

INDEX.

	PAGE
Notice of Appeal.....	1
Petition to Appeal.....	2
Bill of Complaint.....	4
Contract	15
Closing Statement	18
Deed	20
Agreement	23
Summons	29
Complaint	30
Affidavit of Fannie Gorenberg	10
Affidavit of Margaret O'Rourke Hunt.....	27
Schedule "A"—Bond	34
Order to Show Cause.....	36
Notice	38
Memorandum	40
Order Dismissing Bill of Complaint, Etc.....	44

INDEX

- 1. Introduction
- 2. The first part of the book
- 3. The second part of the book
- 4. The third part of the book
- 5. The fourth part of the book
- 6. The fifth part of the book
- 7. The sixth part of the book
- 8. The seventh part of the book
- 9. The eighth part of the book
- 10. The ninth part of the book
- 11. The tenth part of the book
- 12. The eleventh part of the book
- 13. The twelfth part of the book
- 14. The thirteenth part of the book
- 15. The fourteenth part of the book
- 16. The fifteenth part of the book
- 17. The sixteenth part of the book
- 18. The seventeenth part of the book
- 19. The eighteenth part of the book
- 20. The nineteenth part of the book
- 21. The twentieth part of the book
- 22. The twenty-first part of the book
- 23. The twenty-second part of the book
- 24. The twenty-third part of the book
- 25. The twenty-fourth part of the book
- 26. The twenty-fifth part of the book
- 27. The twenty-sixth part of the book
- 28. The twenty-seventh part of the book
- 29. The twenty-eighth part of the book
- 30. The twenty-ninth part of the book
- 31. The thirtieth part of the book
- 32. The thirty-first part of the book
- 33. The thirty-second part of the book
- 34. The thirty-third part of the book
- 35. The thirty-fourth part of the book
- 36. The thirty-fifth part of the book
- 37. The thirty-sixth part of the book
- 38. The thirty-seventh part of the book
- 39. The thirty-eighth part of the book
- 40. The thirty-ninth part of the book
- 41. The fortieth part of the book
- 42. The forty-first part of the book
- 43. The forty-second part of the book
- 44. The forty-third part of the book
- 45. The forty-fourth part of the book
- 46. The forty-fifth part of the book
- 47. The forty-sixth part of the book
- 48. The forty-seventh part of the book
- 49. The forty-eighth part of the book
- 50. The forty-ninth part of the book
- 51. The fiftieth part of the book

Notice of Appeal.

(Filed May 13, 1930)

IN CHANCERY OF NEW JERSEY.

HARRY A. GORENBERG and FANNIE
GORENBERG,
Complainants,

and

MARGARET O'ROURKE HUNT,
Defendant.

On Bill, &c. 10

The complainants, Harry A. Gorenberg and Fannie Gorenberg, hereby appeal from the Decree and Order of his Honor Edwin Robert Walker, Chancellor of the State of New Jersey advised by John O. Bigelow, Vice Chancellor, entered in the above entitled matter on the 12th day of May, 1930, and from each part thereof to the Court of Errors and Appeals in the last resort in all causes. 20

O'BRIEN & TARTALSKY,
Solicitors of Complainants.

I conceive there is good cause for appeal. 30

SAMUEL TARTALSKY,
Of Counsel with Complainants.

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Petition to Appeal.

(Filed May 13, 1930)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	HARRY A. GORENBERG and FANNIE GORENBERG, Complainants-Appellants, and MARGARET O'ROURKE HUNT, Defendant-Appellee.	}	On Appeal.
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TO THE HONORABLE NEW JERSEY COURT OF ERRORS
AND APPEALS IN THE LAST RESORT IN ALL CAUSES:

20 The petition of Harry A. Gorenberg and Fannie
Gorenberg appellants respectfully shows:

30 1. That your petitioners find themselves ag-
grieved by a Decree and Order made in the Court of
Chancery by his Honor Edwin Robert Walker,
Chancellor of the State of New Jersey on the advice
of Vice Chancellor John O. Bigelow bearing date
May 12th, 1930, wherein your petitioners are com-
plainants and Margaret O'Rourke Hunt is defend-
ant, to wit, that the said Decree and Order errone-
ously dismisses the bill of complaint filed by your
petitioners and erroneously discharges the Order
to Show Cause previously granted therein.

40 2. Your petitioners humbly appeal from the
Order and Decree as aforesaid upon the ground
that the said Order and Decree is erroneous and
that the bill of complaint did state an equitable

Petition to Appeal.

cause of action and should have been sustained and that the Order to Show Cause should have been made absolute.

3. Petitioners further appeal upon the ground that the Chancellor should have granted a Decree in favor of complainants.

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Your petitioners therefore pray that the said Decree and Order may be reversed and your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

O'BRIEN & TARTALSKY,
Solicitors for Complainants-Appellants.

SAMUEL TARTALSKY,
Of Counsel.

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Bill of Complaint.

(Filed Apr. 21, 1930)

IN CHANCERY OF NEW JERSEY.

TO HIS HONOR EDWIN ROBERT WALKER, CHANCELLOR OF THE STATE OF NEW JERSEY :

10 The complainants, Harry A. Gorenberg and Fannie Gorenberg, his wife, of the City of Jersey City, Hudson County, New Jersey, respectfully show :

20 1. That on August 22, 1925, they became the owners of lands and premises commonly known as #117 Manning Avenue, in the City of Jersey City, and on said date they made and executed to the defendant, Margaret O'Rourke Hunt, a bond in the principal sum of Four thousand and five hundred (\$4,500.) Dollars payable August 22, 1928, which bond was secured by a mortgage on said lands and premises particularly described therein and which was recorded in the Hudson County Register's Office in Book 1331 at page 47.

30 2. Prior to the due date of said bond and mortgage, to wit, July 21st, 1926, complainants entered into a contract with John Trupkiewicz according to the terms of which said complainants agreed to convey and said John Trupkiewicz agreed to purchase said lands and premises for the sum of \$12,700. subject to a first mortgage held by Jewett Building and Loan Association and subject to the mortgage of defendant in the sum of \$4,500., the said purchaser paying cash above said mortgages, a copy of said contract being annexed hereto and made a part hereof.

40 3. On or about August 25th, 1926, pursuant to the contract of purchase aforesaid, the title to said

Bill of Complaint.

lands and premises was closed, and the amount of the bond and mortgage held by defendant, viz., the sum of \$4,500. was deducted by said John Trupkiewicz, the aforesaid vendee, from the purchase price of \$12,700 which said sum represented the whole value of the lands and premises.

Annexed hereto and made a part hereof is a copy of the said closing statement disclosing the deduction and retention by the vendee aforesaid of the amount of defendant's bond and mortgage from the consideration for said conveyance. 10

4. Upon payment by said John Trupkiewicz to complainants of the sum of \$1,062.64 which was the balance of the purchase price after deducting the amount of defendant's bond and mortgage and other encumbrances and charges against the lands and premises, complainants made, executed and delivered to said John Trupkiewicz and Fannie Trupkiewicz a warranty deed conveying the lands and premises to them which deed was recorded in the Hudson County Register's Office on August 26th, 1926 in Book 1621 at page 80 &c. and a copy of which is hereto annexed and made a part hereof. 20

5. Said John Trupkiewicz and Fannie, his wife, thereupon entered into and upon said lands and premises and enjoyed the rents, issues and profits therefrom, and they paid defendant the interest on her said bond and mortgage until August 23rd, 1928. 30

6. Prior to August 22, 1928, the due date of the bond made by complainants to defendant, defendant agreed with said John Trupkiewicz and Fannie Trupkiewicz, the then owners of the lands 40

Bill of Complaint.

and premises, that upon the payment by them to defendant of a pecuniary consideration or bonus of \$200., a payment of \$500. on account of the principal sum and the covenant or agreement of said John Trupkiewicz and Fannie, his wife, to comply with the terms and conditions of the bond and mortgage and to pay the principal of \$4,000. on August 24th, 1931, that defendant would agree to extend the time of payment of said principal sum of \$4,000. to August 24th, 1931.

7. Said John Trupkiewicz and Fannie Trupkiewicz accepted the terms and conditions of said defendant hereinbefore recited, and on or about August 23, 1928, paid to the defendant the sum of \$200. as a pecuniary consideration moving to defendant, a further sum of \$500. on account of the principal sum of the bond and mortgage, and said John Trupkiewicz and Fannie, his wife, and said defendant, entered into an agreement which is annexed hereto and made a part hereof, wherein and whereby said defendant in consideration of the premises and the covenant upon the said John Trupkiewicz and Fannie, his wife, to pay the principal sum of the bond and mortgage, the payment thereof was extended to August 24th, 1931.

8. Said extension agreement and the negotiations leading to the execution thereof was without the consent or knowledge of complainants.

9. On or about July 26th, 1929, said defendant instituted in this Court an action for the foreclosure of her said mortgage by reason of an alleged default on the part of said John Trupkiewicz and Fannie, his wife, in the compliance with the

Bill of Complaint.

terms of the bond and mortgage and the extension agreement entered into between the said parties. A final decree for the sale of said lands and premises was made on or about December 31, 1929, and on or about March 20th, 1930, by virtue of a writ of fieri facias directed to him, the Sheriff of Hudson County sold the lands and premises to defendant for the sum of \$500. 10

10. On or about April 1st, 1930, defendant instituted in the New Jersey Supreme Court an action against complainants to recover from complainants the sum of \$4,042.17 which sum defendant alleges to be a deficiency on the bond made by complainants, payment of which was extended as hereinbefore recited.

Annexed hereto and made part hereof is copy of said summons and complaint. 20

11. Complainants further show that Edward M. Taylor Company, Real Estate Brokers, were the agents of the defendant in the sale of said lands and premises to complainants and Milton Taylor, a member of said firm, on or about August 23, 1928, received the sum of \$200.00 as a bonus or other consideration for the extension of said bond and mortgage by defendant. Said Milton Taylor paid defendant the sum of \$100.00 on or about August 23, 1928, and thereafter on or about January 8, 1929, the said defendant lodged a complaint with the New Jersey Real Estate Board against said Milton Taylor, a copy of which is hereto annexed and made part hereof, wherein it is alleged that she had agreed to accept \$200.00 and not \$100.00 for the consideration and charged said Milton Taylor with wrongfully withholding the additional \$100.00 for 30
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Bill of Complaint.

the extension of the mortgage. Thereafter, on or about March 15, 1929, this defendant instituted a suit in the First District Court of Jersey City against Edward M. Taylor Company to recover the additional \$100.00 and on or about May 2, 1929, recovered a judgment for said bonus against said Edward M. Taylor Company, which judgment was subsequently satisfied and paid to defendant.

12. Complainant further shows that by reason of the foregoing facts and circumstances the said John Trupkiewicz and Fannie Trupkiewicz became principals and the said complainants sureties on said bond and mortgage hereinbefore referred to and by reason of the extension of said bond and mortgage for the consideration paid to and received by defendant from said John Trupkiewicz and Fannie Trupkiewicz, his wife, the said complainants are discharged of their said bond and mortgage.

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

1. That the defendant Margaret O'Rourke Hunt, may answer this bill of complaint and each statement herein contained.

2. That the said defendant may be enjoined and restrained by decree of this Honorable Court from prosecuting and anywise proceeding with the action in the New Jersey Supreme Court instituted by her against the complainants.

3. That it may be decreed by reason of the facts and circumstances hereinbefore set forth that the complainants as sureties have been released and

Bill of Complaint.

discharged by said defendant on their bond and mortgage.

4. That a writ of subpoena may issue commanding the said defendant to answer the bill of complaint and to abide by such decree as this Court may make in the premises.

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5. That the complainants may have such other and further relief as this court may deem just and equitable.

O'BRIEN & TARTALSKY.
Solicitors for Complainants.

SAMUEL TARTALSKY,
Of Counsel.

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Affidavit of Fannie Gorenberg.

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

10 FANNIE GORENBERG, being duly sworn according to law on her oath deposes and says: that she is one of the complainants named in the foregoing bill of complaint and that on August 22, 1925, she and Harry A. Gorenberg, her husband, became the owners of lands and premises commonly known as No. 117 Manning Avenue, in the City of Jersey City, and on said date they made and executed to the defendant, Margaret O'Rourke Hunt, a bond in the principal sum of Four thousand five hundred (\$4500.) Dollars payable August 22, 1928, which bond was secured by a mortgage on said lands and premises particularly described therein and which was recorded in the Hudson County Register's Office in Book 1331 at page 47.

20 That prior to the due date of said bond and mortgage, to wit, July 21st, 1926, deponent and her husband entered into a contract with John Trupkiewicz according to the terms of which said complainants agreed to convey and said John Trupkiewicz agreed to purchase said lands and premises for the sum of \$12,700. subject to a first mortgage held by Jewett Building and Loan Association and subject to the mortgage of defendant in the sum of \$4500. the said purchaser paying cash above said mortgages, a copy of said contract being annexed hereto and made part hereof.

30 That on or about August 25, 1926, pursuant to the contract of purchase aforesaid, the title to said lands and premises was closed, and the amount of the bond and mortgage held by defendant, viz., the sum of \$4500. was deducted by said John Trupkiewicz, the aforesaid vendee, from the purchase price

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Affidavit of Fannie Gorenberg.

of \$12,700. which said sum represented the whole value of the lands and premises.

Annexed hereto and made a part hereof is a copy of the said closing statement disclosing the deduction and retention by the vendee aforesaid of the amount of defendant's bond and mortgage from the consideration for said conveyance.

Upon payment by said John Trupkiewicz to deponent and her husband of the sum of \$1062.64 which was the balance of the purchase price after deducting the amount of defendant's bond and mortgage and other encumbrances and charges against the lands and premises, deponent and his wife made, executed and delivered to said John Trupkiewicz and Fannie Trupkiewicz a warranty deed conveying the lands and premises to them which deed was recorded in the Hudson County Register's Office on August 26th, 1926, in Book 1621 at page 80, &c., and a copy of which is hereto annexed and made part hereof.

Said John Trupkiewicz and Fannie, his wife, thereupon entered into and upon said lands and premises and enjoyed the rents, issues and profits therefrom, and they paid defendant the interest on her said bond and mortgage until August 23rd, 1928.

Prior to August 22nd, 1928, the due date of the bond made by deponent and her husband to defendant, defendant agreed with said John Trupkiewicz and Fannie Trupkiewicz, the then owners of the lands and premises, that upon the payment by them to defendant of a consideration or bonus of \$200. a payment of \$500. on account of the principal sum and the covenant or agreement of said John Trupkiewicz and Fannie his wife, to comply with the terms and conditions of the bond and mortgage and

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Affidavit of Fannie Gorenberg.

to pay the principal of \$4000. on August 24th, 1931, that defendant would agree to extend the time of payment of said principal sum of \$4000. to August 24th, 1931.

10 That said John Trupkiewicz and Fannie Trupkiewicz accepted the terms and conditions of said defendant hereinabove recited, and on or about August 23rd, 1928, paid to defendant the sum of \$200. as a bonus or consideration moving to defendant, a further sum of \$500. on account of the principal sum of the bond and mortgage, and said John Trupkiewicz and Fannie, his wife, and said defendant, entered into an agreement which is annexed hereto and made a part hereof, wherein and whereby said defendant in consideration of the premises and the covenant upon the said John Trupkiewicz and Fannie, his wife, to pay the principal sum of the bond and mortgage, the payment thereof was extended to August 24th, 1931.

Said extension agreement and the negotiations leading to the execution thereof was without the consent or knowledge of deponent and her husband.

20 On or about July 26th, 1929, said defendant instituted in this court an action for the foreclosure of her said mortgage by reason of an alleged default on the part of said John Trupkiewicz and Fannie, his wife, in the compliance with the terms of the bond and mortgage and the extension agreement entered into between the said parties. A final decree for the sale of said lands and premises was made on or about December 31, 1929, and on or about March 20th, 1930, by virtue of a writ of fieri facias directed to him, the Sheriff of Hudson County sold the lands and premises to defendant for the sum of \$500.

Affidavit of Fannie Gorenberg.

That on or about April 1st, 1930, defendant instituted in the New Jersey Supreme Court an action against deponent and his wife to recover from deponent and his wife the sum of \$4042.17 which sum defendant alleges to be a deficiency on the bond made by deponent and his wife, payment of which was extended as hereinbefore recited. Annexed hereto and made part hereof is a copy of said summons and complaint. 10

Deponent further says that Edward M. Taylor Company, Real Estate Brokers, were the agents of the defendant in the sale of said lands and premises to deponent and her husband and Milton Taylor, a member of said firm, on or about August 23, 1928, received the sum of \$200.00 as a bonus or other consideration for the extension of said bond and mortgage by defendant. Said Milton Taylor paid defendant the sum of \$100.00 on or about August 23, 1928, and thereafter, on or about January 8, 1929, the said defendant lodged a complaint with the New Jersey Real Estate Board against said Milton Taylor, a copy of which is hereto annexed and made part hereof, wherein it is alleged that she had agreed to accept \$200.00 and not \$100.00 for the consideration and charged said Milton Taylor with wrongfully withholding the additional \$100.00 for the extension of the mortgage. Thereafter, on or about March 15, 1929, this defendant instituted a suit in the First District Court of Jersey City against Edward M. Taylor Company to recover the additional \$100.00 and on or about May 2, 1929, recovered a judgment for said bonus against said Edward M. Taylor Company, which judgment was subsequently satisfied and paid to defendant. 20 30 40

Affidavit of Fannie Gorenberg.

Deponent further says that by reason of the foregoing facts and circumstances the said John Trupkiewicz and Fannie Trupkiewicz became principals and the deponent and her husband sureties on said bond and mortgage hereinbefore referred to and by reason of the extension of said bond and mortgage for the consideration paid to and received by defendant from said John Trupkiewicz and Fannie Trupkiewicz his wife, deponent and her said husband are discharged of their said bond and mortgage.

FANNIE GORENBERG.

Sworn and subscribed to before me at }
Jersey City this April 21st, 1930. }

20 JOS. M. MILBERG,
 Atty. at Law of N. J.

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Contract, Annexed to Bill of Complaint.

ARTICLES OF AGREEMENT, made and entered into the 21st day of July in the year one thousand nine hundred and twenty-six between HARRY A. GORENBERG and FANNIE GORENBERG, his wife, parties of the first part, and JOHN TRUPKIEWICZ, party of the second part, in manner following: The said parties of the first part, in consideration of the sum of Four hundred (\$400.) dollars, to them duly paid by the said party of the second part, hereby agree to sell unto the said party of the second part, All that certain lot, piece or parcel of land and premises, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, and which on a certain map entitled "Map of property of Mary E. Sisson made by Jacob Weart, Trustee, Jersey City, N. J." and filed in the Register's Office of Hudson County is known and designated as lot thirty-four (34), in Block three hundred and forty-three (343), fronting on the northwesterly side of Manning Avenue as same is laid down on said map, together with one-half of the party wall on the west side of said premises.

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Being also known on the Official Assessment Map of Jersey City as lot thirty-four (34), in Block two thousand and eighty-six (2086) and also known by street number 117 Manning Avenue, Jersey City. For the sum of twelve thousand seven hundred (\$12,700.) dollars which the said party of the second part hereby agrees to pay to the said party of the first part, as follows: The sum of four hundred (\$400.) Dollars, on the signing of this agreement, the receipt whereof is hereby acknowledged, and the sum of thirteen hundred sixty dollars (\$1360) in cash more or less, on the 23rd day of August,

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Contract.

nineteen hundred and twenty-six. Subject to a first mortgage in the original amount of seven thousand (\$7000.) dollars upon which there is due a balance of about sixty-four hundred forty dollars (\$6440.) held by the Jewett Building & Loan Association.

10 Subject to a second mortgage for forty-five hundred dollars (\$4500.00) held by Margaret O'Rourke Hunt.

20 AND THE SAID parties of the first part, on receiving such payment at the time and in the manner above mentioned, shall at their own proper cost and expense execute, acknowledge and deliver to the said party of the second part, or to his assigns, a proper deed for the conveying and assuring to them, the fee simple of the said premises, free from all encumbrance except as herein stated.

Taxes, water rents, insurance premiums, rents and building and loan mortgage as to payment of dues shall be adjusted as of the day of passing of title.

30 The balance of said purchase price to be paid, and the deed therefore to be given at the office of Walter J. Freund, No. 15 Exchange Place, Jersey City, New Jersey, on the 23rd day of August nineteen hundred and twenty-six, at the hour of ten o'clock in the forenoon of said day, which deed shall contain a general warranty and the usual full covenants.

AND IT IS UNDERSTOOD that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties.

Contract.

IN WITNESS WHEREOF, the parties of these presents have hereunto set their hands and seals the day and year first above written.

HARRY A. GORENBERG L. S.
FANNIE TRUPKIEWICZ L. S.
JOHN TRUPKIEWICZ L. S.

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Sealed and delivered in the presence of

WALTER J. FREUND,
as to Harry A. Gorenberg and
John Trupkiewicz.

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**Closing Statement, Annexed to Bill of
Complaint.**

August 25, 1926.

10	<p align="center">HARRY A. GORENBERG and FANNIE, his wife,</p> <p align="center">to</p> <p align="center">JOHN TRUPKIEWICZ.</p>	}	<p align="center">117 Manning Avenue.</p>
	Lot 34, City Block 2086		
	Purchase Price		\$12,700.00
	Ins. Firemen's Ins. Co. 871080—\$3500.		
	Aug. 25/26 to Mch. 28/27		
	Prem. \$44.63 7 months		8.68
20	Commonwealth Ins. Co. 556293—\$2000.		
	Aug. 25/26 to Aug. 24/28		
	Prem. \$25.50 2 yrs.		17.00
			<hr/>
			\$12,725.78
	Deposit		\$425.00
	1st Mtge. Harry E. Gorenberg & wife to Jewett Bldg. & Loan Assn.		6506.75
30	1325-101		
	2nd Mtge. Harry E. Gorenberg & wife, to May O'R. Hunt 1131-47		4500.00
	Int. from Aug. 24-26 paid by Seller to Aug. 24/26		
	1925 taxes, 2nd half	\$72.23	72.23
	1926 taxes 1st half Tax	97.69	
	Int	1.61	99.30
			<hr/>
40	2nd half	96.69	

Closing Statement.

July 1/26 to Aug. 25/26 1 mo. 25 days	29.66		
1926 Water rents \$25.55 May 1/26 to Aug 25/26, 3 mos 25 days	8.14		
Rents Store Pabinas \$50. paid to Sep 1/26			10
Rear Store Parker \$20. paid to Sep. 1/26			
2nd Floor \$20. paid to Sep. 1/26			
3rd Floor Kelly No. Adj.			
3rd Floor Anton \$20. paid to Sep. 1/26			
<hr/>			
\$110. Aug. 25/26 to Aug 31/26— 6 days	21.96		
	<hr/>	11,663.04	20
By check		\$494.80	
Cash		800.00	
		<hr/>	
		\$1295.00	
To Harry A. Gorenberg	\$1062.64		
Jewett Bldg. & Loan	144.00		
1926 Water rents	26.00		
Walter J. Freund	53.60		
John Trupkiewicz	8.76		30
	<hr/>	1295.00	
Due 1925 taxes 2nd half	\$72.23		
1926 " 1st half	99.30		
	<hr/>		
	\$171.53		

Deed, Annexed to Bill of Complaint.

THIS DEED, Made the twenty-third day of August in the year one thousand nine hundred and twenty-six

BETWEEN HARRY A. GORENBERG and FANNIE GORENBERG, his wife, of Jersey City, Hudson County, New Jersey, and JOHN TRUPKIEWICZ and
 10 FANNIE TRUPKIEWICZ, his wife, of the same place, party of the second part.

WITNESSETH: That in consideration of the sum of one dollar and other valuable consideration the said parties of the first part do grant and convey unto the said party of the second part and their heirs and assigns forever All that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City
 20 of Jersey City, in the County of Hudson and State of New Jersey, and which on a certain map entitled, "Map of property of Mary E. Sisson, made by Jacob Weart, Trustee, Jersey City, N. J., and filed in the Register's Office of Hudson County", is known and designated as lot number thirty-four (34) in block three hundred forty-three (343) fronting on the northwesterly side of Manning Avenue as same is laid down on said map, together
 30 with one-half of the party wall on the west side of said premises. BEING also known on the Official Assessment Map of Jersey City as lot thirty-four (34) in block two thousand and eighty-six (2086) and also known by street number 117 Manning Avenue, Jersey City.

BEING the same premises conveyed to the parties of the first part by Margaret O'Rourke Hunt, widow, by deed dated August 24th, 1925, recorded
 40

Deed.

in Book 1577 of Deeds for said Hudson County on page 275 &c.

SUBJECT to a mortgage of \$7000. held by the Jewett Building and Loan Association, dated August 24, 1925, which has since been reduced.

SUBJECT to a second mortgage of \$4500., held by Margaret O'Rourke Hunt, dated August 24th, 1925. 10

TO HAVE AND TO HOLD said premises with the appurtenances, unto the said grantees their heirs and assigns forever. The said Harry A. Gorenberg and Fannie Gorenberg, his wife,

COVENANT:

1. That they are lawfully seized of the said land. 20
2. That they have the right to convey the said land to the grantee.
3. That the grantees shall have quiet possession of the said land free from all incumbrances.
4. That the grantors will execute such further assurances of the said land as may be requisite.
5. That they will warrant generally the property hereby conveyed. 30

IN WITNESS WHEREOF, the said grantors have hereunto set their hands and seals the day and year first above written.

HARRY A. GORENBERG L. S.
FANNIE GORENBERG L. S.

SIGNED, SEALED AND DELIVERED in the presence of 40
WALTER J. FREUND.

Deed.

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

10 BE IT REMEMBERED That on this 25th day of August in the year one thousand nine hundred and twenty-six before me, the subscriber, a Master in Chancery of New Jersey, personally appeared, Harry A. Gorenberg and Fannie Gorenberg, his wife, who, I am satisfied, are the grantors in the within Indenture named, and I having first made known to them the contents thereof, they did severally acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed :

20 WALTER J. FREUND,
 Master in Chancery of New Jersey.

Received in the Office of the Register of the County of Hudson, N. J., on the 26th day of Aug. A. D., 1926, at 11:17 o'clock, A. M., and Recorded in Book 1621 of Deeds for said County, page 80, etc.

30 CHARLES F. X. O'BRIEN,
 Register.

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**Agreement, Annexed to Bill of
Complaint.**

THIS AGREEMENT Made the twenty-third day of August, in the year One Thousand Nine Hundred and twenty-eight BETWEEN JOHN TRUPKIEWICZ and FANNIE TRUPKIEWICZ, his wife, of the City of Jersey City, County of Hudson and State of New Jersey, parties of the first part, and MARGARET O'ROURKE HUNT, party of the second part

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WHEREAS, the party of the second part hold the bond of HARRY A. GORENBERG, bearing date, the twenty-fourth day of August, one thousand nine hundred and twenty-five, conditioned for the payment of the principal sum of Forty-five hundred (\$4500) dollars, on the twenty-fourth day of August, one thousand nine hundred and twenty-eight, and the interest thereon, together with a mortgage securing payment thereof, made and executed by the said HARRY A. GORENBERG & FANNIE GORENBERG, his wife to MARGARET O'ROURKE HUNT, bearing even date with said bond, and recorded in the office of the Register of the County of Hudson, in the State of New Jersey, on the twenty-fourth day of August, one thousand nine hundred and twenty-five, in Liber 1331 of Mortgages, at page 47.

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AND WHEREAS, the said parties of the first part now the owner of the premises described in the said mortgage and have requested that the time of payment of the said principal sum or balance of Four thousand (\$4000.) dollars, secured to be paid thereby, be extended for three years from the twenty-fourth day of August, one thousand nine hundred and twenty-eight.

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TO THE OF Agreement.

10 NOW THIS AGREEMENT WITNESSETH, that the said party of the second part, in consideration of the premises and of one dollar to her in hand paid by the said parties of the first part, agree to extend the time of payment of the said principal sum or balance of Four thousand (\$4000.00) dollars, to the twenty-fourth day of August, which will be in the year one thousand nine hundred and thirty-one.

20 PROVIDED, that the said interest thereon according to the tenor of the said bond or obligation, is punctually paid quarter-annually, on the twenty-fourth day of August, November, February and May in each and every year until said principal sum is fully paid; all terms and conditions of said bond and mortgage to remain in full force and effect, except as the same may be herein modified.

30 AND PROVIDED FURTHER, that nothing herein contained shall in anywise impair the security now held for the said debt. And the said parties of the first part agree to the extension of the time of payment of the principal of said bond hereinbefore stated, and for their heirs, executors and administrators hereby covenant to pay the same on the twenty-fourth days of August, one thousand nine hundred and thirty-one, and to pay the interest thereon on the days on which the same becomes due as hereinbefore mentioned.

40 AND IT IS FURTHER MUTUALLY AGREED, that should the said interest, or any part thereof, remain due and unpaid for the space of thirty days, or should any tax or assessment remain due and unpaid for the space of ninety days after the same shall have become due and payable, then the whole of the said

Agreement.

principal sum shall, at the option of the said party of the second part, or of her legal representatives, become due and payable immediately thereafter, anything hereinbefore stated to the contrary notwithstanding.

IN WITNESS WHEREOF, the parties hereto have hereunto set their respective hands and seals the day and year first above written. 10

JOHN TRUPKIEWICZ L. S.
 FANNIE TRUPKIEWICZ L. S.
 MARGARET O'ROURKE HUNT L. S.

Signed, Sealed and Delivered
 in the Presence of

MILTON W. TAYLOR 20
 for all

Received on account Five hundred (\$500.) Dollars receipt of which is hereby acknowledged leaving a balance of Four thousand (\$4000.) Dollars.

MARGARET O'ROURKE HUNT L. S.

MILTON W. TAYLOR 30

Agreement.

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

10 BE IT REMEMBERED, That on this 23rd day of August, in the year of our Lord One Thousand Nine Hundred and twenty-eight, before me a Notary Public of New Jersey, personally appeared JOHN TRUPKIEWICZ & FANNIE TRUPKIEWICZ, who, I am satisfied are the grantors mentioned in the within Instrument, and to whom I first made known the contents thereof, and thereupon, they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

20 JOHN TRUPKIEWICZ L. S.
 FANNIE TRUPKIEWICZ L. S.

MILTON W. TAYLOR
 Notary Public of New Jersey
 (Seal)

30 Received in the Register's Office of the County of Hudson on the 24th day of August A. D., 1928, at 4:00 o'clock, in the afternoon and recorded in Book 80 for said County, on page 107 Releases etc

CHARLES F. X. O'BRIEN
 Register

Affidavit of Margaret O'Rourke Hunt.

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

MARGARET O'ROURKE HUNT, being duly sworn according to law, upon her oath deposes and says that during the month of August, 1925, Edward M. Taylor Company, acting as her broker did sell property commonly known as 343 Manning Avenue, Jersey City, N. J. to Harry A. Gorenberg and Fannie Gorenberg his wife, for which a commission was paid to Edward M. Taylor Company.

10

Deponent further states that a purchase money mortgage, which was to be a second mortgage in the amount of \$4500. was given to her by Harry A. Gorenberg and Fannie Gorenber, his wife, accompanied by a bond properly executed by the said Harry A. Gorenberg and Fannie Gorenberg, his wife which mortgage was to run for a period of three years.

20

Deponent further states that Milton Taylor well knowing that her financial condition was such that she needed immediate cash in order to cover living expenses, did call on her close to the expiration date of the mortgage and advised her that John Trupkiewicz and Fannie Trupkiewicz, his wife, were now the owners of the property and that if she would grant an extension of the mortgage upon the payment of \$800. towards the principal that the said John Trupkiewicz and Fannie Trupkiewicz, his wife, would pay to her the sum of \$500. for the extension of the said mortgage. Deponent, upon the solicitation of the said Milton Taylor, finally agreed to extend the mortgage for three years for the consideration of \$500. but when the extension of the mortgage was to be executed Milton Taylor advised deponent that he could only secure the sum of \$200. for the extension and which amount deponent finally advised Milton Taylor that she was agreeable to accept.

30

40

Affidavit of Margaret O'Rourke Hunt.

Deponent thereupon signed the extension of the mortgage for three years but received from Milton Taylor only the sum of \$100. although she has been informed and believes that John Trupkiewicz and Fannie Trupkiewicz, his wife, did pay to Milton Taylor the sum of \$200. for the extension of the mortgage.

10 Deponent further states that at no time did she agree to pay to Milton Taylor or Edward M. Taylor Company any monies which she was to receive for extending the above mentioned mortgage, and while she has made repeated demands on Milton Taylor, both through her attorney and by personal calls, she has been unable to receive the \$100. which she believe he is withholding from her and which Milton Taylor knew and was advised by deponent she
20 was in dire need of when she executed the extension of the mortgage above mentioned.

Deponent further believes that the bond given to her by Harry A. Gorenberg is not now binding and that her security on the extension of the mortgage is not protected in the same degree as her original mortgage, and while Milton Taylor did not inform her of this neither did he secure from John Trupkiewicz and Fannie Trupkiewicz, his wife, a bond covering the extension of the mortgage in
30 question.

Deponent therefore believes that Milton Taylor is withholding money rightfully belonging to her and that he did not properly take care of her interests in the transaction above set forth.

MARGARET O'ROURKE HUNT.

Sworn and subscribed to before me }
this 28th day of January, 1929. }

40 REBE SHANAHAN,
Notary Public.

(Seal)

**Summons, Annexed to Bill of
Complaint.**

THE STATE OF NEW JERSEY TO:

HARRY A. GORENBERG, and FANNIE GORENBERG,
his wife, 451 Bramhall Avenue, Jersey City, N. J.

YOU ARE SUMMONED to answer the an-
(L. S.) nexed complaint of Margaret O'Rourke 10
Hunt, in an action at law in the New
Jersey Supreme Court. AND TAKE NOTICE that un-
less you file your answer to said complaint with
the Clerk of the said New Jersey Supreme Court,
at Trenton, N. J., within twenty days after service
upon you of this writ and the annexed complaint
the plaintiff may proceed in the suit and judgment
may be entered against you.

WITNESS, William S. Gummere, Chief Justice of 20
the New Jersey Supreme Court at Trenton, this
first day of April, One Thousand Nine Hundred and
Thirty.

FRED L. BLOODGOOD,

Clerk.

CHARLES C. COLGAN,
Attorney.

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**Complaint, Annexed to Bill of
Complaint.**

NEW JERSEY SUPREME COURT,

COUNTY OF HUDSON.

10

MARGARET O'ROURKE HUNT,
Plaintiff,

vs.

HARRY A. GORENBERG and FANNIE
GORENBERG, his wife,
Defendants.

} Action at
} Law.

20 The plaintiff Margaret O'Rourke Hunt, residing in the City of Jersey City, County of Hudson, New Jersey, says that:

30 1. On August 22, 1925, at Jersey City, in the County of Hudson, and State of New Jersey, the defendants Harry A. Gorenberg and Fannie Gorenberg his wife, executed to the plaintiff their bond of that date in the penal sum of \$9,000.00, conditioned to pay the principal sum of \$4,500.00, with interest at six per cent; a copy of which bond is annexed hereto and made a part hereof, and marked "Schedule A".

40 2. To secure said bond, the defendants, on August 24th, 1925, executed a mortgage to the plaintiff upon lands and premises owned by them, situated in the City of Jersey City, bounded and described as follows:

Complaint.

All that certain lot, piece or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Jersey City in the County of Hudson and State of New Jersey, and which upon a certain map entitled "Map of property of Mary E. Sisson, made by Jacob Weart, Trustee, Jersey City, N. J., and filed in the Register's office of Hudson County is known and designated as lot numbered thirty-four (34) in Block numbered three hundred and forty-three (343) fronting on the northwesterly side of Manning Avenue as the same is laid down on said map together with one-half of the party wall on the westerly side of said premises. 10

3. On August 25, 1926, the defendants Harry A. Gorenberg and Fannie Gorenberg, his wife, conveyed said premises in fee to John Trupkiewicz and Fannie Trupkiewicz, his wife, which conveyance was made subject to the aforesaid mortgage of the plaintiff. 20

4. On December 31, 1929, a final decree for the sale of said lands and premises, and the foreclosure of said mortgage was made in the Court of Chancery of New Jersey in a suit brought by the plaintiff against Harry A. Gorenberg and Fannie Gorenberg, his wife, and other in interest. 30

5. Said decree adjudged that there was then due upon said bond and mortgage the sum of \$4,196.00, and ordered a writ of Fieri Facias to be issued to the Sheriff of Hudson County for the sale of the mortgaged premises to meet the sum so due, to- 40

Complaint.

gether with interest from December 23, 1929, and the taxed costs of suit, amounting to \$253.08.

10 6. On March 20, 1930, and within six months of the commencement of this action, the sheriff of said county under authority of the said writ sold said premises at a public sale, according to law, to the plaintiff she being the highest bidder at said sale for the sum of \$500.00.

7. The fees and disbursements of the sheriff as lawfully allowed on said execution amounted to \$93.09, and those fees and disbursements were therewith paid by the said plaintiff to the said sheriff as appears by the writ of execution duly returned into court.

20 8. The sum of \$500.00, realized from the said sale having been duly credited upon said decree and execution there remained due to the plaintiff the amount of \$4,042.17.

9. The said sum of \$4,042.17, in deficiency has not nor has any part thereof, been paid to the plaintiff.

30 10. On March 31, 1930, and within six months after the said sheriff's sale and prior to the institution of this action, the plaintiff filed in the office of the register of deeds and mortgages in the county of Hudson, where said mortgaged premises were situate, a notice of this action as proposed setting forth therein the name of the court where such action would be brought, and the names of the parties to the bond and action, the record of the mort-

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Complaint.

gage, and a description of the mortgaged premises, as provided by statute a copy of which notice is hereto annexed and made a part hereof, and marked "Schedule B".

11. This action of plaintiff's against the defendants was commenced within six months from the date of the sale of said mortgaged premises. 10

Plaintiff demands the sum of \$4,042.17, with interest from March 20, 1930.

CHARLES C. COLGAN,
Attorney of Plaintiff.

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Schedule "A"—Bond.

KNOW ALL MEN BY THESE PRESENTS, That WE, HARRY A. GORENBERG and FANNIE GORENBERG, his wife, of Jersey City, Hudson County, New Jersey, are Held and firmly bound unto MARGARET O'ROURKE HUNT, of the same place, in the penal sum of NINE THOUSAND DOLLARS lawful money of the United States of America, to be paid to the said
 10 MARGARET O'ROURKE HUNT, their executors, administrators or assigns FOR WHICH PAYMENT well and truly to be made, we bind ourselves, our heirs, executors and administrators, Jointly and severally firmly by these presents. Sealed with our seals. Dated the twenty-second day of August One Thousand Nine Hundred and twenty-five.

20 THE CONDITION of the above obligation is such that if the above bounden HARRY A. GORENBERG and FANNIE GORENBERG, their heirs, executors or administrators, shall well and truly pay, or cause to be paid, unto the above named MARGARET O'ROURKE HUNT, her executors, administrators or assigns, the just and full sum of Forty-five Hundred Dollars on the twenty-second day of August, which will be in the year One Thousand Nine Hundred and twenty-eight, and the interest thereon, to be computed
 30 from the date hereof and thereof at and after the rate of six per cent. per annum, and to be paid quarterly from the date hereof, without any fraud or other delay, then the above Obligation to be Void, otherwise to remain in full force and virtue.

AND IT IS HEREBY EXPRESSLY AGREED, that should any default be made in the payment of the said interest, or of any part thereof, on any day whereon the same is made payable as above expressed, or
 40

Schedule "A"—Bond.

should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable; and should the said interest remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien, or any or either of them, remain unpaid and in arrear for the space of three months then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of FORTY-FIVE HUNDRED DOLLARS with all arrearage of interest thereon, shall, at the option of the said MARGARET O'ROURKE HUNT or her legal representatives, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

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HARRY A. GORENBERG (L. S.)

FANNIE GORENBERG (L. S.)

Signed, Sealed and Delivered }
 in the presence of }

30

WALTER J. FREHND.

(Documentary Stamps)

40

Order to Show Cause.

(Filed April 21, 1930)

IN CHANCERY OF NEW JERSEY)

10	Between HARRY A. GORENBERG and FANNIE GORENBERG, Complainants, and MARGARET O'ROURKE HUNT, Defendant.	}	On Bill, &c.
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Upon reading and filing the duly verified bill of complaint and good cause being shown therefor;

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It is, on this Twenty-first day of April, 1930, on motion of Samuel Tartalsky of Counsel with Complainants, ORDERED that the defendant Margaret O'Rourke Hunt, show cause before the Chancellor at the Chancery Chambers, 1 Exchange Place, Jersey City, New Jersey, on the 28th day of April, 1930 at ten o'clock in the forenoon (daylight saving time) or as soon thereafter as counsel can be heard why said defendant should not be enjoined and restrained from proceeding with an action at law pending in the New Jersey Supreme Court;

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It is further ORDERED that a true copy of this Order, of the complaint and the affidavit thereto annexed, which may be certified by counsel for complainants, be served upon the defendant or her solicitor of record within two days from the date hereof.

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Order to Show Cause.

It is further ORDERED that until the further order of this Court, the said defendant be restrained from proceeding with said action at law in the New Jersey Supreme Court.

E. R. WALKER,
C.

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Respectfully advised,

JAMES F. FIELDER,
V. C.

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Notice.

IN CHANCERY OF NEW JERSEY.

10	Between HARRY A. GORENBERG and FANNIE GORENBERG, Complainants, and MARGARET O'ROURKE HUNT, Defendant.	}	On Bill, &c.
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O'BRIEN & TARTALSKY, Esqs.,
 Solicitors for Complainants,
 1 Exchange Place,
 Jersey City, N. J.

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SIRS:

TAKE NOTICE that on Monday, April 28th, 1930, at the hour of 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard at the Chancery Chambers in the City of Jersey City, I shall apply to the Chancellor, for an Order to strike out the bill of complaint filed herein and to dissolve the restraint imposed upon the defendant Margaret O'Rourke Hunt, by an order made in the above entitled cause on the 21st day of April, 1930, on the following grounds:

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1. The complainants have not in and by their bill filed in this cause disclosed any cause of action which entitles them in the Court of Equity to the relief prayed against this defendant.

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2. From the facts alleged in said bill of complaint it appears that the complainants are both

Notice.

liable on the bond which is the subject matter of this suit as principals and not as sureties, and therefore are not entitled to the relief prayed against this defendant.

3. The matter involved in this cause is res adjudicata as between the parties to this cause, by reason of the final decree made in the foreclosure suit alleged in paragraph 9, of the bill of complaint herein and the complainants are therefore not entitled to the relief prayed against this defendant. 10

CHARLES C. COLGAN,
Solicitor of Defendant.

Dated April 23rd, 1930.

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Memorandum.
(Filed May 9, 1930)

IN CHANCERY OF NEW JERSEY.

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Between
HARRY A. GORENBERG and FANNIE
GORENBERG,
Complainants,

and

MARGARET O'ROURKE HUNT,
Defendant.

(Not for
Print)
On Bill, &c.

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O'BRIEN & TARTALSKY, Esqrs., Solicitors, SAM-
UEL TARTALSKY, Esq., of Counsel, for the
Complainants.

CHARLES C. COLGAN, Esq., Solicitor, for the
Defendant.

30

(This memorandum is not to be published in the
official or unofficial reports).

BIGELOW, V.-C.:

On bill to restrain prosecution of action at law.
On complainant's order to show cause and de-
fendant's motion to strike out bill of complaint for
want of equity.

40

Memorandum.

The defendant, Mrs. Hunt, is the owner of a bond and mortgage made in 1925 by the complainants. In 1926, the complainants sold the mortgaged premises subject to the lien of the mortgage. Mrs. Hunt thereafter and before the mortgage matured, entered into an agreement with the new owners whereby she extended the time of payment of the mortgage money for three years and whereby they agreed to pay the same. This agreement was made without the knowledge or consent of complainants. About a year after the original maturity of the mortgage, Mrs. Hunt foreclosed and the premises were sold by the Sheriff at a price which failed by a wide margin to pay the amount due. She has instituted in the New Jersey Supreme Court an action on the bond against complainants for the deficiency. This is the action which complainants seek to stay.

10

The bill of complaint also sets forth that when complainants conveyed the property to the present owners, the agreed purchase price was the full value of the premises and there was credited thereon the amount due on the bond and mortgage. These facts, however, were never brought to the attention of Mrs. Hunt. She had no notice of them. The principles discussed in *Woodberry Heights Land Co. v. Loudenslager*, 60 N. J. Eq. 403, 45 A. 630, are not involved in this case. So far as Mrs. Hunt is concerned, the complainants remained the only persons personally liable on the bond.

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Complainants contend that the action of Mrs. Hunt in extending the mortgage prejudiced their interest to such an extent as to release them in equity from liability on the bond, and hence they are entitled to an injunction. They rely principally on decisions of the courts of New York. The rule

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Memorandum.

in that State is that the land is the primary fund for the payment of the debt and is liable in exoneration of the bond; that the extension of the mortgage after the premises are sold releases the mortgagor but only to the extent the premises depreciate in value, after the original due date of the mortgage.

- 10 *Murray v. Marshall*, 94 N. Y. 711;
 Metzger v. Nova Realty Co., 214 N. Y. 126,
 107 N. E. 1027.

The instant case is not within that rule since the bill of complaint does not allege that the land depreciated in value between the original maturity of the mortgage and the time when foreclosure was begun.

- 20 In a large number of states it is held that an extension of the mortgage without the consent of the mortgagor releases him from liability in case the mortgagee has notice of the fact that the grantee has assumed the mortgage debt and thus become the principal debtor. The cases are collected in 41 C. J. 735. In some of the western and southern states this same rule is applied even though the mortgagee has not become the principal debtor. 41 C. J. 719. To the contrary are *Sheppard v. May*, 115 U. S. 510, 6 S. C. 119, *Chilton v. Brooks*, 72 Maryland 554, 20 A. 125, and *Morganroth v. Pink*, 227 Ill. App. 244.
- 30

I think the correct rule applicable to this case is that an extension of a mortgage by agreement between the mortgagee and the grantee of the mortgaged premises, does not release the mortgagor from liability on his bond when the mortgagee has no notice that the grantee has become the principal

Memorandum.

debtor or otherwise equitably liable to the mortgagor. The safety of mortgages should not be whittled away. The mortgagor when he sells his land subject to a mortgage, assumes many risks. He takes the chance that the grantee will permit taxes and interest to accumulate, that he may not keep buildings insured, that he may allow them to deteriorate; and he also takes the risk that the term of the mortgage may be extended. 10

I will advise that the order to show cause be discharged and that the bill of complaint be dismissed.

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Order Dismissing Bill of Complaint, Etc.

(Filed May 12, 1930)

IN CHANCERY OF NEW JERSEY.

10	Between HARRY A. GORENBERG and FANNIE GORENBERG, Complainants, and MARGARET O'ROURKE HUNT, Defendant.	}	On Bill, &c.
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20 This matter coming on to be heard in the presence of Charles C. Colgan, solicitor of the defendant Margaret O'Rourke Hunt, and of O'Brien & Tartalsky, Esqs., solicitors of the complainants Harry A. Gorenberg and Fannie Gorenberg, and the court having heard the arguments of counsel, and being of the opinion that the bill of complaint filed herein discloses no cause of action;

30 And it appearing that due notice of the said defendant's motion to dismiss the said bill of complaint for the cause aforesaid has been given to said complainants;

It is thereupon, on this 12th day of May, 1930, ORDERED, ADJUDGED and DECREED, that the complainant's said bill of complaint be and the same is hereby dismissed;

40 And it is further ORDERED, ADJUDGED and DECREED, that the Order To Show Cause made herein on the 28th day of April, 1930, be and the same is

Order Dismissing Bill of Complaint, Etc.

hereby discharged, and the restraint imposed on the defendant Margaret O'Rourke Hunt, by the aforesaid order be and the same is hereby dissolved;

And it is further ORDERED, ADJUDGED and DECREED, that the complainants Harry A. Gorenberg and Fannie Gorenberg, pay to the defendant Margaret O'Rourke Hunt, her costs in this suit to be taxed, including a counsel fee of One Hundred Dollars, which is hereby allowed to said defendant. 10

E. R. WALKER,
C.

Respectfully advised,

JOHN O. BIGELOW,
V. C.

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THE UNIVERSITY OF CHICAGO

DEPARTMENT OF CHEMISTRY

REPORT OF THE COMMITTEE ON THE

PROGRESS OF CHEMISTRY

IN THE YEAR 1900

BY THE COMMITTEE ON THE

PROGRESS OF CHEMISTRY

IN THE YEAR 1900

BY THE COMMITTEE ON THE

PROGRESS OF CHEMISTRY

CHICAGO, ILL.

UNIVERSITY OF CHICAGO

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New Jersey Court of Errors and Appeals

HARRY A. GORENBERG and
FANNIE GORENBERG,
Complainants-Appellants,
and
MARGARET O'ROURKE HUNT,
Defendant-Appellee.

**BRIEF FOR
COMPLAINANTS-APPELLANTS.**

Complainants appeal from an order dismissing their bill of complaint advised by Vice Chancellor Bigelow on defendant's motion to strike (Case, pp. 44-45).

The facts are undisputed and the averments of the bill must be taken as true and in their entirety.

Baum vs. Canter, 7 A. R. 406; 144 Atl. 588.

The Facts.

On August 22, 1925, defendant conveyed premises #117 Manning Avenue, Jersey City, to complainants who as part of the purchase price executed to defendant a bond and mortgage for \$4500. payable August 22, 1928. This mortgage was subject to a building and loan association mortgage.

On July 21, 1926, complainants entered into a contract for the sale of the property to John Trupkiewicz for \$12,700. which was the whole value of the lands and premises (Case, pp. 15-17). Title

was closed and deed delivered on August 25, 1926. Pursuant to the contract, the sum of \$4500., the principal sum of defendant's bond and mortgage was deducted from the purchase price and retained by the said grantee, John Trupkiewicz (Closing Statement, Case, pp. 18-19). A deed reciting that the premises were conveyed subject to defendant's mortgage was executed, delivered and recorded (Case, pp. 20-22). Thereafter, complainants' grantees, John Trupkiewicz and Fannie, his wife, entered into the property and paid the interest on said mortgage to defendant.

Prior to the due date of the bond and mortgage, WITHOUT THE KNOWLEDGE OR CONSENT OF COMPLAINANTS, defendant agreed with said John Trupkiewicz and Fannie Trupkiewicz that if they would pay her a consideration of \$200; make a payment of \$500. on account of the principal, and covenant and agree to pay the said bond and mortgage, she would extend the time of payment of said bond and mortgage for three years from its maturity. The said complainants' grantees paid the consideration required, and thereupon on August 23, 1928, defendant and said John and Fannie Trupkiewicz entered into a written agreement whereby the time of payment was extended to August 24, 1931 and wherein said John and Fannie Trupkiewicz covenanted and agreed to pay said bond and mortgage (Extension Agreement, Case, pp. 23-26).

Thereafter, in July, 1929, defendant foreclosed her mortgage by reason of an alleged default on the part of said Trupkiewicz, resulting in a decree and sale by the Sheriff, at which sale the defendant purchased the property for \$500. which sum was credited on the decree.

Defendant instituted a suit in the New Jersey Supreme Court against complainants seeking to recover the deficiency (Case, pp. 29-33). Complain-

ants filed a bill in equity (Case, pp. 4-35) praying for an injunction against the prosecution of the law action and for a decree that by reason of the said extension agreement made without the knowledge or consent of complainants, they have been released and discharged from the bond. An order to show cause with an *ad interim* restraint issued (Case, pp. 36-37). Defendant moved to strike the bill for want of equity (Case, pp. 38-39). Vice Chancellor Bigelow filed a memorandum (Case, pp. 40-43) and advised an order dismissing the bill (Case, pp. 44-45) which is the basis of this appeal (Case, pp. 1-3).

Question Involved.

Does an agreement for the extension of the time of payment of a bond and mortgage entered into between the mortgagee and the grantee of the mortgagor who has assumed the payment thereof, for a valuable consideration, without the knowledge or consent of the mortgagor, release the obligor?

THE LAW.

POINT ONE.

Complainants had no defense or adequate remedy at law.

The division in this state between courts of law and equity brings about different principles; whereas, in jurisdictions where there is a fusion of courts of law and equity, the different rules do not arise. Complainants claim an equitable status of surety which they cannot set up at law. The remedy is in chancery.

Shute v. Taylor, 61 N. J. L. 256;
Anthony v. Fritts, 45 N. J. L. 1;
Pintard v. Davis, 21 N. J. L. 632;
Grier v. Flitcraft, 57 Equity 556.

POINT TWO.

In equity upon a conveyance of lands by a mortgagor to a purchaser who assumes the mortgage, or upon a conveyance subject to the mortgage where the purchase price is the whole value of the land and the mortgage debt is deducted from the purchase price and retained by the purchaser, the relationship which arises is that the grantor becomes the surety and the grantee, the principal debtor.

At law, the grantor who has contracted the mortgage debt continues to be the principal debtor.

Palmer v. White, 65 N. J. L. 69.

In equity, however, the purchaser of lands subject to a mortgage who assumes and agrees to pay the mortgage debt, becomes, as between himself and his grantor, the principal debtor, and the liability of the vendor, is that of a surety.

Klapworth v. Dressler, 13 Equity 62;
Hoy v. Bramhall, 19 Equity 563;
Stiger v. Mahone, 24 Equity 426;
Crowell v. Hospital of St. Barnabas, 27
 Equity 650;
Binns v. Baumgartner, 105 Equity 58; 146
 Atl. 879.

It is also well settled that an assumption of the mortgage debt by the purchaser arises though the premises are conveyed subject to the mortgage, where the purchase price is the whole value of the lands and the amount of the mortgage debt has been deducted and retained by the purchaser out of the agreed price, and hence, as between the parties, the vendor is the surety and the vendee the principal debtor. This is the rule both at law and in equity.

Tichenor v. Dodd, 4 Equity 454;

Heid v. Vreeland, 30 Equity 591;

Thayer v. Torrey, 37 N. J. L. 339.

POINT THREE.

Complainants' grantees were personally liable to defendant for the mortgage debt.

This is so, because in the extension agreement made between defendant and complainants' grantees, they expressly and directly covenanted to pay the principal of the bond. The agreement provided (Case, p. 24, l. 23) :

"And the said parties of the first part (complainants' grantees) agree to the extension of the time of payment of the principal of said bond hereinbefore stated, and for their heirs, executors and administrators hereby covenant to pay the same on the twenty-fourth day of August, one thousand nine hundred and thirty-one, and to pay the interest thereon on the days, on which the same becomes due as hereinbefore mentioned."

It is settled law that the assumption of the payment of a mortgage by the mortgagors grantee subjects him to personal liability at the suit of the mortgagee.

Green v. Stone, 54 Equity 387;
Binns v. Baumgartner, 105 Equity 58; 146
Atl. 879.

The Vice Chancellor in his memorandum, Case, page 41, line 30, said: "So far as Mrs. Hunt is concerned, the complainants remained the only persons personally liable on the bond." We respectfully contend that this conclusion is erroneous because of the facts and the law and is inconsistent with his recital of the fact, for on the same page at line 10 referring to the extension agreement, he said: "And whereby they (the grantees) agreed to pay the same."

POINT FOUR.

The agreement for the extension of time of payment of the mortgage debt entered into between defendant and complainants' grantees without the knowledge or consent of complainants, discharged them as obligors.

Chief Justice Beasley recognized this rule in *Firemen's Insurance Co. v. Wilkinson*, 35 Equity 160. In that case, the question of fact was whether an extension of mortgage agreement had been made or merely a collateral bond given. The Chief Justice determined that only a collateral bond was executed and stated the rule that if an extension of mortgage had been made the obligor would have been discharged. He said at page 175:

"Those circumstances are as follows: That when he sold and conveyed the mortgaged premises, his grantee assumed the payment of

the mortgage in question, and that, by such assumption, such grantee became the primary debtor, and that he, the respondent, stood in equity as his surety, and that the appellant, having knowledge of the situation, made a subsequent arrangement with Stern, whereby the time for the payment of the mortgage debt was extended, and that by such extension, upon well-known legal and equitable principles, set him free from the bond of his suretyship. If such an adjustment was consciously made by the appellant, there can be no doubt that it affords this respondent a defence to the claim now preferred against him. The surety has a vested interest in the contract between the primary debtor and the creditor, to the performance of which he has bound himself, and that contract cannot be altered without his consent, so as to affect his equitable or legal position; and if such modification be effected, the consequence is the exoneration of the surety from all liability. This principle is elementary and indisputable."

In *Firemen's Insurance Co. v. Wilkinson*, *supra*, Chief Justice Beasley cited the leading case of *Calvo v. Davies*, 73 N. Y. 211, which is parallel with the instant one and wherein it was decided that an express agreement to extend the time of the payment of the original debt discharged the obligor. The *Calvo* case is relied upon in the New York Court of Appeals and the case of *Metzger v. Nova Realty Co.*, 214 N. Y. 26; 107 N. E. 1027 in which the facts were identical with the facts at bar. They are these:

Nova Realty Co. made a bond and mortgage to plaintiff which was payable on May 1st, 1910 and later conveyed the property to Westown Realty Co. subject to the mortgage of plaintiff. Before the maturity of the mortgage, an agreement extending the time of payment of the mortgage for three years from the due date was entered into between the

plaintiff mortgagee and said Westown Realty Co. This agreement was without the consent of the defendant obligor against whom an action for a deficiency was instituted. The defendant, as the complainants here, pleaded a discharge by reason of the said extension agreement. The New York Court of Appeals held that the defendants were released by reason of the said extension agreement. The grounds for the decision were that by reason of the conveyance from Nova Realty Co. to Westown Realty Co. the grantor became the surety and the grantee the primary debtor of the mortgage debt. The extension agreement entered into by the mortgagee with the grantee without the knowledge or consent of the mortgagor made it impossible for the mortgagee to subrogate the mortgagor to the contract originally entered into between them. As a reason for holding that the mortgagor is discharged, the court pointed out that if the mortgagee could legally extend the time of payment for three years without the consent of the mortgagor he could make a like extension for a period of ten years or even a greater number of years. Because the facts are identical with the case at bar, we quote from the opinion in detail.

“On March 15, 1910, the date of the agreement for the extension of time of payment of the bond and mortgage, the premises covered by the mortgage were owned by the Westown Realty Co., and as between the Nova Realty Co. and the Westown Realty Company the land was the primary fund for the payment of the mortgage. The mortgage and the bond accompanying the same were then owned by the plaintiff but the debt secured therein was not due until May 1, following that date. The Nova Realty Company was the obligor upon the bond, and, having parted with title to the mortgaged premises, it had the right to pay the debt on May 1, 1910, and be substituted to the mort-

gaged security with the privilege of immediately proceeding by foreclosure against the land then owned by the Westown Realty Co. or call upon the mortgagee to foreclose the mortgage and have determined the amount, if any, of its liability upon the bond for the deficiency arising from the sale of the premises in foreclosure. In the enforcement of such right the Nova Realty Company was vested with all of the rights of a surety, and the mortgagee was inhibited from dealing with the Westown Realty Company to the prejudice of the equitable rights of the Nova Realty Company, the surety.

We may inquire what was the situation of the parties on May 1, 1910. The plaintiff had without the consent of the Nova Realty Company extended the time of the payment of the principal sum secured by the bond and mortgage for a period of three years. He had thereby denied to himself the right to foreclose the mortgage immediately after May 1, 1910, and the mortgage, by reason of the extension of time, not being due, the Nova Realty Company could not pay the debt to the plaintiff and become substituted to the mortgage security and proceed against the land by foreclosure. Had it paid the mortgage to the plaintiff and undertaken to foreclose the same it would be met by the defense that the mortgage debt was not due. If the Nova Realty Company demanded of the plaintiff that the mortgage be foreclosed, such demand would be futile. Plaintiff had by the agreement to extend the time of payment created a condition which would estop him from maintaining such action.

We think it clear that by the action of the plaintiff, the mortgagee, he denied to the Nova Realty Company, the equitable rights vested in it. If he could legally extend the time of payment for three years without the consent of the company, he could make a like extension for a period of ten years or even a greater number of years, and, upon his theory, continue

the liability of the Nova Realty Company upon the bond.”

In the Metzger case the extension agreement contained a clause similar to the one in the instant case to the effect that the terms of the bond and mortgage were to remain in full force and effect except as modified by the extension agreement. The Court of Appeals held that notwithstanding this clause the discharge of the obligor was affected by the extension agreement. The court said:

“The question as to whether or not any reservation would have been embodied in the extension agreement which would preserve the liability of the Nova Realty Company upon the bond is not in this case. The sole question is whether the clause quoted from the extension agreement had that effect. We are of the opinion that it did not. The owner of the equity of redemption sought an extension of time. The mortgagee granted the extension and the mortgage was to stand unimpaired, except as to the time of payment of the same. The owner of the equity of redemption did not consent or agree that the Nova Realty Co., the obligor of the bond, might assert its rights and foreclose the mortgage on May 1, 1910, or at any time thereafter. Had it or the plaintiff intended to reserve to the surety all of its legal and equitable rights, language more apt would have been used in the agreement, but the language contained therein is not susceptible of such a construction. The principles of law stated in *Calvo v. Davies*, 73 N. Y. 211; *Murray v. Marshall*, 94 N. Y. 611, and *National Park Bank of N. Y. v. Koehler*, 204 N. Y. 174, 97 N. E. 468, are controlling here and the judgment (for defendant) should be affirmed with costs.”

It is conceded that upon the conveyance by appellants to Trupkiewicz and the creation of the

relationship of principal and surety between them the rights of the defendant *at that time* were not affected because defendant as mortgagee was not a party to the deed nor was she at all concerned in the transaction. However, defendant had knowledge of the conveyance and is charged with knowledge of the relationship of principal and surety which had arisen upon the conveyance from appellants to grantee. The defendant thereupon should not have entered into any agreement nor done anything without the consent of the appellants. She entered into an agreement for the extension of the mortgage for the pecuniary consideration paid her and for the further covenant and agreement of the grantees to pay the mortgage debt and because of such conduct, without the consent of appellants, she prejudiced the rights of appellants and thereby released and discharged them from personal liability on the bond. This is the rule of law in the majority of jurisdictions.

The great weight of authority supports the contention of appellants that the extension of the time of payment, under the circumstances as here involved, operates to discharge the appellants. Among these States are, New York, Massachusetts, Illinois, California, Colorado, Florida, Kansas, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, Texas, Utah, Washington, Wisconsin, District of Columbia and United States Supreme Court.

Copious annotations appear in:

41 A. L. R. at page 282;

4 L. R. A. (N. S.) 666.

See also

41 Corpus Juris, Sections 761 and 786;

19 R. C. L., Sections 155, 156.

A minority view holds that upon an extension of mortgage to a grantee who has acquired only the equity of the grantor and taken the property subject to the mortgage, the obligor is released to the extent of the value of the land. Under the facts in the case at bar, even the minority states would consider the release effective *in toto* because in our case the grantee did not purchase merely the equity of the grantor above the mortgage, but agreed to pay the whole value of the land and deducted therefrom the amount of the mortgage, and hence the grantee assumed the payment. Moreover, even it be argued that the grantee did not assume the payment of the mortgage at the time of the conveyance, it clearly appears from the extension agreement entered into between the defendant and the grantee that therein the grantee assumed the payment of the mortgage as part of the consideration for the extension agreement.

Another reason why the obligor should be discharged by reason of the extension of time for payment by agreement between the mortgagee and the grantee, is that the statute of limitations against an action on the bond would be stayed by such extension.

Biddle v. Pugh, 59 Eq. 480.

All of our authorities agree that as between the grantor and the grantee the liability of the grantor becomes that of a surety and the liability of the vendee that of principal debtor as to the mortgage debt, and that upon payment by the grantor of the mortgage debt, he is entitled to be subrogated by the mortgagee to the contract between them in order that the grantor might proceed as against his grantee. *Binns v. Baumgartner*, 105 Equity 58; 146 Atl. 879. *The voluntary agreement between the mortgagee and the grantee without the consent of*

the obligor, renders it impossible to subrogate the obligor in the position in which he is entitled to be placed according to the law of subrogation. By voluntary act, the mortgagee has postponed the due date of the bond and mortgage for a period of three years beyond that contained in the original agreement. Suffice it to say, that irrespective of any depreciation in the value of land during such extended period, it is a matter of common knowledge that the building upon the land necessarily depreciates. The equities of the matter compel the conclusion that the obligor is released by the extension. The mortgagee was not compelled nor required to extend. She might have continued to receive payment of interest without an extension for a definite time, so that at any time after the due date, she could foreclose; but where by her own act, for a pecuniary consideration in addition to any other consideration set forth in the agreement, she voluntarily agreed to forbear for three years against the grantee, without the consent or knowledge of the obligor, she must be regarded as having bargained with the grantee and the security of the property and as having released the obligor because of her election and contract.

POINT FIVE.

The final decree in the foreclosure suit is not *res adjudicata* on the liability of appellants under the bond.

Defendant in her brief may contend that because a final decree was made in the foreclosure suit that the matter is *res adjudicata* on the liability of the appellants for the deficiency under the bond and may cite as authority the case of *Murray v. Pierce*,

95 L. 104. It must be obvious that this contention is wholly without merit. An action for deficiency on a bond is one where personal liability on the obligor is sought to be imposed. An *action for foreclosure of a mortgage is an action in rem*. Both actions are governed by statute. The statutes provide that where a bond and mortgage are delivered the mortgagee must first resort to the land for reimbursement and foreclosures in Chancery are controlled by Section 53 *et seq.* of the Chancery Act (1 Comp. Stat. p. 429) while actions on bonds are controlled by Section 47 *et seq.* of an Act Concerning Mortgages (3 Comp. Stat. p. 3420). Section 47 of this Statute expressly provides that no personal deficiency can be decreed on the bond in the foreclosure action. The case of *Murray v. Pierce* was an action wherein the defendant claimed that credits were not allowed on the principal debt in the foreclosure suit. Chief Justice Gummere decided that not having contested the amount of the mortgage debt the decree in foreclosure was *res adjudicata* "on the question of the amount of the mortgage debt".

In this case there is no question raised as to the amount of the mortgage debt. The only question in this case is whether or not there is any personal liability on the part of the appellants.

In further substantiation of the fact that a decree in the foreclosure suit is not dispositive of the personal liability of an obligor, it is the law that obligors in a bond are not necessary parties to the bill of foreclosure.

In the case of *Raritan Savings Bank v. Lindsley*, 58 Eq. 214, Vice Chancellor Grey so held and therein he pointed out that a foreclosure of mortgage is an action *in rem*; that no decree for personal deficiency can be rendered in the foreclosure action.

If defendant's contention is to be accepted, why the provision in our law that subsequent to foreclosure an action on the bond must be instituted and why the necessity for an action on the bond? Clearly, therefore, the only determination in a decree in foreclosure is the amount of the mortgage debt and the sale of the mortgaged premises to satisfy that debt out of the lands. The question of personal liability remains to be determined in an action on the bond.

Comments on Opinion.

The court below in its opinion (Case, p. 43) said:

"The mortgagor when he sells his land subject to a mortgage, assumes many risks. He takes the chance that the grantee will permit taxes and interest to accumulate, that he may not keep buildings insured, that he may allow them to deteriorate; and he also takes the risk that the term of the mortgage may be extended."

We cannot agree with the conclusion of the Vice Chancellor that a mortgagor when he sells his land "takes the risk that the term of the mortgage may be extended". It is certainly not within the contemplation of the parties, nor is it to be reasonably anticipated. An extension of mortgage agreement requires the affirmative action and agreement of the mortgagee and it cannot logically be said that one who sells property assumes a risk such as this.

For the reasons urged we respectfully submit that the decree of the court below should be reversed.

Respectfully submitted,

SAMUEL TARTALSKY,
Of Counsel with Complainants-Appellants.

The following is a list of the names of the persons who were present at the meeting held on the 15th of the month of June 1875, at the residence of the late Mr. J. H. ...

Committee on the Report of the ...

The committee on the report of the ... have the honor to report that they have had the pleasure of ...

The committee on the report of the ... have the honor to report that they have had the pleasure of ...

Respectfully submitted,
 J. H. ...

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New Jersey Court of Errors and Appeals

Between

HARRY A. GORENBERG and
FANNIE GORENBERG,
Complainants-Appellants,
and
MARGARET O'ROURKE HUNT,
Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE.

Statement of Facts.

The bill of complaint in this case alleges the following facts:

On August 24, 1925, the defendant sold the premises known as 117 Manning Avenue, Jersey City, N. J., to the complainants. The defendant took back from the complainants a purchase money bond and mortgage dated August 24, 1925, due in three years as part of the consideration for the conveyance.

On August 25, 1926, the complainants conveyed the property to John Trupkiewicz and his wife, subject to the defendant's mortgage. The purchasers did not assume and agree to pay the defendant's mortgage in the deed which they received from the complainants. It appears from the contract and closing statement annexed to the bill of complaint that the purchasers were allowed a deduction in the purchase price for the amount of the defendant's mortgage and took the property subject to said mortgage.

On August 23rd, 1928, the defendant Mrs. Hunt received the sum of \$500.00 on account of the principal sum of her bond and mortgage. On the same date the defendant agreed with the purchasers from the complainants, to extend the time for payment of the balance due on her bond and mortgage for three more years, until August 24th, 1931, for a consideration of \$200.00.

On July 26, 1929, the defendant Mrs. Hunt, commenced a foreclosure suit in this Court, making parties defendant, the complainants, Harry A. Gorenberg and his wife, the purchasers, John Trupkiewicz and his wife, and two subsequent lienors.

On December 5, 1929, a decree *pro confesso* was entered against all the defendants in the foreclosure suit.

On December 31, 1929, a final decree for the sale of the lands and premises was made.

On March 20, 1930, the Sheriff of Hudson County, sold the property to Mrs. Hunt, the defendant, and there was left a deficiency of \$4,042.17 due on said bond and mortgage.

On April 1, 1930, the defendant Mrs. Hunt, instituted a suit of law against the complainants, as the original mortgagors and obligors on the bond to recover the aforesaid deficiency.

The complainants allege by reason of the facts already stated, that they are sureties and the purchasers, John Trupkiewicz and his wife, are principal debtors, and therefore by reason of the extension agreement, the complainants as sureties were released and discharged from their obligation.

The bill prays that the suit at law be permanently restrained and that it be decreed that the complainants as sureties have been released and discharged by reason of the extension agreement.

The defendant moved to strike out the bill and dissolve the restraint on the following grounds:

1. Complainants have failed to disclose an equitable cause of action.

2. From the facts it appears that the complainants are liable on the bond as principals and not as sureties.

3. That the matters involved in this cause are *res adjudicata* as between the parties herein.

Vice-Chancellor BIGELOW advised an order that the bill of complaint and the restraint be dismissed and from this order the present appeal is taken.

ARGUMENT.

POINT I.

From the facts it appears that the complainants are liable on the bond as principals and not as sureties, and therefore were not released by the extension agreement.

The complainants contend that they are sureties and were released by the extension agreement. In order for this Court to sustain this contention it must appear from the facts alleged in the bill that the complainants were sureties on the date of the extension agreement. What had happened before the extension agreement was granted from which counsel contends that the relationship of principal and surety arose? The extension agreement is dated August 22, 1928 and before this time we have the following simple facts. The defendant had sold the property to the complainants and had taken back a purchase money bond and mortgage. The complainants then sold the same property to

John Trupkiewicz and his wife, subject to the defendant's mortgage and a deduction was allowed to the purchasers for the amount of the mortgage debt. This is all that happened before the extension was granted, and it is only from these facts that counsel can spell out a relationship of principal and surety. The contention of the complainants is utterly novel and incongruous, without support in New Jersey, and without support in reason. The complainants' argument is simply this, that if A sells his house to B, and takes back a bond and mortgage from B, and B thereafter without notice to or the consent of A, sells to C, subject to A's mortgage, allowing C a deduction in the purchase price for the amount of A's mortgage, then A loses B as a principal debtor and B slips down to the position of a surety. This bare statement of the contention refutes itself. Such an argument would destroy the very purpose of a bond and render the taking of a bond a futile performance. If I exact a bond from a responsible person, all he has to do is to sell the property to some third party subject to my mortgage, allow the purchaser a deduction in the purchase price for the mortgage debt, without any notice to or agreement with me, and then he, the principal obligor, escapes as a principal debtor and becomes a surety, and I have forced upon me a new principal debtor whom I must accept without any regard for his financial responsibility or worth. This would be a strange result of equitable principles to take away a principal obligor from a mortgagee through no fault of his own.

In the case of *Woodbury Heights Land Co. v. Loudenslager*, reported in 60 N. J. E. 403, Mr. Justice GARRISON, speaking for the Court of Errors and Appeals, at page 409, summarizes the rules respecting transactions of this kind and says:

1. "In equity a stipulation of this kind is regarded as a contract to indemnify the grantor against the mortgage debt."

2. "The mortgage does not thereby become a personal debt of the grantee."

3. "The equity is operative between the parties to the deed *only*."

4. "If the purchaser buy the mere equity of redemption he may discharge his equity to the mortgagor by releasing the land."

5. "If by the terms of the purchase the mortgage debt is by agreement taken as part of the consideration money equity raises upon the conscience of the purchaser an obligation to indemnify the mortgagor against the mortgage debt."

"In other words, the mortgage debt may by agreement be charged upon the unpaid purchase money which is a different thing from the legal assumption of the mortgage debt by the grantee."

From this case it is clear that the facts alleged in the bill do not disclose any relation of principal and surety between the complainants and their grantees that existed at the time of the extension agreement and therefore they were not released and discharged as contended.

In the case of *Friedman v. Zuckerman*, reported in Vol. VII, No. 16 N. J. Adv. Rep. 575, also 145 Atl. 541 (not officially reported), a bill was filed by a mortgagee seeking to recover a deficiency from the grantees of the original mortgagors, and it appeared that the grantees took the property subject to the mortgage and were allowed a deduction in the purchase price. A motion to strike out the bill was granted. Vice-Chancellor INGERSOLL wrote the opinion and quoted the rules hereinbefore stated from the case of *Woodbury Heights Land Co. v. Loudenslager*, *supra*, and he held that the mort-

gagee could not proceed primarily against the grantees of the mortgagor. We respectfully urge since this is so then it cannot be held in a case of this kind that the relation of the original mortgagors who were the grantors changed to that of sureties and that of their grantees to principal debtors. For if we assume as counsel for the complainants contends that the relationship of principal and surety did arise from these facts then surely the creditor-mortgagee should be permitted to proceed against the grantees or assumed principals in the first instance. Vice-Chancellor INGER-SOLL has said that such a bill would not lie and struck it out and therefore no relation of principal and surety arose from the facts alleged.

Counsel for the complainants in the brief under Point 2, contends that the sale of the premises subject to the mortgage and the deduction in the purchase price allowed the purchaser is the same as an express assumption of the mortgage debt and creates the relationship of principal and surety between the vendor and vendee, and cites the following cases:

Tichenor v. Dood, 4 N. J. Equity 454;
Heid v. Vreeland, 30 N. J. Equity 591;
Thayer v. Torrey, 37 N. J. Law 339.

An examination of these cases will show that they do not stand for any such proposition and following the case of *Woodbury Heights Land Co. v. Loudenslager*, *supra*, it is clear that the assumption of the mortgage debt by the grantee of the mortgagor is a different thing than a sale subject to the mortgage even though the purchaser is allowed a deduction in the purchase price for the amount of the mortgage debt.

Counsel for the complainants under Point Three in the brief, also seems to contend that even though the relation of principal and surety did not arise

by reason of the conveyance by the mortgagor in this case, then such a relationship between the complainants and their grantees did arise by reason of the extension agreement and also by reason of the same extension agreement, the sureties so created were released and discharged. That is *eo instante* the complainants became sureties and released debtors. This argument we think is fallacious.

In the case of *Morganroth v. Pink* (1922), 227 Ill. App. 244, the same argument was made in a case involving the same facts as the case at bar, and the Illinois Court held and said: "We do not believe that the extension agreement effected this incongruity."

We also wish to call the Court's attention to cases in other jurisdictions, where under the same facts as in the case at bar, the Courts held no relationship of principal and surety arose.

In the United States Supreme Court, the case of *Shepard v. May*, reported in 115 U. S. 505, 29 L. Ed. 456, 6 Sup. Ct. Rep. 119;

In Maryland, the case of *Chilton v. Brooks*, 72 Md. 554, 120 Atl. 125;

In Illinois, the case of *Morganroth v. Pink*, 227 Ill. App. 244.

Under Point 4, counsel for the complainants cites the case of *Firemen's Insurance Co. v. Wilkinson*, 35 N. J. Equity 160, in support of their contention. An examination of this case shows that it is easily distinguished from the case at bar, for in the case cited, the grantee of the mortgagor expressly assumed the payment of the mortgage, whereas in the case at bar, there was no assumption of the mortgage by the grantee of the mortgagor and therefore the relationship of principal and surety never arose.

Counsel also relies on the decisions of the Courts of New York. The rule in that State is that the

land is the primary fund for the payment of the debt and is liable in exoneration of the bond; that the extension of the mortgage after the premises are sold, released the mortgagor but only to the extent that the mortgage depreciate in value after the original due date of the mortgage.

Murray v. Marshal, 94 N. Y. 711;

Metzger v. Nova Realty Co., 214 N. Y. 126;
107 N. E. 1027.

Vice-Chancellor BIGELOW in his opinion of this case, correctly pointed out that the bill of complaint in the case at bar does not allege that the land depreciated in value between the original maturity of the mortgage and the time when the foreclosure was begun and therefore the New York rule did not apply.

What has already been said under Point 1, covers the first four Points in the complainant's brief.

POINT II.

The matter involved in this cause is *res adjudicata* as between the parties by reason of the final decree made in the foreclosure suit alleged in paragraph 9 of the bill of complaint herein.

The present complainants were parties defendant to the foreclosure suit instituted in the Court of Chancery of New Jersey by the defendant herein, Mrs. Hunt, and were duly served with subpoena to answer in said suit. On December 5, 1929, a decree *pro confesso* was entered against them in said suit, and on December 31, 1929 a final decree for sale was made.

The final decree as entered, adjudged and decreed that there was due the complainant therein

the sum of \$4,196.00 and costs, and it further ordered, adjudged and decreed that the defendants stand absolutely debarred and foreclosed of all the equity of redemption of, in and to the mortgaged premises when sold by virtue of the decree.

If the present complainants had any defense to offer as to their liability for the amount due on the mortgage debt they should have filed an answer setting up such a defense in the foreclosure suit, for by failing to do so, they admitted as between the present defendant and the present complainants that the amount of the mortgage debt was due, and therefore the final decree entered is *res adjudicata* on the amount of said mortgage debt. The present complainants could only obtain relief against the binding force of said final decree by an application to the Court in which it was entered.

In the case of *Murray v. Pearce*, reported in 95 N. J. Law, 104, Chief Justice GUMMERE, speaking for the Court of Errors and Appeals said:

“The decree was *res adjudicata* on the question of the mortgage debt, and the appellant in this suit can only obtain relief of the binding force of the decree by an application to the Court in which it was entered.”

From this case it appears that the motion to strike out the bill should be granted on the ground that the matter involved is *res adjudicata*.

CONCLUSION.

If this Court holds with the complainants in this case a result will have been reached that will drastically affect the vitality and desirability of bonds accompanying mortgages. It will then be law, that when an owner sells his property taking back a bond and mortgage from his grantee, and

the owner's grantee resells to a third party, subject to the mortgage and the third party is allowed a deduction in the purchase price, that by operation of law and without participation by the mortgagee, he has lost his principal obligor as a surety. All this must have happened before the extension was granted because counsel argues that the extension released the complainants as sureties, and if it did he must have been a surety at the time the extension was granted, because the extension agreement could not have made him a surety and a released debtor at the same time. We submit that the result prayed for by the complainant should not be granted for if it is, it will have a disastrous effect on the vitality of mortgage bonds in this state, and expose every obligee to the risk of losing his principal debtor at any time, and having his bond obligation altered whether he like it or not, through no fault of his own. His bond may mean one thing today and another tomorrow. He won't know what it is worth from day to day, because at any time his obligee can sell out subject to the mortgage, allow the purchaser a deduction for the amount of the mortgage debt, and escape liability as a principal and force on him an utter stranger who is probably worthless as principal obligor.

Respectfully submitted,

CHARLES C. COLGAN,
Solicitor and Counsel for
Defendant-Appellee.

