, but decrees that the first mortgagee be paid out of the sale of the property the amount actually advanced by him upon his mortgage. The Court points out that had the first mortgagee sought to foreclose his usurious mortgage it would have been declared void; but on the other hand, if the mortgagor or a subsequent encumbrancer asks the Court to redeem the mortgaged premises or to relieve the premises from the encumbrance of the first mortgage, the equitable relief will be granted only upon the payment of the amount actually due upon the first

mortgage. The decision of the Court is based upon the equitable maxim: "He who seeks equity must do equity" as is shown by the following excerpt:

"The well-settled rule in equity is, that if the lender come into the Court of equity seeking to enforce a usurious contract, equity will repudiate the contract. But if the borrower seeks relief against the usurious contract the only terms upon which the Court will interfere are, that he shall pay what is really and bona fide due. The Court acts upon the principle that it is against conscience that a party should have the relief which he asks against the contract, and at the same time keep the money which he received upon it. If he asks equity, he must do equity."

The Court goes on to discuss the nature of the relief demanded against the first mortgagee and the steps which the first mortgagee might have taken had he not desired to come into court in answer to the bill. The Court points out that the first mortgagee was not a necessary nor a proper party to the suit if the sole design was a foreclosure of the equity of redemption; and that unless the complainant offered in his bill to redeem, the bill was demurrable. In the case at bar, the foreclosure of the equity of redemption is not the sole design of the bill; the complainant seeks also to have a discovery and adjudication as to the amount actually due upon the first mortgage.

It is clear upon a close reading of the two cases above named that they do not support the proposition that a first mortgagee is not a proper party in an action to foreclose a second mortgage. The principle of law for which these cases stand is that a second mortgagee cannot force the fore-

closure of a first mortgage or the sale of the property free of the lien of the first mortgage, unless in his bill of complaint he offers to pay the amount due upon the first mortgage. There is no doubt that if that is the only relief sought against the prior mortgagee, the prior mortgagee is not in such case a proper party and should be dismissed. It does not follow, however, that a prior mortgagee can in no case be brought in as a party defendant to a foreclosure of a subsequent mortgage.

It must be clear, from the allegations of the amended bill, that the instant case is entirely outside the scope of the decision in the two cases just above cited and distinguished. In the instant case the very object was to obtain a discovery, and not to make a sale of the property free of the lien of respondents' mortgage.

POINT FOUR.

The statute regarding sales.

Even if I am in error in claiming that the decisions of our courts in the Gihon and Hudnit cases are not in point, nevertheless our law has changed, by reason of the enactments of 196, Chapter 144, entitled "A Further Supplement to an act entitled 'An act relative to sales of land under a public statute or by virtue of any judicial proceedings,'" found in P. L. 1906, page 269, 4 Compiled Statutes page 4686, Section 35, reading as follows:

"Relief of bidder on showing defect in title, etc.—Sec. 1. Any purchaser of real estate at any public sale, held under the provisions of the act to which this is a supplement, or of any supplement thereto or amendment thereof, except at sales under general execution and actual levy thereunder, or for unpaid taxes or municipal liens, shall be entitled to be relieved from his bid if before delivery of the deed he shall satisfy the court by whose authority such sale was made of the existence of any substantial defect in or cloud upon the title of the premises sold which would render said title unmarketable, or of the existence of any lien or encumbrance thereon, unless a reasonable description of the estate or interest to be sold, and of the defects in title and liens or encumbrances thereon, with the approximate amount of said liens and encumbrances, if any, be inserted in the notices and advertisements required by law, and in the conditions of sale; provided, however, that if the court shall direct any lien or encumbrance not described, and which is due and payable, to be paid out of the proceeds of sale, the purchaser shall not then be relieved by reason of such lien or encumbrance."

In practice this statute has now been taken by every sheriff conducting execution sales to not only require a notice of prior encumbrances to be published in the advertisement, but to be orally announced at the time and place of sale. This statute has in some respects received construction by our courts in the case of *Oakley v. Shaw*, 69 Atl. 462 and *West Jersey-Parkside Trust Co. v. Ledyard*, 143 Atl. 554. While counsel for the respondents will contend that these statutes have been construed as to give relief only to a purchaser, nevertheless, the intention of the statute is that the person for whose right and on whose behalf the sale is conducted shall furnish the selling officer with information, so that a proper announcement can be made, and the theory of the statute in relieving a purchaser is that there is a constructive fraud against him if the announcement is not true, so that the object of the discovery sought by the complainant in this case is to be placed in possession of positive, verified information, so as to prevent the working of a fraud.

This court has, in the case of *Calverley v. Ventnor B. & L. Assn.* 107 N. J. Eq. 214 even gone so far as to hold that where a person purchases subject to an announced encumbrance, giving the amount thereof, that that purchaser is obligated to pay the mortgagees the full amount of their mortgage, notwithstanding moneys have been paid on account thereof in reduction of principal. Thus, if as a matter of fact the sum of \$50,000.00 used by Hartung in purchasing the mortgaged premises under order of the Court of Chancery from the receiver of Passaic Arms, Inc., was furnished by these respondents, then by being compelled at a foreclosure sale to announce the encumbrance as \$215,000.00, it would mean in effect that complain-

ant's mortgage of \$30,000.00 would be wiped out by putting the \$50,000.00 interest of Hartung prior to complainant's mortgage, whereas, in fact, in accordance with the allegation contained in Paragraph 8 of complainant's bill, (Case, page 7 lines 30 to 40), Hartung purchased the property subject to complainant's mortgage. Furthermore, if complainant at a sale would be obliged to announce that the encumbrance of respondents is \$215,000.00, under the Calverley case, *supra*, he would be estopped afterwards from asserting an equity. In this case the complainant appellant does not attempt to deny the priority of the respondents' mortgage, but admits its priority of lien. What the complainant wants to know is the amount of that lien, so that he can bona fide and honestly make it known to a purchaser at the time and place of sale. Under the Calverley case, *supra*, unless complainant is in advance of sale put in possession of the information as to the amount of money due on respondents' mortgage, the complainant will be the one who suffers the loss, and Hartung will get the benefit, because the respondents, in collecting \$215,000.00, would be obliged to pay back to Hartung the excess, and not to the second mortgagee, the complainant.

In this case the facts are those as stated in the bill, in paragraph 8 (Case, page 7), and that is, that Hartung took the property subject to the mortgage, so that this complainant-appellant has not even the personal obligation of Hartung, but must rely for any relief upon the money which is derived from a sale of the property under his own foreclosure, and, naturally, he cannot get the same price on an announced encumbrance of \$215,000.00 as he could upon an announcement of an encumbrance of \$165,000.00. All that he is able to sell is

the equity of redemption, subject to the amount of money due on the \$215,000.00 mortgage. It would be unfair and inequitable to compel the complainant to sell subject to an announced encumbrance of \$215,000.00 when, as a matter of fact, there may be due on this mortgage only \$165,000.00.

It is a significant fact in this case that not only the two respondents, Fidelity Union Trust Company and Empire Bond and Mortgage Company, made the motion to dismiss the complainant's bill, but Herman F. G. Hartung, who purchased the property subject to the two mortgages, joined in this motion and was represented by the same counsel as represented the Empire Bond and Mortgage Company. The learned Vice-Chancellor in decreeing a dismissal, allowed costs and counsel fee of \$200.00 in favor of each of the respondents, chargeable against the complainant, but allowed no counsel fee, as the order will show (Case, page 30), in favor of complainant against Hartung. This, we say, is an abuse of his discretion, and by reason of the excessive counsel fees allowed against the complainant on a simple motion to dismiss a bill, we claim there should be a reversal, not only of the primary order dismissing these two defendants from complainant's suit, but from the allowance of the ^ocounsel fees.

The learned Vice-Chancellor also said:

"Since the complainant's mortgage was expressly made subject to a lien of \$215,000.00 complainant cannot be heard in this court to question the amount due under the first mortgage." (Case, page 28, line 15).

The learned Vice-Chancellor has gratuitously recited from his opinion (Case, page 25), the

language in the mortgage. There is no decision which holds that by reference to a prior mortgage a subsequent mortgagee is at all times and events obliged to pay to the prior mortgagee the amount in which the mortgage is written. There are decisions which indicate that a mortgagor is estopped by his recital from denying the amount due on a prior mortgage, but there are no decisions which hold that a junior mortgagee is estopped from denying the amount due upon a prior mortgage. The language recited by Vice-Chancellor Lewis in the forepart of his opinion, and appearing on page 25 of the Case, is merely descriptive of the mortgage and is not a covenant or an agreement by the second mortgagee of an admission of a principal payment due on a mortgage of \$215,000.00. If, as a matter of fact, there is due on the mortgage \$215,000.00, then on a redemption of that mortgage lien the junior mortgagee would be obliged to pay the full amount, but no matter how many times the mortgage is referred to as being a mortgage of \$215,000.00, would that create an obligation on the part of a junior encumbrancer to pay a senior encumbrancer more than the money actually due upon the lien. We are in a court of equity and to hold that a descriptive reference to a mortgage, mentioning in that description the sum for which the mortgage is written, creates an obligation on the part of a junior encumbrancer to pay, or to be estopped from questioning, would certainly be the finest, and, at the same time, the most outrageous way of depriving a junior encumbrancer of any rights. It certainly seems to me that there must be some underlying reason why

these two large companies, the respondents in this case, refuse to give reliable information as to the money due upon their mortgage.

It is therefore respectfully submitted that the order of the Court of Chancery made on the 27th day of July, 1931, be in all things reversed.

Respectfully submitted,

SAMUEL KOESTLER,
Of Counsel with Complainant-Appellant.

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

New Jersey Court of Errors and Appeals

Between

ARTHUR KRAUS,
Complainant-Appellant,

and

HERMAN F. G. HARTUNG,
et als.,
Defendants-Respondents.

On Bill, etc.

*On Appeal
from Court
of Chancery.*

BRIEF FOR RESPONDENT, EMPIRE BOND & MORTGAGE CORPORATION.

This is an appeal from a decree advised by Vice-Chancellor Lewis dismissing a bill of complaint as against Empire Bond & Mortgage Corporation and Fidelity Union Trust Company, as Trustee, both having been made parties defendant to the suit which is one to foreclose a second mortgage on an apartment house in Passaic, N. J.

The appeal is from that part of the decree which dismisses the bill as against this defendant and Fidelity Union Trust Company, as Trustee, as well as from that part of the decree which allows each defendant its costs and a counsel fee in connection with such dismissal.

The bill of complaint seeks to foreclose a second mortgage, dated October 27, 1926, of which the appellant is the holder by assignment. After it had been served, this defendant, a New York corporation, by leave of the Court first had and obtained, appeared specially on a motion to dismiss the bill as against it (Case, pages 20, 21). Thereafter, the complainant gave notice to amend

the bill (Case, pages 13, 14). The amendment was allowed by an order advised by Vice-Chancellor Lewis under date of October 20, 1930 (Case, pages 15 to 17) whereupon the motion of this defendant, as well as the motion of Fidelity Union Trust Company, as Trustee, was then considered by the Court as though directed to the bill as amended.

The original bill of complaint, in Paragraph 6 (Case, pages 5 to 7) and the amendment thereto as allowed by the order of Vice-Chancellor Lewis dated October 20, 1930 (Case, pages 15, 16) allege that at the time of the execution and delivery of a first mortgage on the premises in question in the sum of \$215,000.00 dated May 1, 1926 by Passaic Arms, Inc., to Fidelity Union Trust Company, as Trustee, the former entered into an agreement with this defendant which was duly recorded in Book B33 of Deeds for Passaic County, page 63, whereby this defendant underwrote and agreed to sell and dispose of the bonds secured by the said trust mortgage, and agreed that the money realized from the sale of the bonds secured thereby should be advanced at certain times and under certain terms and conditions, and also allege that neither the Fidelity Union Trust Company, as Trustee, nor this defendant had paid out the full sum of \$215,000.00, but that a less sum had been paid.

The amendment to the bill (Case, page 16, Par. (b)), is to the effect that the sole purpose of making this defendant and Fidelity Union Trust Company, as Trustee, parties defendant is to obtain a judicial determination of the amount of money due and owing on the mortgage of \$215,000.00 so that "in the event of a decree being made in this suit for the sale of the said mortgaged premises, complainant can at such sale

properly comply with the provisions of Statute which requires to be announced to prospective purchasers the nature of and amount due on prior encumbrances."

As appears from the complainant's brief, that statute is P. L. 1906, Chapter 144, entitled "A further supplement to an act entitled 'An Act relative to sales of land under a public statute or by virtue of any judicial proceedings.'" 4 C. S. 4686, Section 35.

The prayer of the bill of complaint, in addition to the ordinary one for the foreclosure of a second mortgage, is that this defendant and Fidelity Union Trust Company, as Trustee, may set forth and discover under oath what, if any, moneys have actually been paid out and advanced on account of the \$215,000.00 first mortgage, and that an account of all sums received or disbursed by this defendant and Fidelity Union Trust Company, be rendered by them.

Four grounds are assigned by the appellant for reversal, which will be discussed in order.

The first point seems to be that because a motion to strike a bill of complaint is in the nature of a demurrer whereby the facts alleged in the bill must be taken as true, on the hearing of such a motion, it follows that because the bill in this case alleges (Case, page 7, Para. 7) that neither this defendant nor the Fidelity Union Trust Company has "in fact paid upon said mortgage the sum of \$215,000.00 nor any such sum of money," the complainant is, by reason of that allegation, entitled to the relief for which he prays.

As appears from the opinion of the Vice-Chancellor, the first mortgage was executed by

Passaic Arms, Inc. to Fidelity Union Trust Company, as Trustee, to secure a bond issue of \$215,000.00. The mortgage sought to be foreclosed, as the Vice-Chancellor observes in his opinion, 108 Eq. 507, 8, expressly recites that it is "subject and subordinate to a mortgage made by Passaic Arms, a corporation of New Jersey, to Fidelity Union Trust Company, a corporation of New Jersey, as Trustee, dated May 1, 1926, and recorded in the Passaic County Clerk's office on June 17, 1926 for \$215,000.00." The first mortgage was the ordinary trust mortgage to secure a corporate bond issue and comes within the rule laid down by this Court that the entire bond issue takes effect and has priority, irrespective of when or how many of the bonds have been placed with investors at the time of execution of the mortgage, or subsequently. *Central Trust v. Continental Iron Works*, 51 Eq. 605 (E. & A., 1893). That being the situation, it is immaterial how much money had been advanced on the mortgage, because it is one for future advances which were obligatory. Other cases to the same effect are *Farnum v. Burnett*, 21 Eq. 87 (Ch., 1870), *Zabriskie, C.*; *Bell v. Flemings Executors, etc.*, 12 Eq. 490 (E. & A., 1859), *Green, C. J.*; *Micela v. Falduti*, 101 Eq. 103, *Church, V.-C.*; *Weinstein v. Anderson*, 102 Eq. 8, *Bentley, V.-C.*

In his brief, under his first point, the complainant cites *Calvary v. Ventnor B. & L. Assn.*, 107 Eq. 214, but we believe an examination of that case will show that it has no bearing upon the situation before this Court. There it was held that when a purchaser at an execution sale bought the property subject to a \$10,000.00 mortgage on it, he also was bound to pay the \$10,000.00 to the mortgagee even though the \$10,000.00 was not all due the mortgagee at the time,

because reductions had been made upon the mortgage. The Court directed the mortgagee, upon receipt of the \$10,000.00, to deduct therefrom and keep the amount due to him on his mortgage and pay over the balance to the mortgagor. In that case the purchaser bought, subject to a \$10,000.00 mortgage, and in this case, the second mortgagee took his mortgage subject to a \$215,000.00 first mortgage. Should the appellant decide to bid in the property at a sale, it would seem that the same practice, such as outlined in the Calvary case, could be followed, but that the case itself does not bear the construction which the appellant seeks to put upon it.

The second point raised by the appellant is that while this respondent is not a necessary party to the bill, it is a proper party, for which reason the bill should not have been dismissed as against it, and in support of that contention certain cases are cited. It is important to bear in mind the reason advanced by the complainant for making Empire Bond & Mortgage Corporation a party defendant to the suit as set forth specifically in Paragraph B of the notice of motion to amend (Case, page 14), and in Paragraph B amending the bill of complaint (Case, page 16), namely, for the sole and only purpose and object of obtaining "a judicial determination as to the amount of money due and owing on said mortgage of \$215,000.00 so that in the event of a decree being made in this suit for the sale of the said mortgaged premises, complainant can, at such sale, properly comply with the provisions of the statute which requires to be announced to prospective purchasers the nature of and amount due on prior encumbrances." The statute in question is no support for the contention of the appellant. Its purpose and meaning at

least twice have been construed by the courts of this State which have held that its object is to relieve bidders at foreclosure sales from having unmarketable or unencumbered titles thrust upon them when they had no notice of the estate or interest to be sold, or of the defects in the title or liens or encumbrances thereon, with the approximate amount thereof, and also that one who has notice should not be relieved under the Act referred to, no matter how he acquired that notice. The statute has been construed as entirely remedial and it has been held that it should not be extended to one whose claim to the remedy is without equity. *Oakley v. Shaw*, 69 Atl. 462 (Ch., 1908), Walker, V.-C.; *West Jersey-Parkside Trust Co. v. Ledyard*, 103 Eq. 447 (Ch., 1928), Ingersoll, V.-C. Manifestly, from its very language and construction the statute can only be availed of by a purchaser at a public sale, which this complainant-appellant is not, and so it affords no authority for the appellant on this appeal. This particular ground is advanced by the appellant under Point 4 of his brief, but we have discussed it here because we think that what we have said about the statute regarding sales should be considered in connection with the second point advanced by the complainant, as well as separately.

In support of his second point, certain cases are cited by the appellant to show that this defendant, while not a necessary party, is a proper party "for the limited purpose set forth in the bill of complaint." It should at all times be borne in mind, as the Vice-Chancellor observes in his opinion, that the mortgage sought to be foreclosed expressly recites that it is subject and subordinate to the first mortgage in the sum of \$215,000.00. That being the situation, the

case of *Jerome v. McCarter*, 94 U. S. 734, cited by the appellant in support of his proposition, is, on the contrary, authority for sustaining the Court of Chancery. A brief quotation from the opinion in that case by Mr. Justice Strong is given in the appellant's brief. That language appears at the bottom of page 735, and at the top of page 736 it is followed by this significant language, which was omitted from the complainant's brief:

"But the case in hand has no such peculiarities. The prior mortgages were not due when this bill was filed; and, without the consent of those mortgagees, nothing more than the equity of redemption could be sold under any decree made in the case, or under the decree which was sought. Nor is there any doubt entertainable respecting the amount due under the prior mortgages. Indeed, the company is estopped by the provisions of its mortgage, of which the complainant is trustee, from asserting that the entire amount of the two \$500,000 mortgages, and of the receiver's mortgage, was not outstanding when the present mortgage was made. The full indebtedness was acknowledged by making the junior mortgage expressly subject to it, and as there is no evidence that any portion of it has been paid, it is not admissible for the mortgagors or their assignees in bankruptcy to deny it now. *Bronson v. The LaCrosse & Milwaukee Railroad Co.*, 2 Wall. 283.

"Apart from the exceptional cases, we understand the general rule to be, that, in a suit by a junior mortgagee to foreclose a mortgage, prior mortgagees are not necessary parties. So it has been held in England in *Rose v. Page*, 2 Sim. 471; *Richards v. Cooper*, 5 Beav. 304; *Delabere v. Norwood*, 3 Swanst. 144.

"Such, also, is the rule asserted in this country, where the bill of a junior mort-

gagee, as in this case, seeks only a foreclosure or sale of the equity of redemption. *Edwards on Parties*, p. 91, and cases cited: *Gihon v. Belleville*, 3 Hals. (N. J.) Ch. 531; *Williamson v. Probasco*, 4 *Id.* 571."

The Court also said, at page 739:

"That all the bonds secured by the first two mortgages are outstanding and due, is, we think, an established fact. We have observed, that the mortgage upon which the present suit has been brought was made subject expressly to those two prior mortgages. In it the mortgagors recited that the company did, simultaneously with those mortgages, 'execute, issue, negotiate, and sell' all the bonds covered thereby, and declared that they were an outstanding and subsisting lien. How can these appellants, who stand in the shoes of the mortgagors, be heard to deny these recitals?"

The case of *Jerome v. McCarter* was an ordinary one for the foreclosure of a junior mortgage, given expressly subject to two prior mortgages upon a canal property, each of the prior mortgages having been made to secure the payment of the company's bonds of even date therewith, all of which bonds were issued and outstanding at the time of the foreclosure of the junior mortgage. When the company later went into bankruptcy, a supplementary bill was filed making the assignees in bankruptcy the parties defendant. They appeared and defended and on their behalf contended that the bill could not be sustained because the prior mortgagees were not made parties. That position the Supreme Court of the United States said could not be sustained. In doing so, Mr. Justice Strong, in the course of his opinion, on page 735, just prior

to the language quoted by the complainant on page 4 of his brief, said:

"It is undoubtedly true there are cases to be found in which it was ruled that prior incumbrancers were necessary parties to a bill for the foreclosure of a junior mortgage, but in most of these cases the circumstances were peculiar. Where the effort of the junior mortgagee is to obtain a sale of the entire property or estate, and not merely of the equity of redemption, there is reason for making the prior incumbrancers parties, for they have an immediate interest in the decree."

Western Insurance Co., et als. v. Eagle Fire Company, et als., 1 Paige 284, is also cited as authority by the appellant. In that case, the complainants, as mortgagees of certain premises, filed their bill against the mortgagor and several junior incumbrancers, and also against the Eagle Fire Company of New York, *et als.*, as prior mortgagees of the same premises. The bill alleged that certain of the prior mortgages had been paid, and prayed a discovery and reference to a Master to ascertain the amount due and that the mortgaged premises might be sold subject to the encumbrance of the prior mortgages, or the amount due thereon as thus ascertained; or that the complainants might be permitted to redeem the prior mortgages; or that the whole interest in the mortgaged premises might be sold and the amount due to the complainants paid out of the proceeds of such sale, after first satisfying the prior mortgages; and for general relief. The Eagle Fire Company answered as to all the facts set forth in the bill, but demurred to so much of the relief prayed for as sought to obtain an order or decree for the sale of the premises covered by the prior mortgages. In

overruling the demurrer, Chancellor Walworth said, at page 286:

"In this case, the relief demurred to is not specifically claimed by the bill. The prayer for relief is in a double alternative; and if the complainants are entitled to either of the three kinds of relief thus asked for, the defendants cannot demur, but may, at the hearing, insist that the complainants be confined to such relief only as they may be entitled to under all the circumstances of the case as then presented. * * * This demurrer to one of the three alternatives in the complainants' prayer for relief is therefore improperly taken, and must be overruled, with costs."

In the bill of complaint under consideration, there is no offer to redeem, which was one of the grounds assigned by this defendant for dismissing the bill of complaint as against it (Case page 20, para. 2).

Quinlan v. Prentice, 153 App. Div. 140, is also cited as authority by the appellant. In that case which never went beyond the Appellate Division, a third mortgage was foreclosed by a trustee in bankruptcy and a first mortgagee was made a party defendant on the application of a fifth mortgagee, but the first mortgagee in that case was not a trustee mortgagee, as in the case in hand, and the situation was not similar. A reading of the other cases cited by the appellant under this heading, namely, *Graham v. Oakden*, 51 Utah 476, 170 Pac. 451; *Bexar B. & L. Association v. Newman*, 25 S. W. 461; *Missouri, Kansas & Texas Trust Co. v. Richardson*, 57 Nebr. 617, 78 N. W. 273, and *Foster v. Trowbridge*, 44 Minn. 290, 46 N. W. 350, will show that they can all be distinguished on the facts, in none of them was the first mortgage a trust mortgage securing a bond issue to bring it within the rule of *Cen-*

tral Trust Co. v. Continental Iron Works, supra, or was the junior encumbrance taken subject to a first mortgage in a specific amount as in this case.

Under his third point the appellant discusses and attempts to distinguish the two New Jersey cases relied upon by Vice-Chancellor Lewis in his opinion, namely, *Gihon v. Belleville White Lead Co.*, 7 Eq. 531, and *Hudnut v. Nash*, 16 Eq. 550. We believe an examination of those cases does not warrant the construction which the appellant seeks to put upon them and that, on the contrary, they are properly construed and followed by Vice-Chancellor Lewis.

The fourth point assigned by the plaintiff, that the statute regarding sales, 4 C. S. page 4686, Sect. 35, *supra*, justifies him in making this defendant a party to the bill, we have already discussed in connection with what we have said above in reply to his second point. From the language of the statute itself and the construction given to it by the cases of *Oakley v. Shaw*, and *West Jersey-Parkside Trust Co. v. Ledyard, supra*, it is clear that the statute can only be availed of by a purchaser at a public sale, and not under the circumstances urged by the appellant.

The appeal is also from that part of the decree allowing this defendant and Fidelity Union Trust Company, Trustee, costs and a counsel fee of \$200.00 each in connection with such dismissal, the reason assigned being that by making such an allowance, the Court below was guilty of an abuse of discretion and the allowance itself is excessive. As will be seen from the state of the case, separate motions for dismissing the

bill of complaint were made by Empire Bond & Mortgage Corporation and Herman F. G. Hartung, both being represented by the same solicitors. In denying the motion on behalf of Herman F. G. Hartung to dismiss the bill, no costs were allowed, but where, on the contrary, Empire Bond & Mortgage Corporation prevailed, the Court made an allowance. This was entirely within the province of the Vice-Chancellor as a proper exercise of his discretion and the amount was no more than reasonable.

It is respectfully submitted that the appeal is without merit and should be dismissed with costs.

McCARTER & ENGLISH,
Solicitors for and of Counsel with Defendant,
Empire Bond & Mortgage Corporation.

Note: An obvious omission appears on page 25 of the state of the case. In line 14, after the words "New Jersey" the following should appear before the words "as trustee," namely, "to Fidelity Union Trust Company, a corporation of New Jersey," so that the entire quotation should read: "Subject and subordinate to a mortgage made by Passaic Arms, a corporation of New Jersey, to Fidelity Union Trust Company, a corporation of New Jersey, as trustee, dated May 1, 1926 and recorded in the Passaic County Clerk's office June 17, 1926 for \$215,000."

New Jersey Court of Errors and Appeals

BETWEEN

ARTHUR KRAUS,
Complainant-Appellant,

and

HERMAN F. G. HARTUNG, *et al.*,
Defendants-Respondents.

On Bill, &c.

On Appeal
From Court
of Chancery

BRIEF FOR FIDELITY UNION TRUST COMPANY, TRUSTEE, RESPONDENT.

The Facts.

The complainant-appellant appeals from an order of the Court of Chancery dismissing the complainant's bill as against the defendant-respondent, Fidelity Union Trust Company, Trustee.

The complainant-appellant holds a second mortgage made by Passaic Arms, Inc., to one A. Edward Baer in the sum of \$30,000.00, dated October 27, 1926, covering lands and premises in the City of Passaic, New Jersey, and which was on the same day assigned to him. (Case, pp. 4 and 5.)

On May 1, 1926, Passaic Arms, Inc., had executed and delivered to defendant-respondent, Fidelity Union Trust Company, Trustee, a mortgage on the same lands and premises to secure an issue of bonds in the aggregate amount of \$215,000.00; which was recorded prior to the execution and delivery of complainant-appellant's mortgage. (Case, pp. 5 and 16.)

The complainant-appellant filed his bill in the Court of Chancery to foreclose his said mortgage, and made the defendant-respondent, Fidelity Union Trust Company, as Trustee, a party thereto, and prayed that said defendant-respondent might set forth and discover under oath what, if any, sums of money had been actually paid out and advanced on account of said \$215,000.00 mortgage, and to render an accounting for any and all sums of money disbursed on account thereof, and all payments received by way of payment or credit on the amount of principal and interest accrued on said mortgage; and from what dates interest has been charged as against said mortgage. (Case, p. 10.)

Defendant-respondent moved to strike out said bill of complaint as against it on the ground that the complainant's mortgage is subsequent and subject to the lien of the mortgage so held by it as trustee; and that it had been made a defendant to said bill without its consent; that no prayer was included that the mortgage of said defendant be first paid out of the proceeds of the sale of the property, nor was any provision made for payment of the amount due to it; that the said defendant was not a party to an alleged agreement set up in said bill; that the complainant was not entitled to any recovery from or relief as against it; and that the bill was multifarious (Case, p. 18).

Before the argument on the motion to strike out, complainant-appellant, with leave of the Court, amended his bill setting forth that Empire Bond and Mortgage Corporation, another defendant, has agreed to sell and dispose of the bonds secured by this defendant-respondent's trust mortgage and to apply the proceeds in a certain manner; and that the sole and only purpose and

object of said complainant in bringing into said suit this defendant-respondent, as trustee, and the Empire Bond and Mortgage Corporation, is to secure a judicial determination as to the amount of money due and owing on said mortgage of \$215,000.00, so that, in the event of a decree being made for the sale of the mortgaged premises, complainant could comply with the provisions of the statute which require to be announced to prospective purchasers the nature and amount due on prior encumbrances (Case, p. 15).

The motion to strike out the bill was argued before the Vice-Chancellor on the bill as amended, and resulted in an order of the Court of Chancery dismissing said bill as to this defendant-respondent and allowing to it a counsel fee of \$200.00 (Case, p. 24).

The Law.

POINT I.

**Fidelity Union Trust Company, Trustee,
was neither a necessary nor a proper party to
said suit.**

In an early case decided in this court, a situation was presented where a subsequent encumbrancer made a first mortgagee a party, alleging that his mortgage was void for usury. The first mortgagee answered the bill, and, having done so, the Court held that he had thereby submitted himself to the jurisdiction of the Court, and said:

“He was not a necessary nor a proper party to the suit if the sole design was to foreclose the equity of redemption. The real design and effect of making him a party was

that his mortgage should be redeemed or the encumbrance removed from the premises. Technically, this is all that could be asked as against him. And in the Irish Court of Equity where, as with us, the mortgaged premises are sold under a bill of foreclosure the bill is demurrable, unless the complainant offers to redeem."

Hudnit v. Nash, 16 N. J. E., page 550.

Again, at page 561, it is said:

"A prior mortgagee is not bound to notice the bill of a subsequent mortgagee filed on his mortgage, although he is made a defendant in the bill * * *.

"The prior mortgagee, although made a defendant, and served with process in the suit of the subsequent mortgagee, may take no notice of that suit and file his bill on his own mortgage and make the subsequent mortgagee a party. This is so from the nature of the different interests mortgaged. If it were not so, the control of the first mortgagee over his own securities, as to the time when he will enforce them, and as to the time and mode of selling the property on execution, might be taken away from him by any person who might choose to make a loan and take a mortgage subject to his."

Gihon v. Bellville White Lead Co., 7 N. J. E., page 531.

One of the cases cited by the complainant-appellant deserves further quotation than that given in his brief.

"It is now contended, on their behalf, that the bill cannot be sustained, because the

prior mortgagees were not made parties. This position cannot be sustained. It is undoubtedly true there are cases to be found in which it was ruled that prior incumbrancers were necessary parties to a bill for the foreclosure of a junior mortgage, but in most of these cases the circumstances were peculiar. Where the effort of the junior mortgagee is to obtain a sale of the entire property or estate, and not merely of the equity of redemption, there is reason for making the prior incumbrancers parties, for they have an immediate interest in the decree. And so, when there is substantial doubt respecting the amount of the debts due prior lien creditors, there is obvious propriety in making them parties, that the amount of the charge remaining on the land after the sale may be determined, and that purchasers at the sale may be advised of what they are purchasing. But the case in hand has no such peculiarities. The prior mortgages were not due when this bill was filed; and, without the consent of those mortgagees, nothing more than the equity of redemption could be sold under any decree made in the case, or under the decree which was sought. Nor is there any doubt entertainable respecting the amount due under the prior mortgages. Indeed, the company is estopped by the provisions of its mortgage, of which the complainant is trustee, from asserting that the entire amount of the two \$500,000 mortgages, and of the receiver's mortgage, was not outstanding when the present mortgage was made. The full indebtedness was acknowledged by making the junior mortgage expressly subject to it, and as there is no evidence that any portion of it has been paid, it is not admissible for the mortgagors or their

assignees in bankruptcy to deny it now. *Bronson v. The LaCrosse & Milwaukee Railroad Co.*, 2 Wall. 283.

"Apart from the exceptional cases, we understand the general rule to be, that, in a suit by a junior mortgagee to foreclose a mortgage, prior mortgagees are not necessary parties. So it has been held in England in *Rose v. Page*, 2 Sim. 471; *Richards v. Cooper*, 5 Beav. 304; *Delabere v. Norwood*, 3 Swanst. 144.

"Such, also, is the rule asserted in this country, where the bill of a junior mortgagee, as in this case, seeks only a foreclosure or sale of the equity of redemption. *Edwards on Parties*, p. 91, and cases cited; *Gihon v. Bellville*, 3 Halst. (N. J.), Ch. 531; *Williamson v. Probasco*, 4 id. 571."

Jerome v. McCarter, 94 U. S. 734 (IV. Otto, p. 735).

An examination of the cases from other States cited in the complainant-appellant's brief discloses states of fact from which this case is distinguished, and they may be what is meant by the "exceptional cases" mentioned in the opinion of Mr. Justice STRONG.

POINT II.

The Statute Regarding Sales.

The complainant-appellant relies for his right to include this defendant-respondent as a party to the suit on an alleged duty imposed on him by the Act of the Legislature of the State of New Jersey, approved April 20, 1906 (P. L. 269 relating to announcements of liens and encumbrances on property sold at public sales).

This Act has been before the Court many times, and the Syllabus of Chancellor WALKER (then Vice Chancellor) in a case before him expresses the purpose and effect of this statute:

“The object of the act of April 20, 1906 (P. L., p. 269) is to relieve bidders at foreclosure sales from having unmarketable or incumbered titles thrust upon them, when they have no notice of the estate or interest to be sold, or of the defects in the title, or liens or encumbrances thereon, with the approximate amount thereof; and one who has notice shall not be relieved under the act referred to, no matter how he acquired that notice. The statute is entirely remedial, and should not be extended to one whose claim to the remedy is without equity.”

Oakley et al. v. Shaw, 69 Atl. Rep. 462.

The statute has also been considered in the following cases:

Armstrong v. Fisher, 66 Atl. Rep. 1071;
West Jersey-Parkside Trust Co. v. Led-
yard, 103 N. J. E. 447, aff. 104 Eq. 460;
Calverly v. Ventnor B. & L. Assn., 107
 N. J. E. 214.

It is apparent both from a reading of the statute and of the construction of it by the Courts, that it was not intended to afford a lien holder the opportunity to litigate with prior encumbrancers the amount due to them.

Since this statute went into effect there must have been a great number of foreclosures of secondary liens, and from the reported cases it does not seem to have been necessary for the complainants to involve the prior lien holders in litigation.

It is obvious that the way to obtain the information desired is by application to the holder of the prior lien. There is nothing in the case to show that any such application was made by the complainant-appellant to Fidelity Union Trust Company, as Trustee for the bondholders, although the complainant-appellant in his brief says that it seems to him that there must be some underlying reason why these two large companies, thereby including this defendant-respondent, refuse to give reliable information as to the money due on "their mortgage".

Fidelity Union Trust Company is a trustee for bondholders, and if the complainant-appellant, having a second mortgage on the same property which was mortgaged to secure these bonds, had applied to the Trustee for the information which he undoubtedly was entitled to receive, there can be no doubt but that the records of the company concerning the mortgage, the bonds issued thereunder, the names and residences of the bondholders, would have been disclosed to him.

POINT III.

Defendant-respondent is not made a party for the purpose of obtaining information as to the amount due on its mortgage, but is brought in so that the complainant-appellant may litigate with it the disposition of the mortgage moneys.

In the complainant-appellant's bill it is set up that the mortgagor and Empire Bond and Mortgage Company entered into a contract relating to the mortgage moneys realized by the sale of the mortgage bonds (Case, p. 5). Fidelity Union Trust Company, as Trustee, according to the allegation in said bill, does not appear to have been a party to the said agreement.

Neither in the Court below, nor in the brief filed by the complainant-appellant in this suit, is there advanced any argument or principle of law which would hold this defendant-respondent, as mortgagee, or the holders of the bonds issuing under the mortgage so held by it as Trustee, as charged with any responsibility for the application of the mortgage moneys.

This Court has dealt with such a mortgage and bond issue, and VAN SYCKEL, *J.*, has quoted with approval the law laid down in numerous cases:

“Aside from these adjudications, the bonds of corporations, secured as are these bonds, are dealt with in commercial transactions and are treated, almost without exception, by the courts as a class by themselves, not subject, in all respects, to the stricter rules which pertain between natural persons.

"In *Claffin v. Railroad Co.*, 4 Hughes 12, the question was whether bonds which were part of an issue secured by a first mortgage, but which remained unissued in the hands of the mortgagor, could be issued, after the making of a second mortgage and issue of bonds thereunder, so as to preserve a lien superior to the issue of bonds under the second mortgage.

"Chief-Justice Waite, in maintaining the priority of the first mortgage bonds, said: 'Here the bonds put out, while not for circulation as money, were intended as articles of commerce, to be bought and sold in the market and passed from hand to hand as current negotiable securities. They were to be used in trade. When in the hands of the company, their lien under the mortgage was suspended, but the moment they were out in the usual course of business, it again took effect as of the time when the mortgage was given. Any other rule than this would materially impair the marketable value of this class of instruments and tend to defeat the very object of their execution. The whole issue of such bonds must be treated as of the date of the mortgage, without regard to the time they were actually put out, unless the contrary is clearly expressed.'

"The like view was taken by the supreme court of Iowa in *Nelson v. Iowa Eastern Railroad Co.*, 8 Am. R. R. Rep. 82. There, between the execution and recording of the mortgage and the issue of the bonds, a mechanics' lien attached to the mortgaged premises. The court of Iowa denied priority to the mechanics' liens, saying that: 'If the purchaser of a bond in New York, in Amsterdam or London is bound to inquire whether the bond in fact was executed by the com-

pany contemporaneously with the execution of the mortgage, or whether, before the signing or the negotiating of the bonds, liens of laborers or materialmen may not have attached to the road, it is apparent that the value of these securities would be much depreciated, and all industries which depend upon the raising of means through negotiation would be paralyzed. The plaintiffs are affected with knowledge of the existence of the mortgage, and, seeing that the road had mortgaged all its future acquisitions, they could and should have protected themselves by refusing to sell the ties without payment or security.'

"In Reed's Appeal, 122 Pa. St. 565, where the lien of the mortgage was held to be dominant, a distinction is clearly drawn between mortgages to secure bonds to be put upon the market and dealt with in commercial circles, and a mortgage given by one man to another. The following is the language used by the court at page 573 of that case: 'Where a mortgage is given to cover future advances of one man to another, it is not a matter of much inconvenience for the mortgagee to ascertain, from time to time, as he is called on for advances, whether there be intervening liens. But a different case is presented where a public improvement is undertaken, requiring the expenditure of large sums of money and the floating of a debt of great magnitude. The debt is necessarily divided into small parts and carried into different and distant markets. It would be out of the question to ascertain the state of the record or of the company's affairs each time a bond was about to be sold. If this were made the duty of purchasers it would prevent the sale of such securities altogether, or at least confine their

purchase to such large concerns as could buy in bulk after due and careful inquiry; even then the facts would be open to doubt at every subsequent sale. Thus, their value would be entirely reduced.'

"The cases are referred to in Jones Corp. B. & M. Par. 205.

"If this well-established doctrine is shaken it will destroy the value of millions of securities of railroad and other corporations which have been negotiated on the faith of the priority of the mortgage which secures their issue.

"In the case before us the lien claimants show no superior equity. They had full notice of the existence of the mortgage and the title which passed thereby to the trustee, and the purpose of the company to put the mortgage bonds upon the market for sale to bona fide purchasers without notice of the mechanics' lien. Charged with such knowledge, they took no active measures to restrain the issue of the bonds."

Central Trust Co. v. Continental Iron Works, 51 N. J. E. 608.

Therefore, it was immaterial whether all of these bonds had been issued before the execution and recording of the complainant-appellant's second mortgage, as he took his mortgage with full notice, not only constructive, but by actual notice in his own mortgage, which recites that it is "subject and subordinate to a mortgage made by Passaic Arms, a corporation of New Jersey, to Fidelity Union Trust Company, a corporation of New Jersey, as Trustee, dated May 1, 1926, and recorded in the Passaic County Clerk's Office June 17, 1926, for \$215,000.00." It will be noted that in

the Case, page 25, that by typographical error this quotation from the mortgage of the complainant-appellant made by the Vice Chancellor is not correctly given (see 155 Atl. Rep., p. 621).

Defendant-respondent's mortgage went through the ordeal of a receivership proceeding against the mortgagor, and the property was sold to the defendant Hartung by the receiver, subject to defendant-respondent's mortgage and also to the second mortgage held by the complainant-appellant (Case, p. 7). In that action of course the complainant-appellant was a party and had ample opportunity to obtain all of the information concerning defendant-respondent's mortgage, and, if necessary, to attack it.

In the complainant-appellant's brief an illustration is given which, perhaps, may indicate what he is seeking to do or ascertain, where on page 18 he suggests the possibility that the \$50,000.00 paid by the defendant Hartung for the purchase of the mortgaged premises from the receiver was furnished by these respondents, meaning this defendant-respondent and Empire Bond and Mortgage Corporation.

No explanation is offered as to how this could have been accomplished. Mortgage money on such a mortgage can only be raised by the sale of bonds, and neither the Trustee nor the bondholders are charged with the duty of seeing to the application of the mortgage money. The Trustee under the mortgage has no personal interest in the mortgage or in the proceeds of the sale of the bonds, nor any voice in the manner of disbursing these mortgage moneys, unless the Trust Indenture lays such obligation on it, and nothing appears in this case to indicate that there was such an obligation.

POINT IV.

The counsel fee allowed to this defendant-respondent in the order appealed from is reasonable and was within the discretion of the Court.

The Vice Chancellor allowed this defendant-respondent a counsel fee of \$200.00 payable by the complainant-appellant. If no such fee had been allowed, the Trustee would have to pay its counsel who had been retained to protect the bondholders, and attempt to collect the money so paid from the holders of the bonds, which would have been an unfair and difficult task. The Vice Chancellor found that the Trustee had acted properly and promptly in protection of its *cestuis que* trust, and that it was justified in taking the action it did, presenting to the Court by brief the authorities bearing on the subject, and was entitled to be reimbursed. In view of this, the counsel fee of \$200.00 allowed was not only reasonable, but modest.

It is, therefore, respectfully submitted that the order of the Court of Chancery made on the 27th day of July, 1931, be sustained in all things, and that the appeal of the complainant-appellant be dismissed with costs.

Respectfully submitted,

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Fidelity Union Trust Company,
Trustee.

DANIEL L. CAMPBELL,
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