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BILL TO FORECLOSE.

(Filed July 21, 1928.)

IN CHANCERY OF NEW JERSEY.

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

Complainant, E. R. C. Co., a New Jersey corporation, having its principal office and place of business in Camden, New Jersey, respectfully shows that:

1. On October 9, 1925, Michael A. Maloney and John J. Hayes, being indebted to Bertha M. Hayes in the sum of $30,000.00, executed to her a bond of that date to secure that sum, payable within one year from the date thereof, together with interest thereon at the rate of 6% per annum, payable half-yearly from the date of the bond.

2. To secure payment of the bond said John J. Hayes, a single man, executed to said Bertha M. Hayes a mortgage of even date with said bond, and thereby conveyed to her in fee the lands hereinafter described on the express condition that such conveyance should be void if payment should be made according to the terms of the bond, which mortgage having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon, was, on October 13, 1925, recorded in the office of the Register of Deeds of Camden County in Book 267 of Mortgages, at page 305, &c.

3. The said mortgaged premises are described as follows:

ALL THAT certain lot or piece of ground, SITUATE on the northeasterly corner of New Broadway and Lawrence Street in the City and County of Camden, State of New Jersey, described as follows:

BEGINNING at a point in the said northeasterly corner of New Broadway and Lawrence Street one hundred and ninety-six and eighty-five one-hundredths feet eastwardly from the northeasterly corner of Sixth and Lawrence Streets; thence extending eastwardly along the northerly line of said Lawrence Street at right angles to New Broadway eighteen and fifteen one hundredths feet to a point; thence northwardly on a line deflecting one minute westwardly from a line at right angles to the said northerly line of Lawrence Street seventy feet to a point; thence westwardly on a line parallel with the said northerly line of Lawrence Street eighteen and thirteen one hundredths feet to the easterly line of New Broadway; and thence southwardly along the said easterly line of New Broadway seventy feet to the point and place of beginning.

4. By assignment in writing, dated October 9, 1925, and recorded in the office of the Register of Deeds of Camden County on October 13, 1925, in Book 67 of Assignments of Mortgages, at page 17, &c., said Bertha M. Hayes assigned said bond and mortgage to Jersey Mortgage Investment Company, a corporation of the State of New Jersey.

5. On December 1, 1925, John J. Hayes conveyed the above described mortgaged premises to Andrew J. Maloney, which deed was, on December 1, 1925,

recorded in the office of the Register of Deeds of Camden County in Book 613 of Deeds, at page 333.

6. On November 22, 1927, said Jersey Mortgage Investment Company filed its bill of complaint in this Court for the purpose of foreclosing the mortgage hereinbefore mentioned, making the said Andrew J. Maloney, Mrs. Andrew J. Maloney, his wife, and Lehigh University (the holder of a mortgage subsequent in lien to the mortgage hereinbefore mentioned) parties defendant; and such proceedings were had in said cause that on June 29, 1928, Walter T. Gross, sheriff of Camden County, under and by virtue of a certain writ of *fieri facias* issued out of this Court and directed to him in said cause, and dated May 10, 1928, duly sold said premises to Robert W. Richman, for the sum of $100.00, which sale was duly confirmed by this Court by an order made on July 10, 1928.

7. By assignment in writing said Robert W. Richman assigned his said bid and all his right, title and interest therein and thereto to the said E. R. C. Co., the complainant in this cause, in consideration of the sum of $32,848.68; and by deed dated July 14, 1928, and intended to be forthwith recorded in the office of the Register of Deeds of Camden County, Walter T. Gross, sheriff of Camden County conveyed said premises in fee to said E. R. C. Co., and immediately thereafter complainant entered into possession of the said mortgaged premises and has ever since retained and still retains possession thereof.

8. In the aforesaid foreclosure suit of Jersey Mortgage Investment Company against Andrew J.

Maloney, and others (Docket 66-227), said Andrew J. Maloney and Mrs. Andrew J. Maloney filed an answer admitting the conveyance to the said Andrew J. Maloney by the said John J. Hayes of the above-described mortgaged premises and setting up a defense of usury to the mortgage of said Jersey Mortgage Investment Company, which said answer was suppressed by an order of this Court made and entered in said foreclosure suit on March 12, 1928, by which said order the Jersey Mortgage Investment Company was given leave to enter a decree *pro confesso* against said defendants, Andrew J. Maloney and Mrs. Andrew J. Maloney, and to proceed thereunder in accordance with the rules and practice of this Court.

9. Complainant further shows and charges that it was to all practical intents and purposes the real purchaser of the above-described mortgaged premises at the aforesaid sheriff's sale, and complainant shortly after said sale applied to the West Jersey Title and Guaranty Company for a policy of title insurance and said West Jersey Title and Guaranty Company thereupon issued its settlement certificate, and by one of the exceptions thereon noted required proof of the facts and circumstances attending and surrounding the execution and delivery of the deed aforesaid from said John J. Hayes to said Andrew J. Maloney, the consideration in said deed having been expressed as $1.00.

10. Complainant thereupon requested the said John J. Hayes to execute an affidavit stating that said conveyance which, on its face was an absolute conveyance, was given for a valuable consideration, and in response to complainant's request said John

J. Hayes wrote the following letter to the West Jersey Title and Guaranty Company:

"Application No. 59437 — 1021 South 60th Street, Philadelphia, Pa., July 11th, 1928.

West Jersey Title and Guaranty Company,
3rd and Market Streets,
Camden, N. J.

Gentlemen:

I have just been handed an affidavit, with the request that I sign and swear to it, stating that the conveyance by me to Andrew J. Maloney of the property at the Northeast Corner of New Broadway and Lawrence Street, Camden, dated December 1st, 1925, and recorded in Book 613, page 333, was not upon 'any secret trusts, confidence, as collateral security or otherwise,' etc.

I am unable to sign such an affidavit.

Please be advised that the said conveyance was made as collateral security for a loan of Five Thousand Dollars and I claim that my title to the property is still good, as I was not made a party to the foreclosure proceedings on the first mortgage and had no notice that the property was to be sold until after the sale had actually taken place.

Yours truly,
John J. Hayes."

11. Said John J. Hayes was not made a party defendant to the foreclosure suit of the Jersey Mortgage Investment Company aforesaid and complainant purchased the said mortgaged land in good faith and without knowledge of the aforesaid interest, if any exists, of the said John J. Hayes.

Any interest which the said John J. Hayes may have in the above-described mortgaged premises is

and was subject to the lien of the aforesaid mortgage of the Jersey Mortgage Investment Company.

12. In the aforesaid deed from John J. Hayes to Andrew J. Maloney, the said John J. Hayes was not recited as being either a single or a married man, and said deed was made by said John J. Hayes alone. Complainant has inquired of the said John J. Hayes by letter, with stamped and addressed envelope enclosed for a reply, as to whether or not he was single or married at the time of the execution and delivery of the aforesaid deed to said Andrew J. Maloney or whether he has married since, but the said John J. Hayes has failed to answer said communication and complainant knows of no other source of inquiry and, therefore, charges that the said John J. Hayes is a married man, but that complainant notwithstanding due and diligent inquiry has been unable to ascertain the Christian name of the wife of the said John J. Hayes, and therefore makes her a defendant in this cause and designates her as "Mrs. John J. Hayes," pursuant to the statute in such case made and provided.

Any interest which the said Mrs. John J. Hayes may have in the above-described premises by reason of the marriage relationship existing between her and the said John J. Hayes, or otherwise, was at all times subject to the lien of the mortgage of the said Jersey Mortgage Investment Company.

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

1. That John J. Hayes and Mrs. John J. Hayes who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

2. That said defendants may set forth and discover what right, title, interest and estate they or either of them may have, if any, in and to said premises.

3. That an account may be taken of the amount due on the aforesaid mortgage of Jersey Mortgage Investment Company.

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

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

WALTER R. CARROLL,
Solicitor for and of Counsel with Complainant.

STATE OF NEW JERSEY, }
COUNTY OF CAMDEN, } *ss.*

WALTER R. CARROLL, being by me duly sworn according to law on his oath deposes and says:

I am the solicitor of the complainant in this suit.

I was advised in such a manner that I believe it to be true that one, Michael A. Maloney, one of the obligors on the bond secured by the mortgage of the Jersey Mortgage Investment Company, in the fore-

going bill referred to me, could give me information as to whether or not John J. Hayes was married and if married his wife's full name. The said Michael A. Maloney resides at No. 1021 South 60th Street, Philadelphia, Pennsylvania, which is also the address of the said John J. Hayes according to the letter written by the said John J. Hayes to the West Jersey Title and Guaranty Company of Camden, N. J., a copy of which is set forth in the foregoing bill.

On Wednesday, July 18, 1928, I called the residence of Michael A. Maloney, No. 1021 South 60th Street, Philadelphia, Pa., on the telephone and inquired for the said John J. Hayes, and was advised that he was not there; I then asked for the said Michael A. Maloney, with whom I am personally acquainted, and he came to the telephone and I recognized his voice. I asked him if the said John J. Hayes was married and he replied that he could not be sure.

I then wrote to the said John J. Hayes by mail enclosing a stamped and addressed envelope for a reply inquiring if he was married and, if married, what his wife's Christian name was.

The said John J. Hayes has not replied to my communication. I know of no other person to whom I might apply for the Christian name of the wife of the said John J. Hayes.

WALTER R. CARROLL.

Sworn to and subscribed before me this 20th day of July, A. D. 1928.

ELSIE L. BELL,
Notary Public of N. J.

AMENDMENT TO BILL.

(Filed July 21, 1928.)

IN CHANCERY OF NEW JERSEY.

Between
E. R. C. Co.,
Complainant,
and
JOHN J. HAYES, *et ux.*,
Defendants.

On Bill, etc.
Amendment to Bill.

The complainant hereby amends its bill of complaint in the above-stated cause in the following particulars:

By inserting after the 12th paragraph of said bill of complaint on the 7th page thereof, the following paragraphs:

13. Said mortgaged premises were sold by the sheriff of Camden County as aforesaid subject to the following municipal charges, liens and assessments:

Taxes for 1928	$145.82
Assessment for Broadway extension (Feb. 27, 1926)	8,750.00
1926 paving assessment	594.00
1927 sewer assessment	227.00
1928 water pipe assessment	48.00
Taxes for 1927	135.70

and also subject to interest and costs thereon.

14. Said John J. Hayes and Mrs. John J. Hayes

were represented in the management and control of the above-described mortgaged premises by the aforesaid Michael A. Maloney. The said John J. Hayes and Mrs. John J. Hayes were not made parties to the aforesaid foreclosure suit brought by the Jersey Mortgage Investment Company because Walter R. Carroll, solicitor of said Jersey Mortgage Investment Company in said foreclosure suit believed and understood that the conveyance made by John J. Hayes to Andrew J. Maloney, as aforesaid, was an absolute conveyance in fee; that notwithstanding the fact that said John J. Hayes and his wife, Mrs. John J. Hayes, were not made parties defendant to said foreclosure suit they well knew of the institution and prosecution thereof and the said Michael A. Maloney and the said John H. Hayes procured and retained Patrick H. Harding, a member of the Bar of the City of Camden, to file, on behalf of Andrew J. Maloney and Mrs. Andrew J. Maloney, the answer mentioned and referred to in the 8th paragraph of this bill of complaint; shortly prior to the filing of said bill of complaint by the Jersey Mortgage Investment Company, as aforesaid, said Walter R. Carroll, on November 19, 1927, had a telephone conversation with Michael A. Maloney, the primary purpose of which was to inquire if the said John J. Hayes was a married man and also to inquire for the Christian name of the wife of the said Andrew J. Maloney and the said Michael A. Maloney informed the said Walter R. Carroll that Andrew J. Maloney was a brother of the said Michael A. Maloney and that the said Andrew J. Maloney was the owner of said mortgaged premises by the aforesaid deed from John J. Hayes.

WALTER R. CARROLL,
Solicitor for and of Counsel with Complainant.

ANSWER.

(Filed Oct. 3, 1928.)

IN CHANCERY OF NEW JERSEY.

Between
E. R. C. COMPANY,
Complainant,
and
JOHN J. HAYES, *et ux.,*
Defendants.

On Bill to Foreclose, &c.
Answer.

The defendant, John J. Hayes, of the City and County of Philadelphia, in the State of Pennsylvania answering complainant's bill says:

1. Defendant admits the execution of the bond described in paragraph 1, of complaint, but denies that on October 9, 1925, either defendant or Michael A. Maloney, jointly or severally were indebted to the said Bertha M. Hayes, in the sum of $30,000, or any other sum; defendant avers that the participation of the said Bertha M. Hayes, was brought about at the suggestion of the Jersey Mortgage Investment Company by its authorized agent and counsel, for the purpose of avoiding the prohibitions of an Act of the Legislature of New Jersey entitled "An Act against Usury" (Rev. 1877, page 519); that at no time did the said Bertha M. Hayes advance any cash

or have the custody of any cash in connection with said bond, and that the execution thereof to the said Bertha M. Hayes was wholly without consideration and null and void.

2. Defendant admits the execution of the mortgage described in paragraph 2 of said bill of complaint, but avers that the same was wholly without any consideration for the reasons set forth in the answer to paragraph 1, which are hereby made part of the answer to this paragraph by reference thereto.

3. Defendant admits the allegations of paragraph 3.

4. Defendant admits the assignment of said bond and mortgage to the Jersey Mortgage Investment Company as set forth in paragraph 4 of complainant's bill; defendant, however, avers that the said assignment of the aforesaid bond and mortgage, given without consideration, was also without any consideration to the said Bertha M. Hayes who acted solely as a straw obligee and mortgagee and assignor, and that the true facts of the said transaction are as appears in the answer to paragraph 1, *supra,* and as hereinafter set forth in defendant's second defense.

5. Defendant admits the execution of the deed described in paragraph 5 of the bill of complainant, but avers that the said deed was not given as an absolute deed of conveyance, but was given as collateral security for a loan of $5,000, made by the said Andrew J. Maloney to Michael A. Maloney, who was an obligor with defendant in the bond described in

paragraph 1 of the bill of complaint; that the said Andrew J. Maloney did not then become the real owner of the property, but that his interest still remained subject to redemption by defendant and reconveyance by the said Andrew J. Maloney upon repayment of the said loan of $5,000 with interest; that said loan was evidenced by a note given by the said Michael A. Maloney to the said Andrew J. Maloney and that the said right of re-conveyance is set forth in writing duly signed by the said Andrew J. Maloney.

6. The allegations of paragraph 6 are admitted.

7. Defendant has not sufficient knowledge of the facts set forth in paragraph 7 upon which to base an answer and demands proof of the same, if material.

8. The allegations of paragraph 8 are admitted.

9. Defendant has not sufficient knowledge or information of the facts set forth in paragraph 9 of the bill of complaint and demands proof thereof, if the same be material.

10. The allegations of paragraph 10 are admitted.

11. Defendant admits that he was not a party to the foreclosure suit of the Jersey Mortgage Investment Company; he has no knowledge as to the good faith or information of the said complainant as to the interest of defendant. The defendant admits that his interest in the property is subject to the aforesaid mortgage held by the Jersey Mortgage Investment Company only to such an extent, how-

ever as is set forth in defendant's second defense hereto.

12. Defendant hereby avers that he is now, and always has been a single man and that there is no Mrs. John J. Hayes, or any person lawfully claiming as wife of defendant.

13. Defendant has no knowledge or information of the facts set forth in paragraph 13 and demands proof thereof, if the same be material.

14. Defendant admits that the said Michael A. Maloney, represented him in the management of the premises described aforesaid. Defendant avers that he did not retain or authorize any one in his behalf to retain the services of Patrick H. Harding to file on behalf of Andrew J. Maloney and Mrs. Andrew J. Maloney, the answer referred to, and that he has no knowledge or information as to the alleged conversation of Walter R. Carroll with Michael A. Maloney or its purpose. Defendant further avers as hereinbefore set forth in the answer to paragraph 5, that the said Andrew J. Maloney was not the owner of the mortgaged premises by the deed from defendant, but that he held the same solely as collateral security for the loan referred to.

Defendant further answering complainant's bill says:

SECOND DEFENSE.

1. That the aforementioned Michael A. Maloney, on defendant's behalf applied to the Jersey Mort-

gage Investment Company for a loan of $30,000 to be secured by a mortgage upon the property set forth in the bill of complaint; that the said Jersey Mortgage Investment Company granted the said loan for a term of one year on condition, (1) that the said Michael A. Maloney join with defendant as obligor on the bond; (2) that it retain a premium, bonus or discount of 12½% of said $30,000, whereby the amount actually lent would be the sum of $26,250.00; (3) and that the bond and mortgage be made for the full sum of $30,000 with interest thereon at the rate of 6% on said $30,000; the matter was then referred to the counsel of the said Jersey Mortgage Investment Company to carry out and arrange the details of the settlement.

2. That the counsel of the Jersey Mortgage Investment Company informed the said Michael A. Maloney to the effect that it would be necessary to adopt a scheme or device for avoiding the prohibitions of the law respecting usury and advised as follows: namely, that a bond and mortgage be made to a straw obligee and mortgagee; that this party should then assign the bond and mortgage to the Jersey Mortgage Investment Company and that upon so doing the said company would actually pay the sum of $26,250, for the said purported bond and mortgage calling for the sum of $30,000, with interest at 6% on said amount.

3. That in compliance with said instructions of the said counsel and with the full knowledge and notice thereof to the said company defendant and Michael A. Maloney executed a bond and the said defendant also a mortgage to Bertha M. Hayes as described in the bill of complaint; that the said bond

and mortgage so executed by them to the said Bertha M. Hayes was wholly without consideration and that the said defendant and Michael A. Maloney were not, either of them, indebted in any manner to the said Bertha M. Hayes, nor received any proceeds from her by reason thereof; that the said Bertha M. Hayes did not have, or possess, for the purposes of the aforesaid loan, the sum of $30,000 or any other sum; further that the said Bertha M. Hayes merely allowed the use of her name as a straw obligee, mortgagee and assignor merely as a participant in the scheme or device designed for the purpose of avoiding the law against usury at the direction of the said counsel for the Jersey Mortgage Investment Company.

4. That at the settlement the said Bertha M. Hayes, executed an assignment of the hitherto void bond and mortgage to the said Jersey Mortgage Investment Company for a purported consideration of $30,000; but your defendant avers and expects to be able to prove that at said settlement "the amount or value actually lent" was the sum of $26,250 the difference between the $30,000 the amount of said bond and mortgage, being an unlawful "premium" or bonus of 12½% demanded and exacted by the said Jersey Mortgage Investment Company, assignee in name, but the actual mortgagee in fact.

5. That on April 16, 1926, defendant paid the sum of $900 to the said Jersey Mortgage Investment Company on account of interest for 6 months on said $30,000 mortgage of which the amount actually lent was $26,250 whereby defendant claims a payment of illegal interest at a higher rate than provided by

law and avers that he did then and there pay an illegal or excessive interest amounting to $112.50. Which amount defendant asks be credited on account of the principal of said mortgage, as of said date of payment.

6. That on October 9, 1926, the term for which the said bond and mortgage were written expired, and the said Jersey Mortgage Investment Company then and there demanded a payment of the full principal of $30,000 and at the request of defendant did agree, however, that the term of said bond and mortgage could be extended upon the payment to the said Jersey Mortgage Investment Company of a premium or a bonus of the same amount namely, 12½% as had been originally received by them, which defendant thereupon agreed with the said officers of the said Jersey Mortgage Investment Company to pay.

7. That by reason of the demand for further premium as set forth in paragraph 6 hereof, defendant did on October 8, 1926, pay to the said Jersey Mortgage Investment Company the sum of $2775.00 said amount being made up as follows: a payment of $1875.00 on account of said 12½% premium; the sum of $900.00 for 6 months interest; that defendant asks that he be credited on account of said principal of the mortgage of $26,250, the sum actually lent the said premium of $1875.00, and for illegal interest, the sum of $115.74 as of the date of the payment thereof.

8. That on April 14, 1927, defendant paid to the said Jersey Mortgage Investment Company the sum of $2775.00. Said amount being made up as follows: A payment of $1875.00, being the remainder of the

12½% premium for extension of said term and a further payment of $900, for interest on the said bond and mortgage; defendant asks that he be credited on account of the principal of said mortgage and the sum actually lent of $26,250, the said premium of $1875.00 and the sum of $175.59 being the amount of illegal interest in excess of the lawful rate of 6% so paid by defendant to the said Jersey Mortgage Investment Company.

9. Defendant avers that the officers and directors of the said Jersey Mortgage Investment Company had full knowledge and notice not only of the original premium paid together with illegal or excessive interest paid as herein set forth, but also of the additional premium paid for the extension of the term of said mortgage and also of the illegal or excessive interest paid on the amount beyond the sum actually lent.

10. Defendant hereby tenders in satisfaction of the said bond and mortgage the payment of the sum and amount actually lent and asks that such credits on account of said principal be allowed to him as may be provided by law, by reason of the payments made as aforesaid.

Defendant asks that this suit be dismissed without interest or costs.

SAMUEL P. HAGERMAN,
Solicitor for and of Counsel with Defendant.

by the final determination of this cause, and the Court having heard and considered the arguments of respective counsel and being of the opinion that said motion ought to be denied, but that the Jersey Mortgage Investment Company should be admitted as a party complainant herein and should be given leave to file a special replication to the answer of the defendant.

It is, thereupon, on this 18th day of October, A. D., 1928, on motion of Walter R. Carroll, solicitor for and of counsel with the complainant, ordered that the complainant's motion to strike out defendant's answer be and the same is hereby denied, and that the Jersey Mortgage Investment Company be admitted as a party complainant herein and that it be given leave to file a special replication to the answer of the defendant, John J. Hayes within twentys days from the date hereof and that a copy of such special replication, certified by the solicitor of the complainant as a true copy be served on the said defendant, John J. Hayes or Samuel P. Hagerman, his solicitor of record, within five days after the filing of the same.

E. R. Walker,
C.

Respectfully advised,
E. B. Leaming,
V. C.

ORDER DENYING MOTION, BUT GRANTING LEAVE TO FILE A SPECIAL REPLICATION.

(Filed Oct. 18, 1928.)

IN CHANCERY OF NEW JERSEY.

Between E. R. C. Co., *Complainant,* and JOHN J. HAYES, *Defendant.*	On complainant's motion to Strike out defendant's answer. Order denying motion, but granting leave to file a special replication.

The complainant, having moved on due notice to strike out the answer of the defendant, John J Hayes, upon the grounds in said notice specified; and the matter coming on to be heard in the presence of Walter R. Carroll, solicitor of the complainant, and Samuel P. Hagerman, solicitor of the defendant, and it appearing that the defendant's answer refers to and involves transactions between said defendant and the Jersey Mortgage Investment Company, a New Jersey corporation, to which the complainant herein is a stranger, and that the rights of the Jersey Mortgage Investment Company may be affected

REPLICATION OF THE COMPLAINANT, E. R. C. CO., TO THE DEFENDANTS' ANSWER.

(Filed Oct. 23, 1928.)

IN CHANCERY OF NEW JERSEY.

Between E. R. C. Co., *Complainant,* and JOHN J. HAYES, *et ux.*, *Defendants.*	On Bill, &c. Replication of the Complainant, E. R. C. Co., to the Defendants' Answer.

The complainant, E. R. C. Co., joins issue on the answer of the defendant.

WALTER R. CARROLL,
Solicitor of Complainant.

SPECIAL REPLICATION OF THE COMPLAINANT, JERSEY MORTGAGE INVESTMENT COMPANY TO THE ANSWER OF THE DEFENDANT, JOHN J. HAYES.

(Filed Oct. 23, 1928.)

IN CHANCERY OF NEW JERSEY.
69-271.

Between E. R. C. Co., *Complainant,* and John J. Hayes, *et ux.*, *Defendants.*	On Bill, &c. Special Replication of the Complainant, Jersey Mortgage Investment Company to the Answer of the Defendant, John J. Hayes.

In reply to the defense stated in the answer of the defendant, John J. Hayes, and not anticipated in the bill of complaint, complainant, Jersey Mortgage Investment Company, by leave of the Court first had and obtained, says that:

1. It is without knowledge as to whether or not the defendant, John J. Hayes and Michael A.

Maloney were indebted to said Bertha M. Hayes in the sum of $30,000, on the bond mentioned in the first paragraph of the answer; this complainant expressly denies that the participation of the said Bertha M. Hayes in the transaction was brought about at the suggestion of any authorized agent and counsel of this complainant for the purpose of escaping the usury laws of the State of New Jersey; on the contrary this complainant, Jersey Mortgage Investment Company avers that said Michael A. Maloney, representing himself to be the agent of said Bertha M. Hayes, proposed to this complainant that it should purchase from the said Bertha M. Hayes the bond and mortgage involved in this transaction at a discount of 12½%; that said Michael A. Maloney represented that said mortgage was or would be a valid, outstanding and subsisting lien in the shape of a first mortgage on the premises covered thereby, and the said John J. Hayes executed and delivered to this complainant, Jersey Mortgage Investment Company, under date of October 9, 1925, a declaration of no offset wherein and whereby the said John J. Hayes declared under his hand and seal that there was due on said bond and mortgage the principal sum of $30,000.00 with interest thereon at 6% from October 9, 1925, and this complainant purchased said bond and mortgage at a discount, as aforesaid, in reliance upon said declaration of no set-off and in reliance upon the direct and positive representations of the said Michael A. Maloney.

2. Replying to the fifth paragraph of the answer this complainant, Jersey Mortgage Investment Com-

pany, denies that the deed from said John J. Hayes to Andrew J. Maloney was given as collateral security for a loan to Michael A. Maloney; that complainant by reason of said deed being absolute upon its face did not make the said John J. Hayes a defendant in the suit instituted by this complainant, Jersey Mortgage Investment Company, to foreclose said bond and mortgage because said deed appeared of record as a deed absolute upon its face and the said John J. Hayes, and the said Michael A. Maloney are estopped to deny that said deed was an absolute deed of conveyance; that the said John J. Hayes and the said Michael A. Maloney are further estopped from denying that said deed was an absolute conveyance in fee because at or about the time this complainant, Jersey Mortgage Investment Company, filed its bill for the foreclosure of said mortgage, Walter R. Carroll, solicitor of this complainant, Jersey Mortgage Investment Company in said foreclosure suit made direct personal inquiry of the said John J. Hayes and the said Michael A. Maloney and was informed by them that by virtue of said deed the said Andrew J. Maloney was the owner of said premises; that in said foreclosure suit the said Andrew J. Maloney filed an answer admitting the conveyance to him of said mortgaged premises and setting up the defense of usury which answer was suppressed as charged in the bill of complaint in this cause and said answer was procured to be filed by the said Michael A. Maloney, and the said John J. Hayes, and Michael A. Maloney at all times knew of the pendency of said foreclosure suit, and could have applied to have been made parties defendant therein and thereto, and are now estopped from as-

serting that they or either of them have any right, title or interest of any kind, character or nature in and to said mortgaged premises.

Reply to Second Defense Set up in Answer.

1. This complainant, Jersey Mortgage Investment Company, denies the first paragraph.

2. This complainant, Jersey Mortgage Investment Company, denies the second paragraph.

3. This complainant, Jersey Mortgage Investment Company, denies the third paragraph.

4. This complainant, Jersey Mortgage Investment Company, admits that it purchased said bond and mortgage from said Bertha M. Hayes, for the sum of $26,250.00, but that said purchase was induced by representations made by the said Michael A. Maloney; that said mortgage was or would be a valid and outstanding first lien on the mortgaged premises and that said mortgage was purchased by this complainant, Jersey Mortgage Investment Company, in reliance upon the declaration of no set-off executed and delivered by the said John J. Hayes hereinbefore mentioned and referred to.

5. This complainant, Jersey Mortgage Investment Company, denies the fifth paragraph.

6. This complainant, Jersey Mortgage Investment Company, denies the sixth paragraph.

7. This complainant, Jersey Mortgage Investment Company, denies the seventh paragraph.

8. This complainant, Jersey Mortgage Investment Company, denies the eighth paragraph.

9. This complainant, Jersey Mortgage Investment Company, denies the ninth paragraph.

Complainant, Jersey Mortgage Investment Company, joins issue upon the remainder of the answer.

WALTER R. CARROLL,
Solicitor of Complainant.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between
E. R. C. Co.,
Complainant,
and
JOHN J. HAYES,
Defendant.

On Bill, etc.

March 11, 1929.

LEAMING, V. C.

HARVEY F. CARR, ESQ., for complainant.
SAMUEL P. HAGERMAN, ESQ., for defendant.

The Court: Are there any other matters ready?

Mr. Carr: Is your Honor desirous to begin at this late hour?

The Court: How long do you think it would take? Can we finish this afternoon?

Mr. Carr: I would think an hour and a half or possibly two hours. What is your Honor's usual hour?

The Court: I have no rule on that.

Mr. Carr: I doubt whether we could finish unless we impose upon your Honor. So far as I am concerned I am perfectly willing to come back.

The Court: We might go on, and if we can't finish we can go on tomorrow morning before my 10 o'clock case comes on.

Mr. Carr: That will be all right for me.

The Court: What is the issue?

Mr. Carr: The issue, briefly stated, is this; has your Honor read the pleadings?

The Court: I did, but I have forgotten what they were.

Mr. Carr: Shall I attempt to summarize them briefly?

The Court: See if it comes back to me, E. R. C. Company against Hayes. It is a question of whether an assignment was taken without notice?

Mr. Carr: One of the questions is the fact of a recital of one dollar and other valuable consideration in a deed. I will very briefly outline this to your Honor. The complainant here, the E. R. C. Company, is the purchaser at sheriff's sale of a

property at Lawrence Street and Broadway, the property was sold under a mortgage foreclosure of the Jersey Mortgage Company against Andrew J. Maloney, and others. There was in that suit, if your Honor may remember, an answer filed on behalf of Andrew J. Maloney, I think Mr. Harding was counsel, and later suppressed by your Honor, they attempted to set up usury in the original transaction. In the mortgage foreclosure suit Andrew J. Maloney appeared to be the owner of the equity of redemption, it being conveyed to him by a deed dated December 1st or 5th, I have forgotten which, 1925, and it went to a foreclosure sale ——

The Court: And they claim a trust arising from a deed wherein a consideration of one dollar was made?

Mr. Carr: Yes.

The Court: I have no sympathy with that doctrine. Who started that thing?

Mr. Carr: That started at the title company, I think, if the Court please.

The Court: It sounds like a title company doctrine. Where is the sense of the idea that a deed, naming a one dollar consideration, gives notice of a trust, or a defect? Are there any decisions on it?

Mr. Carr: No, sir. I have searched rather carefully and I can't find any case that holds just that. Your Honor passed up on the question to some extent in Lockheed v. Armstrong, in 84 N. J. Equity, and I can refer your Honor to the cases ——

The Court: Which way did I decide?

Mr. Carr: You decided they were not put upon inquiry by the one dollar consideration.

The Court: And the title company still decides to the contrary, do they?

Mr. Carr: Yes, sir, they do. I know of no higher authority to cite to your Honor in this case.

The Court: And you don't know of any other New Jersey case on that particular point?

Mr. Carr: No, I think there are no other authorities in New Jersey, they all seem to be satisfied with your Honor's ruling, except the title company.

The Court: Is that the only question involved here?

Mr. Carr: Incidentally is involved the question of estoppel. Mr. Carroll, who had charge of the foreclosure suit, called up Mr. Michael Maloney, who was the real man in this transaction, as we understand Mr. Hayes was only the straw man, and inquired of him as to the address of Andrew Maloney and as to his marital status, and finally Mr. Maloney became somewhat annoyed ——

The Court: That is in addition?

Mr. Carr: This all appears in the answer, and it will appear by testimony actual inquiry was made, and also the question as to whether Mr. Andrew

Maloney was the owner in fact, or something to that effect. May I add, the deed of conveyance, dated in December, 1925, from Hayes to A. J. Maloney, who was the brother of Michael Maloney, was expressly stated to be subject to an existing mortgage of $30,000, and a second mortgage of $17,000, which made it subject on the face of it for $47,000, and we are prepared to show there were municipal liens and claims arising out of the extension of Broadway, in the neighborhood of $9,000, so that the property was burdened with about 55 or 56 thousand dollars of incumbrances at the time.

The Court: I think I recall, there is a claim here that the mortgagee was really a straw man, or straw woman, used in order to avoid the usury act.

Mr. Carr: Yes, sir, that charge is made.

The Court: That defense I am in high sympathy with, if it is a fact.

Mr. Hagerman: If the Court please, it seems to me the issue here is—rather, this a case where there has been a foreclosure on a mortgage, and now a suit in strict foreclosure is brought wherein John J. Hayes, the mortgagor, and obligor on the bond and mortgage is made a defendant and he has set up the claim of usury.

The Court: He claims he is the real owner of the property, there was a trust in his favor?

Mr. Hagerman: Yes, sir.

Mr. Carr: I would like to offer in evidence, if the Court please, the bond and warrant referred to in the bill, its execution is admitted by the answer, being the bond of Michael A. Maloney and John J. Hayes, and dated the 9th day of October, 1925, to Bertha M. Hayes, conditioned for the payment of $30,000 within one year.

(Said paper offered in evidence and marked Exhibit C1.)

Mr. Carr: I would next like to offer in evidence mortgage dated the 9th day of October, 1925, made by John J. Hayes, a single man, to Bertha M. Hayes, conditioned for the payment of the sum of $30,000 within one year from the date thereof, and recorded in book 267 of mortgages, page 305, in Camden County.

(Said paper offered in evidence and marked Exhibit C2.)

Mr. Carr: I now offer in evidence assignment of mortgage, Bertha M. Hayes to Jersey Mortgage Investment Company, assigning mortgage Exhibit C3.

(Said paper offered in evidence and marked Exhibit C3.)

Mr. Carr: I now offer in evidence declaration of no offset executed by John J. Hayes to the Jersey Mortgage Investment Company, dated the 9th day of October, 1925.

(Said paper offered in evidence and marked Exhibit C4.)

Mr. Carr: I offer in evidence a certified copy of a deed bearing date the 1st day of December, 1925, made by John J. Hayes, recited to be a single man, to Andrew J. Maloney, conveying the premises described in the bill of complaint.

The Court: That is Hayes to Maloney?

Mr. Carr: Yes, sir, for a consideration ——

The Court: Which Maloney?

Mr. Carr: From John J. Hayes to Andrew J. Maloney, reciting a consideration of "One dollar and other good and valuable consideration, lawful money of the United States."

The Court: What is the date of that?

Mr. Carr: December 1, 1925, the original of which mortgage is recorded in book 613 of deeds, page 333, Camden County.

The Court: Recorded what date?

Mr. Carr: The same day, I think, if the Court please. Recorded on December 1st.

(Said paper offered in evidence and marked Exhibit C5.)

Mr. Carr: I offer in evidence sheriff's deed dated July 14, 1928, made by Walter T. Gross, Sheriff, and so forth, to E. R. C. Company, a New Jersey Corporation, conveying the mortgaged premises.

(Said paper offered in evidence and marked Exhibit C6.)

Mr. Carr: I also offer in evidence tax bill ——

Mr. Hagerman: I object to that, I don't see that it has any relevancy whatsoever. The question is whether it was not usury. The only question, the main question he sets up in his answer, he bought this mortgage at a discount, and we claim instead of being a bona fide mortgage it was a scheme for evading the usury laws.

Mr. Carr: Here is our idea of that, if the Court please ——

The Court: What is the purpose of offering the tax bill? The mortgage has been foreclosed and now you want to shut out any equity that Mr. Hayes may claim by reason of a notice of the one dollar consideration which would be binding on you?

Mr. Carr: The purpose, if the Court please, is this, one of the questions that arise where inadequacy of consideration is set up as being a possible ground of inquiry, is what were the liens upon the property at the time of its transfer.

The Court: The transfer from Hayes to Maloney?

Mr. Carr: Yes, sir.

The Court: You can show what was against the property at that time, sure.

Mr. Carr: That is what I am undertaking to do,

if the Court please. The first is an assessment for the extension of Broadway, an item of $8,750.

The Court: How much?

Mr. Carr: $8,750.00.

The Court: As of what date?

Mr. Carr: That was for 1925, if the Court please.

The Court: It was prior to the deed?

Mr. Carr: This work had already been done prior to the deed, the actual assessment of it was as of the 27th of December, 1925.

The Court: Is there any way to show when the lien ——

Mr. Carr: We have the local tax officer here.

The Court: Do you admit, Mr. Hagerman, this was for work ——

Mr. Hagerman: The work had been done prior to the mortgage, yes.

The Court: Very well.

Mr. Carr: I also produce a paving bill of the city for $594.

The Court: $594.00?

Mr. Carr: I am informed by the city authorities

that all of this work was done in 1925, and prior to this transfer.

The Court: Do you concede that?

Mr. Hagerman: Yes, except it states it is confirmed April 26, 1926.

(Said paper offered in evidence and marked Exhibit C8.)

The Court: You concede this work ——

Mr. Hagerman: Was constructed but confirmed subsequently.

Mr. Carr: A further assessment for sewers or drains amounting to $227, actually confirmed August 1, 1927. All these sub-surface improvements were necessarily done before the paving, if the Court please. A further assessment for water pipes against this property of $48.00, the actual assessment being confirmed on February 20, 1928.

The Court: What was the amount?

Mr. Carr: $48.00, if the Court please.

(Said paper offered in evidence and marked Exhibit C9.)

Mr. Carr: Now, if the Court please, we would like to offer in evidence the files in the case of the Jersey Mortgage Company against Maloney, and with particular reference to the final decree in that case.

CHARLES W. AUSTERMUHL, sworn.

By Mr. Carr:

Q. Mr. Austermuhl, what is your business, please?
A. Insurance broker and mortgage business.
Q. Are you connected with the Jersey Mortgage Company?
A. I am, as secretary and treasurer of that company.
Q. Do you know Michael A. Maloney?
A. I do.
Q. Did you know him in October, 1925?
A. I did.
Q. How long had you known him prior to that time?
A. About a year.

The Court: Did you refer to Michael or Andrew?

Mr. Carr: Michael A. Maloney.

Q. What was Mr. Maloney's business when you knew him for a year prior to October, 1925?
A. I met Mr. Maloney about a year previous to October, 1925, and my understanding was he was a member of the Philadelphia bar, and a real estate speculator, and apparently a good sport, and was apparently making money in his deals with the real estate he was buying here in New Jersey.
Q. Did he have an office here in Camden?
A. Mr. Maloney, I understand his office was run under the name of a lady by the name of Hayes in the Temple Building, and I believe he had an office in Philadelphia. I never was in his office, but I be-

lieve that his offices were in the Temple Building, which he owned, and also in Philadelphia.

Q. Did Mr. Michael A. Maloney approach you any time in the early fall of 1925, with reference to the purchase of the property described in the mortgage later taken by your company?

A. He did.

Q. Where was that property?

A. The property was located on the east side of Broadway 70 feet north of Lawrence Street with a depth of approximately 18 feet and a few inches.

Q. And it was a lot 70 by 18 feet three inches?

A. Approximately, yes.

Q. Considering it from the Broadway side you would have a frontage on Broadway of 70 feet by a depth of 18 feet three inches, approximately, is that right?

A. Yes.

Q. When was it Mr. Maloney first spoke to you about the property I have just mentioned?

A. Well, possibly the latter part of September or very early in October, 1925.

Q. What did Mr. Maloney say to you with reference to the matter?

A. I had talked to Mr. Maloney several times, he coming into my office, and he stated he had an opportunity to buy this back yard which was located at Broadway and Lawrence, and it was in his mind a very good buy, and he advised me he was paying approximately $25,000 for the ground and he wanted the Jersey Mortgage, or somebody, to take a mortgage on the ground.

Q. For what purpose, did he say?

A. To purchase the ground.

Q. He was to use the money to buy the ground with, is that it?

A. He was.

Q. Now, your first conversation, did that result in any conclusion?

A. The first conversation resulted in nothing, as a matter of fact, if my memory serves me correct, the matter was approximately declined, or turned down.

Q. Did he say what he expected to do with this property if he got it?

A. He was going to make an awful lot of money on it, it was during the boom, and he expected to make a lot of money.

Q. Did he tell you so?

A. Yes, yes.

Q. How soon after that was it before he saw you again with reference to the same subject?

A. I should say possibly once or twice.

Q. What was talked about on those occasions?

A. That he was very desirous of buying this ground and that he must have the money to purchase the ground, and again the subject came up would we take a mortgage for the ground, and during that time, I think, everybody in the real estate business, or mortgage business, more or less, had an exaggerated idea as to the value of ground, and he suggested that we take a mortgage in the amount of $30,000, and I told him we couldn't take such a mortgage, and then he broached the subject whether we would take it at a premium suitable for the risk, and I said no, that would be usury, and we later on talked the matter over, Mr. Maloney and myself, and it was agreed, at his suggestion or idea, that he would pay $3,750 to get this money, he realizing that we were financing this proposition for Mr. Maloney.

Q. Were you financing the whole purchase?

A. Yes, he never had a cent in the deal, and this matter was submitted to the board of directors, they

realizing that they were placing all the money on this ground for the purchase of Michael Maloney, and after deliberation and consideration, realizing and taking my word for it that Maloney was a good sport, they agreed to take a $30,000 mortgage if Maloney would pay $3,700.

Q. Was the amount advanced by you in excess of the entire purchase price?

A. I didn't get you.

Q. Was the amount advanced by your company in excess of the entire purchase price?

A. The amount of $30,000 was advanced by our company.

Q. What was the purchase price Maloney stated to you?

A. $25,000.00.

Q. In other words, you were advancing $5,000 more than the purchase price?

A. Yes, sir.

Q. And you were making a charge for that service of $3,750?

A. Yes, sir.

Q. Now, what did Maloney say ——

The Court: You were to get a $30,000 mortgage and were to pay—how much in cash were you to pay for that mortgage?

The Witness: We paid $30,000 in actual cash. Mr. Maloney giving back to us $3,750.

Q. Now, did Mr. Maloney make any suggestion as to what form this transaction should take?

A. Mr. Maloney suggested a Bertha M. Hayes, if my memory serves me correct, would take the mortgage, or a John M. Hayes, one or the other.

Q. What did he say about John M. Hayes and Bertha Hayes?

A. They were straw people for Mr. Maloney.

Q. And then what did he say would be done, if he did say?

A. I don't get your question, Mr. Carr.

Q. Did he indicate further how the transaction was to be handled?

A. That they would give the mortgage, and in turn that mortgage would be assigned to the Jersey Mortgage Investment Company, evading usury.

Q. Did you ever have any dealings whatever with Mr. Hayes?

A. Never saw Mr. Hayes in my life.

Q. Up to the present time have you ever seen him to know him?

A. I wouldn't know him.

Q. Did you ever meet Bertha Hayes?

A. I wouldn't know Bertha Hayes.

Q. Who paid as much interest as was paid on this mortgage?

A. Mr. Maloney.

Q. Did you ever receive anything from Mr. Hayes?

A. No.

Q. Now, this mortgage was dated October 9, 1925, for one year?

A. It was.

Q. It was not paid at maturity, was it?

A. No.

Q. Was anything further paid by Mr. Maloney for its extension?

A. $1875 was paid for a further extension, under the same promise and condition after a talk between Mr. Maloney and myself, and each time we talked he had great ideas as to what he was going to make as a profit from the money we had advanced.

The Court: He gave you $1875 for an extension of time?

The Witness: Yes. Each time he told me he was going to make considerable money on the money we had advanced. As a matter of fact, each time—there were two times I talked to him, and I said, "You are going to make a lot of money from our money, aren't you?" and he said, "Yes."

Q. Were there any further premiums for extension as it later fell due?

A. One more.

Q. How much was that?

A. $1875.

Q. That carried it along for a total of two years?

A. Another extension for 6 months.

Q. Is that the total amount paid either by way of commission or extension?

A. That is.

Q. The three sums you have mentioned?

A. Yes.

Q. To what date was interest on this mortgage paid?

A. Interest was paid to April 9, 1927.

Q. So that interest is due on the mortgage, omitting the fact it is now in the form of a decree, from April 9, 1927, to date, is that right?

A. To date, that is right.

Q. Were any of those payments of interest, or the payments for extensions made by the check of Mr. Hayes?

A. Mr. Hayes, no.

Q. Did you ever see, hear, or know Mr. Hayes in the transaction in any other character except as straw man of Michael A. Maloney?

A. That is all I knew him as, as straw man.

Q. Mr. Austermuhl, you were familiar with real estate values in 1925, or thought you were?

A. The better answer to that is I thought I was.

Q. You were buying, selling, trading and mortgaging, weren't you, in those years?

A. Yes.

Q. Rather extensively, weren't you?

A. Yes.

Q. Can you tell me what, in your judgment, was the value of that property on December 1, 1925, having regard to the conditions that then existed?

A. You are giving me a hard question to answer, I am afraid, after my several talks with Mr. Maloney, that he more or less sold me on the idea that the property was worth a lot of money, and we had an idea—I had an idea, followed up by my directors, that there was a value in that property.

The Court: I think if we sit through until 5 o'clock we can get through; wouldn't you rather do that?

Mr. Carr: I am perfectly willing to stay, except I have made a rather important engagement in Philadelphia with the idea that we would be through.

The Court: It doesn't make any difference, I can finish it tomorrow morning just as well.

The Witness: In advancing this money I figured the ground was worth at that time somewhere around $40,000.

The Court: You understood the assessments against it were something over $9,000, I suppose?

The Witness: To be honest with you we almost forgot the assessments.

Q. They had not been made at that time, were they?

A. No. A little matter of $10,000 assessments didn't cut any ice in those days.

Cross-examination.

By Mr. Hagerman:

A. You stated, Mr. Austermuhl, this matter was considered by your board of directors?

A. Yes, sir.

Q. By that do you mean the terms of this 12½% bonus, as well as the safety of the bond?

A. We did not treat this as a bonus, we treated it ——

Q. Just answer the question.

A. What was the question?

Q. The fact that your company was to get $3,750 was considered and known at your directors' meeting?

A. It was, yes.

Q. Was your company making any loans at all at this time except if there was some special fee or bonus paid to you?

The Court: Why is that material? Is there any dispute about the bonus being paid?

Mr. Hagerman: No.

The Court: Then don't spend any time on it.

Q. Did your company consider making the loan without the bonus?

Mr. Carr: I object to that.

The Court: I don't think it is material. They say that they received $3,750 for making this loan, and these two extensions were additional. You can't make that any plainer, Mr. Austermuhl has testified to it with strict accuracy.

Q. Had the value not been in the property, of course, your company would not have made the loan?

Mr. Carr: I object, immaterial and irrelevant.

The Court: What is the idea of that? I think I can answer it, they wouldn't if they hadn't thought so.

Q. I ask you to identify these, Mr. Austermuhl, check of $900.
A. Yes, that is evidently a check made to us.

(Said check offered in evidence and marked Exhibit D1 for identification.

The Court: Are they interest checks?

Mr. Hagerman: Yes, and bonus checks.

The Court: Do they differ from what he said?

Mr. Hagerman: They confirm it.

The Court: Then don't take any more time with it, what is the use?

Q. Who first proposed this arrangement, Mr. Austermuhl?

A. Which arrangement?

Q. That there should be a fee paid for the mortgage?

A. Mr. Maloney.

Q. Mr. Maloney?

A. Yes.

Q. You are quite sure of that?

A. Yes.

Q. Who made the proposition that the mortgage should be made to Miss Hayes instead of to your company direct?

A. It must have been Mr. Maloney, because I didn't know Miss Hayes.

Q. Was that proposition made to you or to someone else?

A. Was the proposition made to me?

Q. Yes.

A. I act as secretary and treasurer, and as to Miss Hayes I didn't know as to that.

Q. After the details of this company's arrangements had been made, didn't you refer him to your solicitor for the method of carrying it out?

A. Mr. Maloney was directed to our solicitor, naturally, because there is where the settlement would be made.

RALPH D. BAKER, sworn.

By Mr. Carr:

Q. Mr. Baker, what is your business, please?
A. Real estate broker.
Q. How long have you been in that kind of work?
A. Ever since I started employment, practically born and raised in that business.
Q. That has been quite a few years?
A. Forty-two.
Q. Your business has been here in Camden?
A. I succeeded my father, I bought my father out in 1915, and I was associated with my father all my life.
Q. Have you had experience in making real estate appraisals in a number of different matters?
A. I have.
Q. Such as what?
A. I have represented the State Highway Commission since 1924, I am now employed by the Camden County Park Commission in the matter of the Cooper River Valley, and I have also represented the City of Camden in several capacities.
Q. You have had experience in dealing with the value of properties that were taken, or to be taken in connection with the construction of the Delaware River Bridge?
A. I represented the factory owners only, I did not represent any of the dwelling owners, the five factories taken out by the bridge.
Q. Were you familiar with the value of properties in the neighborhood of Broadway and 5th Street in December, 1925?
A. I have, continuously. I bought the hotel site for the Community Hotel Corporation.

The Court: I think Mr. Hagerman will probably accept your qualifications.

Mr. Hagerman: Surely.

Q. Do you know the property at the corner of Broadway and Lawrence Street, 70 feet on Broadway by 18 feet 3 inches, approximately, on Lawrence Street?

A. I do.

Q. Can you tell me what the value of that property, in your judgment, was on December 1, 1925?

A. $42,000.00.

Q. $42,000.00?

A. Yes.

(No cross-examination.)

Walter R. Carroll, sworn.

By Mr. Carr:

Q. Mr. Carroll, you are an attorney at law, I presume?

A. Yes, sir.

Q. Are you the solicitor for the Jersey Mortgage Company?

A. Yes, sir.

Q. Were you their solicitor in 1925?

A. Yes, sir.

Q. Did you represent the Jersey Mortgage Company in the matter of a loan procured by Michael A. Maloney upon the premises described in the bill of complaint here?

A. I did. My recollection is when I was informed by the Jersey Mortgage Investment Company what the proposition was, the question came up of having our title as first mortgagee, insured by the West Jersey Title and Guaranty Company with a proper survey, and I think I wrote or telephoned to Mr. Michael A. Maloney, who at that time had an office in the Temple Building, Camden, to come in and see me and give me the preliminary data, and he came in and gave me a description of the property. At that time he had not yet completed his purchase from Arthur A. Green, and he wanted the settlement on the mortgage made on the same day his settlement with Green was to take place.

Q. Did he say how much he was paying for the property?

A. $25,000, and he was to use part of the proceeds of the loan to pay Green $25,000, and he came in to see me, I can't recall the exact time, but a few days prior to October 9, 1925, which was the date of the settlement, and I asked him where the papers were, meaning the bond and mortgage, and things of that sort, and he said he had not prepared them, he would just as leave I prepare them, and I inquired how the title stood, and he said he was going to take title in the name of John J. Hayes, and I asked him who he was, and he said he was just a straw man for him, and he told me the arrangement was that he wanted John J. Hayes to give the mortgage to Bertha M. Hayes, and Bertha M. Hayes to assign it to the Jersey Investment Company.

Q. Was that the form the transaction took?

A. Yes, sir.

Q. Do you know whether or not Maloney is a lawyer?

A. I always understood he was a member of the Philadelphia bar.

Q. Were you present at the time of the actual settlement?

A. Yes, sir. The Jersey Mortgage Investment Company placed in my hands to make settlement $26,500, and I think the settlement was made at the title company, and was at the same time as the settlement made with Arthur A. Green, and the money was disbursed at the same settlement. I think Maloney, prior to October 9, 1925, had paid a couple of thousand dollars to Green on the purchase price.

The Court: While Hayes signed the mortgage, title having been made to him, Maloney joined Hayes in the bond?

The Witness: We took Hayes on the bond, thinking he had some financial responsibility.

The Court: Maloney signed the bond with him?

The Witness: Yes, he was a mere figurehead.

Q. Have you the checks given in this matter?

A. Yes.

Q. Will you produce them, please?

A. (Witness complies.) They are all there except one check for $12 which I think my girl forgot to get out for me.

Q. Now, Mr. Carroll, I call your attention to two checks which you have produced out of the larger number, both dated October 9, 1925, one bearing number 3028 to the order of John J. Hayes, in the amount of $23,612.50, signed by Walter R. Carroll, that is your signature, isn't it?

A. Yes, sir.

Q. Was that one of the checks used at the settlement?

A. Yes, sir.

Q. Will you kindly read the endorsement on that check?

A. "Pay to the order of Authur A. Green, John J. Hayes," and endorsed, "Arthur A. Green."

The Court: How much?

The Witness: $23,612.50.

Mr. Carr: I offer this check.

(Said check offered in evidence and marked Exhibit C10.)

Q. I now call your attention to check 3029, dated October 9, 1925, to the order of John J. Hayes, in the amount of $2,011.80, signed Walter R. Carroll, that is your signature, isn't it?

A. Yes, sir.

Q. Was that one of the checks used in this transaction?

A. Yes, sir.

Q. Will you kindly read the endorsement on the check?

A. "Pay to the order of Michael A. Maloney, John J. Hayes," and then a deposit stamp, "for deposit only, Michael A. Maloney."

Q. Both of these checks have a cancellation or pay stamp, or cut on them, a perforation?

A. Yes, sir.

Q. And have been actually paid?

A. Yes.

Mr. Carr: I offer in evidence check #3029.

(Said check offered in evidence and marked Exhibit C11.)

Q. Mr. Carroll, will you say whether you completely disbursed the sum of $26,250 in this settlement, and how?

A. $26,500, wasn't it?

Q. $26,250.

A. I guess that is right, $3,750 off of $30,000.

Q. Did you completely disburse that sum in this settlement?

A. I did.

Q. And outside of the money directly represented by checks C10 and C11, was the balance of the disbursements paid those usually incident to a settlement, title company charges, tax adjustments, and so on?

A. Yes, sir.

Q. Can you state just exactly how that sum was disbursed?

The Court: I will have to quit, if I am going to catch this train. 9 o'clock tomorrow.

Mr. Hagerman: Would Wednesday suit your Honor as well? Mr. Andrew Maloney is in Chicago and will return Wednesday morning, and at that time I will be in a position to furnish the deed which they call for.

(At this point an adjournment was taken until Tuesday, March 12, 1929, at 9 A. M.)

Camden, N. J., March 12, 1929.

(Trial of the cause resumed on the above date, pursuant to adjournment, at 9 A. M.)

WALTER R. CARROLL, resumed.

The Witness: There were $40 paid for revenue stamps, that was $15 for stamps on the bond given by Hayes to Bertha M. Hayes and assigned to the Jersey Mortgage Investment Company, and $25 for revenue stamps on the deed from Arthur H. Green to Hayes; $32.40 paid to Remington and Vosbury for a survey; $503.77 paid to the West Jersey Title and Guaranty Company for their charges in insuring the first mortgage, and that covers some adjustment for taxes, and I am not able to recall the exact items that made up that item of $503, and my own charges amounting to $43.50.

Q. That accounts for the disbursement of the sum of $26,250, doesn't it?

A. All except $12, and I don't seem to have any check for that.

Q. But, at any rate, after the usual title company charges and adjustments, the entire sum of $26,250 was paid to Mr. Maloney?

A. Yes, sir, disbursed under Mr. Maloney's personal instruction and direction.

Q. Now, Mr. Carroll, did you conduct the foreclosure suit of the Jersey Mortgage Company under Maloney?

A. Yes, sir.

Q. Do you remember the fact that an answer was filed by Mr. Patrick Harding on behalf of Andrew J. Maloney setting up the defense of usury?

A. Yes, sir.

Q. Do you also recall the fact that the answer was suppressed by his Honor, Vice-Chancellor Leaming, upon your application?

A. Yes, sir.

Q. Now, Mr. Carroll, are you able to tell what the sheriff's charges were, what the costs were incident to the foreclosure?

A. The sheriff's fees were in the neighborhood of $78 and some odd cents.

Q. Will this memorandum assist your recollection?

A. No, that won't.

Q. Will you kindly refer to the file in the foreclosure suit and state the amount of the decree, the amount of the complainant's costs, and the date from which interest ran upon the decree?

A. The final decree was entered on April 4, 1928, for $31,800, with interest thereon from April 3, 1928, and costs taxed at $432.64.

The Court: How much?

The Witness: $432.64. In addition thereto there were sheriff's costs from the sale amounting to $78 and some odd cents. There would be nothing in these papers to show the exact figures, but I can ascertain the exact amount.

Q. Will you ascertain the exact amount of the sheriff's costs and state them later?

A. Yes, sir.

Mr. Carr: Any objection to that, if the Court please?

The Court: No.

Q. Now, Mr. Carroll, in foreclosing the first mortgage in the suit against Andrew J. Maloney, did you make any inquiry of Michael A. Maloney as to the status of Andrew J. Maloney?

A. The bill in the foreclosure suit of the Jersey Mortgage Investment Company against Andrew J. Maloney was filed, I think, on November 22, 1927. The matter had been placed in my hands for foreclosure some two weeks or so before that. When the foreclosure search came in, I observed that it set forth a deed from John J. Hayes to Andrew J. Maloney of Chicago, Illinois, and I think it was on Saturday, November 19, 1927, that I called up the office of Michael A. Maloney in the Temple Building in Camden, I wanted to ascertain first whether Andrew J. Maloney was married, and if so, what his wife's name was, and I also wanted to see whether some arrangement could be made for having some attorney in Camden acknowledge service for any persons that might be non-residents, and when I called up Mr. Maloney's office in Camden I was told he wasn't there, and it was suggested that I call up his residence in Philadelphia, and I called up Mr. Maloney, that is, Michael A. Maloney, and I had a telephone conversation with him, I said, "Mr. Maloney, I understand you have conveyed new Broadway and Lawrence Street to Andrew J. Maloney, is that your brother?" and he said, "Yes," and I said, "Is he the present owner?" and he said, "Yes," and I said, "Have you any objection to giving me his street address in Chicago and telling me whether he is

married or not, and what his wife's name is?'' and Mr. Maloney seemed to be getting impatient under the questioning and he said, ''What do you want to know for?'' and I said, ''I have received instructions to foreclose this mortgage,'' and he said, ''If that is the case you can get your information the best way you can,'' and he complained a little about the foreclosure suit being pressed, and I said, ''Mr. Maloney, if you raised $17,200 on the second mortgage, taking that plus what you got from us in excess over the purchase price, and the fact you haven't paid any taxes,'' I said,''you are nine or ten thousand dollars ahead of the game and we are holding the bag, and you haven't a cent in the proposition, and you haven't any kick coming against us,'' and I said, ''why don't you come clean and straighten me out on this thing,'' and he said, ''The whole thing is up to my brother, and I have nothing more to do with it,'' and that was the end of the conversation.

Q. Did he state that Andrew J. Maloney's interest was that of a mortgagee?

A. No.

Q. Do you know whether or not the residence of John J. Hayes and the residence of Michael A. Maloney are at the same street address in Philadelphia?

A. Yes, sir. The letter of John J. Hayes written to the West Jersey Title and Guaranty Company after the foreclosure sale when Hayes was asked to furnish an affidavit as to the consideration of this deed, was written from the same address that Maloney had his address at.

Q. That letter appears in the pleadings, doesn't it?

A. Yes, sir.

Q. The letter to which you have reference is that

the letter which appears on page 5 of the bill of complaint?

A. Yes, sir. The title company had removed that exception upon my statement, and when they got this letter from Mr. Hayes they reinstated the exception.

Mr. Carr: If the Court please, I think I will read this unless your Honor has it clearly in mind. The letter referred to appears in paragraph 10 of the bill of complaint, on page 5, and reads as follows: "Application #59437," and in the upper right-hand corner, "1021 S. 60th Street, Philadelphia, Pa. July 11, 1928. West Jersey Title & Guaranty Company, 3rd & Market Streets, Camden, New Jersey. Gentlemen: I have just been handed an affidavit with the request that I sign and swear to it stating that the conveyance by me to Andrew J. Maloney of the property at the northeast corner of New Broadway and Lawrence Street, Camden, dated December 1, 1925, and recorded in book 613, page 333, was not upon any secret trust, as collateral security, or otherwise, etc. I am unable to sign such an affidavit. Please be advised that the said conveyance was made as collateral security for a loan of $5,000, and I claim my title to the property is still good, as I was not made a party to the foreclosure proceedings on the first mortgage and had no notice that the property was to be sold until after the sale had actually taken place. Yours truly, John J. Hayes."

Q. Up to that time had you any knowledge whatever that John J. Hayes claimed to have any interest in this property?

A. No, sir.

Q. So far as the records went, and the searches,

did John J. Hayes appear of record to have any title or right or interest in this property?

A. No, there was an absolute deed from John J. Hayes to Andrew J. Maloney for the expressed consideration of one dollar and other good and valuable consideration; that recited it as subject to a first mortgage of $30,000 and a second mortgage of $17,200.

Q. Prior to the letter addressed to the title company, was your attention directed in any way to the claim that John J. Hayes still had the fee to this property?

A. No, sir, not in any way.

The Court: And you had no intimation until then that he had any interest of any kind?

The Witness: No, I had that exception removed from the title company certificate and then Mr. Warren, of the E. R. C. Company, representing the purchaser at the sheriff's sale, wrote a letter to Hayes enclosing this affidavit, and Hayes wrote back this letter, and the title company reinstated that exception, it was the first intimation anybody had that Hayes was asserting any claim against this property.

Cross-examination.

By Mr. Hagerman:

Q. Mr. Carroll, who was present at the settlement on October 9, 1925?

A. John J. Hayes was there, because he executed the bond and mortgage to Bertha M. Hayes, and I think Bertha M. Hayes was there, because she executed the assignment, and Mr. Maloney was there.

Q. Now, you have stated that you received $26,250 for the purpose of this settlement from the E. R. C. Company?

A. No, the Jersey Mortgage Investment Company.

Q. Now, how much, if anything, did Bertha M. Hayes advance, the mortgagee?

A. Who?

Q. Bertha M. Hayes?

A. I don't suppose she advanced anything.

Q. You received all the money and made all the disbursements?

A. Yes, sir.

Q. Then you know she did not advance anything for the purpose of settlement?

A. Mr. Hagerman, there is no doubt about it, everybody knew what it was all about, exactly as described by Mr. Austermuhl yesterday, and we are not trying to show or indicate the contrary in any way.

Q. There is no doubt, when this bond was made by Michael A. Maloney and John J. Hayes to Bertha M. Hayes, and the accompanying mortgage from John J. Hayes to Bertha M. Hayes, there was no actual consideration moving between the two parties?

A. I would say that is correct.

Q. In the assignment of the mortgage from Bertha M. Hayes to the Jersey Mortgage Investment Company no consideration was moving to Mrs. Hayes for that?

A. The consideration that supported the entire situation was the $26,250 that the Jersey Mortgage Investment Company put up, and it was disbursed as I have testified to.

Q. And you did not testify, as I recollect, any

disbursement whatever to Bertha M. Hayes on any of these checks given out?

A. No, Mr. Maloney dictated how the money should be disbursed.

Q. So that up to the point of this declaration no set-off—there was no valid consideration at all for the property?

Mr. Carr: I object to that, if the Court please.

Q. There was no valid consideration for the original bond and mortgage?

A. I don't think there was, no.

Q. Now, how did this roundabout method come to be done, why wasn't the mortgage, in other words, made directly to the Jersey Mortgage Investment Company?

A. Mr. Hagerman, the Board of Directors of the Jersey Mortgage Investment Company were very reluctant to put this thing through.

Mr. Hagerman: Is that responsive to my question?

The Court: Mr. Austermuhl said frankly it was done to avoid the usury law. He said that in so many words, and I don't know how you can get it any stronger.

Mr. Hagerman: I was wondering if counsel had ——

The Witness: It was put through in this way at Mr. Maloney's own suggestion, and I didn't think that Mr. Maloney would ever plead usury under the circumstances of this case.

Q. Did he make that suggestion to you or did you receive your instructions from Mr. Austermuhl and the other officers of the company?

A. Mr. Hagerman, I don't think there was any direct suggestion made, and I don't know that I specifically said to Mr. Maloney, "We will do it this way," or that Mr. Maloney said, "We will do it this way," it was understood it should be done in this way because it is the way this sort of a transaction is commonly given color.

Q. This was a method of doing indirectly what the law prohibited doing directly, wasn't it?

A. I don't think under the arrangement we had with Mr. Maloney you can put it that way, although the question may be answered yes.

Q. In other words, it was a scheme being tried to conceal and violate the usury law?

A. There couldn't be any concealment, everybody knew what it was, we never at any time pretended the transaction was otherwise than we have stated in here.

Q. You knew then the bond which Mr. Hayes had signed was given particularly for a bonus when you brought your original foreclosure suit, didn't you?

A. Yes.

Q. And you, as an attorney, are well familiar with the right that is given to any obligor on a bond, or mortgagor, on a usury transaction to have a right to redeem, aren't you?

A. Yes.

Q. And therefore he had an interest or an unusual equity in this proceeding, even though he had conveyed his deed of record?

A. No, I wouldn't say so, we had no intention of proceeding against Hayes on the bond, he wasn't worth anything.

Q. You are perfectly familiar with the law which gives Hayes a right to claim a right of redemption, aren't you?

A. When Mr. Hayes had conveyed away his interest by a deed absolute upon its face, and in addition to that I heard the information that Mr. Maloney gave me, I felt satisfied that Mr. Hayes had parted with all his interest in the property.

Q. And even though you were familiar with the law which holds the original mortgagor, having conveyed, still has a right to redeem where there has been usury in the transaction?

A. I don't know that that is true, as a matter of law.

Q. Now, when you called up Mr. Maloney he didn't give you any information, did he?

A. I have already stated the conversation I had with him; I thought he did give me information.

Q. He didn't tell you whether Hayes was out of it or not, he referred you to the records?

A. When I stated that I noted he had conveyed the property to Andrew J. Maloney, I said, "Is he the present owner?" and he said, "Yes," and, bearing this in mind, there was always more or less of an understanding, if we had to foreclose, that Michael A. Maloney, instead of fighting the thing, would help us out and have counsel over here acknowledge service, and it was with that general idea in mind that I called him up, and I was very much surprised when he assumed the attitude he did.

Q. You started this foreclosure immediately after the bonus payments stopped coming?

A. No, I think the last bonus he paid was around April 9th, 1927, and the bill was not filed until November, 1927.

Q. It was right after the six months' period expired?

A. He did not pay his interest which fell due on the 9th of October, 1927, and all our efforts to get him to pay it were unavailing, and, accordingly, on the 22nd of November, 1927, the bill was filed.

Q. Even though this record showed a change of ownership as of December 1st, 1925, all the dealings of yourself and the company were still with Michael Maloney?

A. I don't know, I had nothing to do with the matter between the time I made the settlement and the time the matter was put in my hands to foreclose.

Mr. Carr: That is our case, if the Court please.

THE COMPLAINANT RESTS.

———

The Court: Make your defense.

Mr. Hagerman: It seems to me there ought to be stricken out anything relating to value. They have given the testimony of Mr. Baker, and the testimony of Mr. Austermuhl, and as far as it relates to value ——

The Court: This is not the time to object, make your defense. The time to object is when the testimony is offered.

THE CASE FOR THE DEFENDANT.

MICHAEL A. MALONEY, sworn.

By Mr. Hagerman:

Mr. Hagerman: If the Court please, may I suggest that the pleadings allege that Mr. Michael Maloney is a party to this bond, and the bond offered in evidence shows he is, and it seems to me he is therefore a party in interest, and may I ask he be joined as a party defendant?

The Court: Not now, unless counsel wishes to consent.

Mr. Carr: No, we don't care to consent.

Q. Mr. Maloney, what is your story of this negotiation?

A. I bought this property in question from Arthur H. Green for $25,000, and I applied to Mr. Austermuhl for a mortgage of $30,000 on the property, and I told him what I had paid for it, and he thought I had made a wonderful purchase ——

Mr. Carr: I object to what he thought.

The Witness: He said I made a wonderful purchase ——

The Court: You had better ask questions.

Q. Now, who proposed this scheme for the negotiation of this loan?

A. I applied for the loan and Mr. Austermuhl said a bonus would have to be paid, and I said, "How much, 5%?" and he said, "No, at least 10," and I asked him to do the very best he could in the matter, and at the second interview I had he said the directors would only consent to grant the loan on condition a bonus of 12½% be paid, and he asked if I was willing, and I said if that was the best that could be done, I was, and he reported back to the directors, and he told me in a telephone conversation and referred the matter to Mr. Carroll for the preparation of the papers, and I got in touch with Mr. Carroll, and he advised me in order to get around the usury law of New Jersey it would be necessary to create the mortgage first to a third party and have it assigned to the Jersey Mortgage Investment Company, and he asked me if I could furnish a party, and I said, "Yes, my sister-in-law, Bertha M. Hayes, could be used," and the papers were prepared on that basis. We had the settlement, and the Mortgage Investment Company advanced the sum of $26,250, the amount of the mortgage was $30,000. That was for a year, and at the expiration of a year I got a bill for the repayment of the mortgage with interest that was due, and I took it up with Mr. Austermuhl and asked if they would extend it, and he said they would be willing to extend it, but on the same basis as before, 12½%, and I tried to get them to accept something lower, but they wouldn't consider it, and I said I was unable to pay $3,750 at one time, and I asked them if an arrangement couldn't be made for a payment of $1,875 for six months, and at the expiration of six months another $1,875, and he said yes, he could fix it up that way, and I made a payment of $1,875 as a bonus for another extension of six months, and

when that expired in April, 1927, I made a further payment of $1,875 for a further extension of six months, and in addition I paid the regular 6% interest each time.

Q. You have a statement of the calculation of how much you received and how much you paid in the matter?

A. $26,250 paid on October 9th, 1925; $900 paid as interest on April 9th, 1926; $2,775 paid on October 8, 1926, and $2,775 paid on April 9th, 1927. The last payment was partly in the form of a note of $1,500 which I gave them for sixty days, which they discounted, and when the note matured I paid it.

Q. Assuming this had been a straight mortgage, without any bonus, just a charge of interest of 6%, taking credit for your account on the payments, what was the balance?

A. $22,096.03.

Q. With interest from what date?

A. April 9th, 1927.

Q. Now, do you know whether or not Andrew Maloney attempted to file any answer setting up usury in the original suit?

A. Yes. A letter had been addressed to Andrew J. Maloney and Mrs. Andrew J. Maloney in Chicago, notifying them of this suit, and those letters were sent on to me by my brother and I engaged Patrick H. Harding to file an answer, and it happened the morning I went to his office his sister had died and he did not return to the office for four or five days after that, and the answer was to be filed, I think, on February 8th, 1928, and through some oversight it was not filed until the next day, February 9th.

Q. It was filed one day late?

A. Yes, due primarily to the fact Mr. Harding was away from the office on account of the death of his sister.

Q. Do you know why the answer was stricken out?

A. The answer was stricken out solely because —

Mr. Carr: I object to that, that is a matter of Court record.

The Witness: I don't know of my own knowledge.

Q. Do you know before whom that hearing was held; it has been stated it was held before Vice-Chancellor Leaming?

A. I understood it was before Vice-Chancellor Ingersoll. I don't know of my own knowledge, except what the record shows.

Q. So neither Andrew J. Maloney or John Hayes ever had any opportunity to set forth their defense?

A. No, the answer was suppressed.

Q. It has been testified that title was conveyed on December 1st, 1925, from John J. Hayes to Andrew J. Maloney, what are the facts and circumstances in connection with that?

A. I had need for money on account of the payment of taxes and the settlement for properties which had been purchased in Camden, and on November 27, 1925, I wrote this letter to my brother, which I wrote personally on the typewriter, it being a personal matter, therefore I wrote it myself. I offer this letter in evidence.

Mr. Carr: May I see it, please.

Q. That is a true carbon copy you made yourself?

A. A carbon copy of the original sent to Andrew J. Maloney, which I wrote and mailed myself, personally.

Mr. Carr: If the Court please, this is a rather important matter and I will object to the use of a carbon copy, I think the original should be produced.

The Court: I think your objection could be even broader, couldn't it? As a letter from this defendant to Mr. Andrew J. Maloney it would hardly be competent.

Mr. Carr: It doesn't seem to me so, even if you had the original, it would be a self-serving letter.

Mr. Hagerman: We propose to offer the reply to the letter from Andrew J. Maloney, we are unable to have him here today.

The Court: I will overrule this offer. You may follow it with anything else you have to offer. I don't think the letter is competent.

Q. Mr. Maloney, did you make an application to your brother for a loan?

A. I did.

Q. For how much?

A. $5,000.

Mr. Carr: I object, if the Court please, if it was by a written instrument that should be produced. Was the application made in writing?

The Witness: In the form of a letter.

Mr. Carr: I object to the statement of the contents of the letter.

The Court: Yes, if it is by letter you will have to produce the original letter.

Q. Did you obtain a loan on or around the 1st day of December, 1925, from your brother?

Mr. Carr: I object, that calls for a conclusion, and it is leading.

The Court: If your negotiations with him were in writing, you will have to produce the original. He was in Chicago and you in Philadelphia?

The Witness: Yes, sir.

Q. Did you receive a check from your brother on or about December 1st, 1925?

Mr. Carr: I object unless it is connected up in some way.

Q. Did you receive a letter from your brother on or about December 1st, 1925, in relation to this matter?

A. I received a letter dated November 28, 1925.

Q. Have you seen your brother write?

A. Yes.

Q. Is that his signature to that letter?

A. Yes, the signature of the first name, Andy, he signs in writing to me.

The Court: Have you seen the letter?

Mr. Carr: No. I object to the letter, if the Court

please. It purports to be an answer to a letter of November 27th, the carbon copy.

The Court: I kind of think the letter would be competent if he received it from his brother. I don't see the relevancy of any of this, anyway. What is the difference if there was a security or not? I don't know what this correspondence may disclose, I haven't seen it, but this was an absolute conveyance in form, with a consideration of one dollar, and what is the difference whether there was a trust or not, how can it bind the mortgagee?

Mr. Carr: I don't think it can, if the Court please, but all of this controversy is stirred up by the title company's view, which I frankly don't think is sound, and may I call attention, if the Court please, to paragraph five of the answer, which refers to the loan of $5,000 and then says, "That said loan was evidenced by a note given by the said Michael A. Maloney to the said Andrew J. Maloney, and that the right of re-conveyance is set forth in writing duly signed by the said Andrew J. Maloney," and this paper here, if it purports to be the instrument evidencing the right of re-conveyance, is dated November 28, 1925, and is prior to the date of the deed itself.

The Court: The claim is, Mr. Hagerman, this conveyance was made by Mr. Hayes at the instance of Michael Maloney to his brother Andrew, for what purpose?

Mr. Hagerman: As collateral to a loan of $5,000 which was then made, and upon which $1,700 was paid and $3,300 still due and owing.

The Court: A loan from who to who?

Mr. Hagerman: From Andrew Maloney to Michael Maloney, this deed given as collateral security to the note.

Mr. Carr: All of the allegations in the answer say this was a personal transaction of Mr. Hayes, and that Mr. Hayes had conveyed this and that Mr. Hayes had paid the bonuses. I have a little difficulty in seeing how the transaction with Michael Maloney and his brother ——

The Court: I think the testimony had better go in, Mr. Carr, for what it is worth. I don't think it is controlling at all, but to exclude it would only necessitate, in the case of a review, if I erroneously excluded it, a new trial, and I think it had better go in, but my own view is it is utterly immaterial one way or the other. I don't think the mortgagee is put on notice of any kind by a conveyance reciting a one-dollar consideration. I don't see how it can be. It is all right to file your bill and give Mr. Maloney a day in Court in order to remove the objection of the title company, but I don't consider the title company's objection of any force.

Mr. Carr: I fancy if your Honor's decision goes along that line it will be very much welcomed by the bar.

The Court: I think I have already decided that in one case.

Mr. Carr: I thought so, too, but apparently it has been forgotten.

The Court: I will let this evidence go in subject to Mr. Carr's objection.

Mr. Carr: The carbon copy as well?

The Court: No, not the carbon copy.

Mr. Hagerman: Will you mark this?

(Said paper offered in evidence and marked Exhibit D2.)

The Court: The letter from Andrew J. Maloney to Michael A. Maloney may be marked as an exhibit.

The Witness: "407 McCormick Building, Chicago. November 28, 1925. Mr. Michael A. Maloney, 1021 S. 60th Street, Philadelphia, Pa. Dear Mike: Your letter of November 27th received, sorry to learn that your transaction on the Camden property did not go through as hoped for at the time I last saw you. At the moment I have not any plans of my own for borrowing on my building and loan shares, so I am glad to accommodate you. I suppose if during the time you have this money I should get in a pinch in connection with my own operations that I could work something out with you that would relieve the situation. I have in the circumstances signed the notes of the building and loan associations and am returning them to you; when you have prepared the deed and recorded same for the further security you offer to me for the loan I shall be glad to know that it has been handled. The only point I have in mind on these family matters is to have them carried along on a strictly business basis, with nothing taken for granted. When handled that

way there is never a chance to have an argument." The rest is personal family matters.

The Court: I think not. Your testimony is he loaned you $5,000?

The Witness: $5,000.

The Court: And you had Mr. Hayes give him this deed instead of a mortgage?

The Witness: Yes.

The Court: Why didn't you make a mortgage?

The Witness: That was the way it was determined to handle it at that time; it was my own suggestion and it was the only method of handling it that occurred to me.

The Court: More controversies come up over deeds being given when mortgages are intended than you can think of, and I think the statute ought to prevent it.

The Witness: In that connection, your Honor, the property referred to here by the Camden property is the property at the northeast corner of Broadway and Lawrence Street, which is in litigation here now.

Q. What is meant by reference to the building and loan associations there?

A. The building and loan association notes were two notes, one for $3,300 to the Maloney Building and Loan Association for a loan of that amount, and

another note to the Home Defense Building and Loan Association for $1,700 for a loan of that amount; I applied to those associations for these loans on my brother's account and they issued checks for the loan, and I have here the check of the Maloney Building and Loan Association to Andrew J. Maloney for $3,300 bearing the endorsement, "Pay to the order of Harris Trust and Saving Bank, Andrew J. Maloney, A. J. Maloney," which I offer in evidence.

(Said check offered in evidence and marked Exhibit D3.)

The Witness: I have here also the check of the Home Defense Building and Loan Association to Andrew J. Maloney ——

Mr. Carr: If the Court please, I make the same objection, that this is immaterial and irrelevant. I understand your Honor will receive it?

The Court: Yes, I will let it be received subject to your objection.

The Witness: For $1700 endorsed "Pay to the order of Harris Trust and Savings Bank, Andrew J. Maloney, A. J. Maloney," and I also offer that in evidence.

(Said check offered in evidence and marked Exhibit D4.)

Q. What did you receive from Mr. Andrew J. Maloney?

A. I received from Andrew J. Maloney a draft

of the Harris Trust and Savings Bank of Chicago, Illinois, for $5,000.

Q. Which is the proceeds of the loan referred to?

A. Yes.

Q. What have you paid since on account of interest and principal?

Mr. Carr: Objected to as immaterial and irrelevant.

The Court: I will let it go in.

A. I have paid all the interest and premiums on these loans to the building and loan associations, and on September 14, 1928, I paid to Andrew J. Maloney, A. J. Maloney, $1700, payment on account of loan.

Q. So you still owe him how much?

A. $3300.

Q. And this conveyance on December 1st, 1925, of this property in question, was given as security for your repayment of this loan?

A. It was, and I also gave a note to my brother at that time, which he has in his possession.

Q. Where is your brother today?

A. In Chicago; he will return tomorrow morning.

Cross-examination.

By Mr. Carr:

Q. Are you a lawyer, Mr. Maloney?

A. I am.

Q. As such you are perfectly familiar with mortgages, the drawing of mortgages, aren't you?

A. I am, yes.

Q. I understand you saw Mr. Patrick Harding on behalf of your brother, Andrew J. Maloney?

A. I did.

Q. And you gave him the information for the purpose of filing an answer, didn't you?

A. I did.

Q. And you had before you a copy of the bill of complaint, hadn't you?

A. Yes.

Q. And you had seen this allegation in paragraph nine of the bill, reading as follows: "On December 1st, 1925, John J. Hayes, single man, conveyed the above-described premises o Andrew J. Maloney, which deed was on December 1st, 1925, recorded in the office of the Register of Deeds of Camden County in Book 613 of Deeds, page 333," you, of course, knew of that allegation in the bill of complaint, having seen it, didn't you?

A. I did.

Q. And the answer prepared and filed by Mr. Patrick Harding in paragraph nine reads as follows: "They admit the allegations contained in paragraph nine;" that is true, isn't it?

A. It is true that is in the answer, but I didn't see the answer before it was filed, I explained the circumstances to Mr. Harding of the entire transaction, but Mr. Harding did not prepare the answer while I was in the office; it was prepared several days afterwards and filed.

Q. You have stated all that, Mr. Maloney. But whatever information Mr. Harding got for the purpose of the answer was furnished by you; isn't that true?

A. That is right; I told him just exactly what I am testifying to this morning.

Q. He had, so far as you know, no other source

of information as to the facts, except as you gave them to him?

A. I didn't see his answer for several days after it was filed.

Q. Answer the question.

(Question repeated by the stenographer.)

A. No.

Q. Now, Mr. Maloney, the conveyance to your brother was made subject to two existing mortgages stated in the deed, Exhibit C5, under and subject to the payment of two mortgages of the principal sums of $30,000 and $17,200 respectively, there were at that time of record those two mortgages, I suppose?

A. Yes.

The Court: Totalling how much?

Mr. Carr: Totalling $47,200.

The Court: All prior mortgages?

Mr. Carr: Yes, sir.

Q. Now, you received the proceeds of the $17,200 mortgage, didn't you?

Mr. Hagerman: I object to that as not proper cross-examination.

The Court: I think so, as a party defendant it is all right.

A. Yes, I did.

Q. So that you received out of this property $47,200 less these bonuses you have spoken of?

A. Yes.

Q. You paid no taxes?

A. No.

Q. And the net result of the transaction was that without putting a dollar of your own money in you were still some 10 or 11 thousand dollars ahead, even after having paid the bonuses, isn't that true?

A. Yes.

Q. Besides, as you say, having realized $5,000 from your brother in Chicago?

A. Yes.

Q. Paragraph five of the answer contains this, contains in part the following, that the said loan, speaking of the loan of $5,000, claimed to have been made by your brother to you, was evidenced by a note given by Michael to the said Andrew J. Maloney, and that the said right of re-conveyance was set forth in writing duly signed by the said Andrew J. Maloney; has the reference to the right of re-conveyance as set forth in writing to paper dated November 28th, 1925, Exhibit D2, is that the reference?

A. The reference to the right of re-conveyance is made in the letter of November 28, 1925, which is in reply to my letter of November 27th, 1925, and December 2, 1925.

Q. December 2nd?

A. Yes, which is another letter, a carbon copy of which I have, which I personally wrote.

Q. Then the reference in your answer is identified by the three papers which you have just referred to?

A. That is right.

Q. And no other instruments?

A. No other instrument except my brother has a note for the amount of the loan.

Q. There was no formal instrument of defeasance executed and acknowledged?

A. No.

By Mr. Hagerman:

Q. This $3,750 paid originally as a bonus, and a subsequent amount, aggregating $7500 altogether, has any of that ever been refunded or returned to you?

A. No.

Q. Has anything been done to purge this transaction of this taint of usury?

A. No, not that I know of. I want to say in regard to the testimony of Mr. Carroll, as to his telephone conversation with me ——

Mr. Carr: If the Court please, I think this should come in the form of a question and answer, a voluntary statement leads to trouble.

Q. You have heard what Mr. Carroll said in acquiring information from you; did you have a conversation with him?

A. I did about the time they started foreclosing this mortgage, and Mr. Carroll called up—at first he got somebody else on the telephone, and he wanted to know the address of Andrew J. Maloney, and he got about that far when I was put on the telephone, and I asked who it was, and it was Mr. Carroll, and he asked me for the address of Andrew J. Maloney in Chicago, and he asked me if Andrew J. Maloney was married, and I said, "What is the purpose of these questions?" and he said he was about to start a foreclosure of the mortgage, and I said, "Well, under those circumstances it

would be advisable to get your information the best way you can," and he said, "Well, you don't need to feel that way about it," he said, "This mortgage was placed on the property, wasn't it?" and I said, "Yes, but if you people had been a little reasonable about your bonuses everybody would get along much better, nobody could afford to pay those bonuses," and he wanted to know then if I had some attorney in Camden to accept service on behalf of my brother, and I said, "No, we didn't intend to give up the property if we could save it, because there was money due to other people on the property, and I considered the property valuable, and I would prefer them to go ahead and take whatever time was necessary to have their foreclosure in the hope that I would ultimately be able to realize enough money to pay off the mortgage, and the transaction went too far and I lost the property. Mr. Carroll never asked me anything about the ownership of the property, whether Andrew J. Maloney was the owner, or whether I had any interest in the property.

By Mr. Carr:

Q. Now, Mr. Maloney, knowing the foreclosure proceedings were about to be instituted, and knowing that the apparent legal title had been passed by you, conveyed by you to your brother, why didn't you tell Mr. Carroll, or Mr. Hayes for you, to maintain the interest on the property so your rights there might be safeguarded, if you desired them safeguarded?

A. The plan I had in mind in connection with the property was just to have Mr. Carroll take as much time as possible in connection with this foreclosure

so I would have an opportunity to salvage the value I deemed to be in the property. I don't know anything about the Jersey law in regard to foreclosures, I am not a member of the Jersey bar, and I didn't know what might be required, the only thing I had in mind by not having anybody accept service on behalf of my brother it would be necessary for Mr. Carroll to advertise, get service by publication, and, as I understood it, that would give me more time to arrange my finances and recover the property, and I also knew while foreclosure was pending, the only thing they could charge me was 6% interest, and I could at least save the tremendous bonuses which I paid every six months.

Q. Mr. Maloney, you did know, if you desired to safeguard your interest, and be heard in court because you claimed to be the owner of the fee, didn't you realize, if you wanted to be heard in court, that in all fairness you should have told Mr. Carroll that you had, or Mr. Hayes still had, an interest, and, in fact, the conveyance to your brother was only as collateral security?

A. The conversation with Mr. Carroll was very —he was kind of irritated, and so was I, we were not discussing the thing in a calm, placid way at all, and I told Mr. Carroll I wouldn't facilitate his speeding the foreclosure in any manner, shape or form, because we did not want to lose the property.

Mr. Hagerman: I want to offer these.

(Check for $1700 marked Exhibit D4. Check of the Home Defense Building and Loan Association marked Exhibit D5.)

JOHN HAYES, sworn.

By Mr. Hagerman:

Q. You are the defendant in this case?
A. Yes.
Q. At the request of Mr. Michael Maloney you merely acted as straw man?
A. I didn't get the question.
Q. At the request of Mr. Maloney you acted as straw man in making title and making the bond and mortgage in this case, is that right?
A. Yes.
Q. Has anybody ever paid to you any $3,750, the bonus charged at the beginning of the transaction, or the further sum of $3,750 afterwards paid, or any other amount?
A. No.

(No cross-examination.)

Mr. Hagerman: That is all.

The Court: Any rebuttal?

Mr. Carr: We rest.

BOTH SIDES REST.

STIPULATION.

IN THE
COURT OF ERRORS AND APPEALS.

E. R. C. Co.,
Complainant-Appellee,
and
JOHN J. HAYES,
Defendant-Appellant.

Stipulation.

It is hereby agreed by counsel for the above appellant and appellee that the following exhibits may be abridged by including the following essentials for the purpose of this appeal as follows:

Exhibit C1. Bond and warrant, made by John J. Hayes and Michael A. Maloney, to Bertha M. Hayes, in the penal sum of $60,000, conditioned for the payment of just sum of $30,000 within one year from date hereof, together with interest at 6% per annum, said bond being dated October 9th, 1925.

Exhibit C2. Mortgage dated October 9th, 1925, made by John J. Hayes, singleman, to Bertha M. Hayes, to sure just sum of $30,000 within one year from the date thereof, interest at 6%, covers premises in question, and recorded on October 13th, 1925, in Book No. 267 of Mortgages, page 305, &c.

Exhibit C3. Assignment of bond and mortgage, Exhibits C1 and C2, dated October 9th, 1925, made by Bertha M. Hayes, to Jersey Mortgage Investment Company, in consideration of one dollar, and other good and valuable considerations, recorded on October 13th, 1925, in Book No. 67 of Assignment of Mortgages, page 17, &c.

Exhibit C4. Declaration of no off-set, dated October 9th, 1925, made by John J. Hayes, owner of premises in question, acknowledging notice of assignment of Exhibit C3, and that there is no off-set to sum of $30,000 on said bond and mortgage, Exhibit C1 and C2.

Exhibit C5. Deed in fee simple, with covenant of general warranty, dated December 1st, 1925, and recorded said date, in Book No. 613 of Deeds, pages 333, &c., made by John J. Hayes, single man, to Andrew J. Maloney, of the City of Chicago, Cook County, State of Illinois, "for and in consideration of the sum of one dollar and other good and valuable consideration lawful money of the United States of America," conveys premises in question.

Exhibit C6. Deed, Walter T. Gross, Sheriff of Camden County, to E. R. C. Company, dated July 14th, 1928, for consideration of $32,848.68, conveys premises in question.

It is further agreed between counsel hereto that the following exhibits are described in the testimony sufficiently for the purposes of this suit, and that they need not be herein set out in detail, to wit: C7, C8, C9, C10, C11, D1, D2, D3, D4 and D5.

It is further agreed between counsel, that of the files of the foreclosure suit of Jersey Mortgage Investment Company against Andrew A. Maloney, offered in evidence, that the following contain all the matters necessary to be considered in this appeal, namely: bill, answer, order suppressing answer, and final decree.

WALTER R. CARROLL,
Counsel for Appellee.
SAMUEL P. HAGERMAN,
Counsel for Appellant.

Dated Sept. 10, 1929.

BILL TO FORECLOSE.

(Filed Nov. 22, 1927.)

IN CHANCERY OF NEW JERSEY.

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

The complainant, Jersey Mortgage Investment Company, a corporation of New Jersey, having its principal office and place of business in Camden, New Jersey, respectfully shows that:

1. On October 9, 1925, Michael A. Maloney and John J. Hayes, being indebted to Bertha M. Hayes in the sum of $30,000, executed to her a bond of that date, to secure that sum, payable within one year from the date thereof, together with interest thereon, payable semi-annually, at the rate of six per cent per annum.

2. To secure payment of the bond, said John J. Hayes, a single man, executed to said Bertha M. Hayes a mortgage of even date with the bond; and thereby conveyed to her, in fee, the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage, having been first duly acknowledged, and the certificate of acknowledgment duly endorsed thereon, was recorded in the office of the Register of

Deeds of Camden County, in Book 267 of Mortgages, page 305, &c.

3. The mortgaged premises are described as follows:

ALL that certain lot or piece of ground, SITUATE on the northeasterly corner of New Broadway and Lawrence Street in the City and County of Camden, State of New Jersey, described as follows:

BEGINNING at a point in the said northeasterly corner of New Broadway and Lawrence Street one hundred and ninety-six and eighty-five one-hundredths feet eastwardly from the northeasterly corner of Sixth and Lawrence Streets; thence extending eastwardly along the northerly line of said Lawrence Street at right angles to New Broadway eighteen and fifteen one-hundredths feet to a point; thence northwardly on a line deflecting one minute westwardly from a line at right angles to the said northerly line of Lawrence Street seventy feet to a point; thence westwardly on a line parallel with the said northerly line of Lawrence Street eighteen and thirteen one-hundredths feet to the easterly line of New Broadway; and thence southwardly along the said easterly line of New Broadway seventy feet to the point and place of beginning.

BEING the same lands and premises which Arthur H. Green and Wilhelmina Green, his wife, by deed dated October 9, 1925, and recorded in the Office of the Register of Deeds of Camden County in Book 600 of Deeds, page 456,

granted and conveyed to the said John J. Hayes, in fee.

4. Both bond and mortgage contained an agreement that if any instalment of interest should remain unpaid for ten days after the same should fall due, then the whole principal sum, with all unpaid interest, should, at the option of the mortgagee, her representatives or assigns, become immediately due.

5. By written assignment, dated October 9, 1925, said Bertha M. Hayes assigned said bond and mortgage to complainant; which assignment is in complainant's possession, and was recorded in the office of the Register of Deeds of Camden County, in Book 67 of Assignments of Mortgages, page 17, &c.

6. On November 25, 1925, John J. Hayes mortgaged said lands to Michael A. Maloney for $17,200, which mortgage was, on November 27, 1925, recorded in the office of the Register of Deeds of Camden County, in Book 271 of Mortgages, at page 2.

7. By assignment in writing dated November 25, 1925, and recorded November 27, 1925, in the office of the Register of Deeds of Camden County, in Book 68 of Assignments of Mortgages, at page 1, said Michael A. Maloney assigned said last mentioned bond and mortgage to Ella G. Stuart.

8. By assignment in writing dated November 25, 1925, and recorded on November 27, 1925, in the

office of the Register of Deeds of Camden County, in Book 68 of Assignments of Mortgages, at page 1, said Ella G. Stuart assigned said last mentioned bond and mortgage to Lehigh University, a corporation.

Any interest which the said Lehigh University may have in said lands by reason of said last mentioned mortgage is subject to the lien of complainant's mortgage.

9. On December 1, 1925, John J. Hayes, single man, conveyed the above-described mortgaged premises to Andrew J. Maloney, which deed was, on December 1, 1925, recorded in the office of the Register of Deeds of Camden County, in Book 613 of Deeds, page 333.

Any interest which the said Andrew J. Maloney may have in said premises is subject to the lien of complainant's mortgage.

10. Said Andrew J. Maloney is a married man, and his wife is a necessary and proper party defendant in this cause; as will appear from the affidavit hereunto annexed, complainant, notwithstanding due inquiry, has been unable to ascertain the Christian name of the wife of the said Andrew J. Maloney, and therefore designates her as "Mrs. Andrew J. Maloney," pursuant to the statute in such case made and provided.

Any interest which the said Mrs. Andrew J. Maloney may have in the above-described mortgaged premises by reason of the marriage relationship existing between her and the said Andrew J. Maloney, or otherwise, is subject to the lien of complainant's mortgage.

11. On October 9, 1926, the principal sum of complainant's mortgage became due and payable by the terms thereof, but was not paid and still remains unpaid.

12. On October 9, 1927, a semi-annual instalment of interest on complainant's bond and mortgage became due and payable, but was not paid and still remains unpaid, although more than ten days have elapsed, and complainant has elected that the whole principal sum of its said bond and mortgage shall not be payable, together with all arrearages of interest thereon.

13. Said John J. Hayes and Andrew J. Maloney, or one of them, or someone under whom they claim, have always been in possession of the mortgaged premises.

14. The whole amount of principal, with interest thereon from April 9, 1927, is due upon complainant's bond and mortgage.

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

1. That Andrew J. Maloney, Mrs. Andrew J. Maloney, and Lehigh University, who are the defendants to this suit, may answer this bill of complaint without oath and each statement therein made;

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

3. That the defendants, or one of them, may be

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

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

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

WALTER R. CARROLL,
Solicitor for and of Counsel with Complainant.

STATE OF NEW JERSEY, } ss.
COUNTY OF CAMDEN, }

WALTER R. CARROLL, of full age, being by me duly sworn according to law, on his oath deposes and says:

I am the solicitor of the complainant in this suit. The foreclosure search which I procured in this matter disclosed that title to the mortgaged premises stands of record in the name of Andrew J. Maloney, of Chicago, Cook County, Illinois, by deed from John J. Hayes.

I was advised, in such manner that I believed it to be true, that one, Michael A. Maloney, one of the obligors on the bond secured by complainant's mortgage, could give me information as to Andrew J. Maloney and whether or not he was married, and if married, his wife's full name. The said Michael A. Maloney is engaged in the real estate business both in Philadelphia, Pennsylvania, and Camden, New Jersey. He had an office in the Masonic Temple Building, Camden, New Jersey, and also in Philadelphia, Pennsylvania, and resides at #1021 South Sixtieth Street, Philadelphia, Pennsylvania.

On Saturday, November 19, 1927, I called the Camden office of said Michael A. Maloney on the telephone, and was informed that Mr. Maloney was not in, and upon inquiring of the person in charge of the office, who answered my telephone call, whether Andrew J. Maloney was related to Michael A. Maloney, I was informed that they were brothers, but the party with whom I was talking was unable to tell me whether Andrew J. Maloney was or was not married, and suggested that I call up the residence

of Michael A. Maloney in Philadelphia at the address above given. I did this, and Michael A. Maloney answered my telephone call and I recognized his voice, as I am personally acquainted with him. This was on Saturday, November 19, 1927. The said Michael A. Maloney informed me that Andrew J. Maloney was his brother and that Andrew J. Maloney was married. Said Michael A. Maloney then inquired of me for what reason I desired the full Christian name of the wife of Andrew J. Maloney, and when I advised him that I was about to foreclose this mortgage, he became indignant and said that I could obtain the information from other sources and hung up the telephone on me.

I know of no other persons to whom I might apply for the Christian name of the wife of Andrew J. Maloney.

WALTER R. CARROLL.

Sworn to and subscribed before me this twenty-first day of November, A. D. 1927.

ELSIE L. BELL,
Notary Public of N. J.

ANSWER.

(Filed Feb. 9, 1928.)

IN CHANCERY OF NEW JERSEY.

Between
JERSEY MORTGAGE INVESTMENT COMPANY,
Complainant,
and
ANDREW J. MALONEY, *et als.*,
Defendants.

On Bill, &c.
Answer.

The defendants, Andrew J. Maloney and Mrs. Andrew J. Maloney, of Chicago, Cook County, Illinois, answering complainant's bill, say:

1. They deny that there was a debt due complainant in the sum of thirty thousand dollars ($30,000.00), on October 9, 1925.

2. Paragraph two of complainant's bill is admitted.

3. Paragraph three of complainant's bill is admitted.

4. Paragraph four of complainant's bill is admitted.

5. They admit the allegations contained in paragraph five of complainant's bill.

6. They admit the allegations contained in paragraph six.

7. They admit the allegations contained in paragraph seven.

8. They admit the allegations contained in paragraph eight.

9. They admit the allegations contained in paragraph nine.

10. They admit the allegations contained in paragraph ten.

11. They deny the allegations contained in paragraph eleven.

12. They deny the allegations contained in paragraph twelve, and further deny complainant's right to exercise the option therein set forth.

13. They admit the allegations contained in paragraph thirteen.

14. They deny that the principal sum, with interest thereon from April 9, 1927, is due upon complainant's bond and mortgage.

Defendants, further answering complainant's bill, say:

First Defense.

1. At the time of the execution of the bond and mortgage referred to in the bill of complaint, Michael A. Maloney and John J. Hayes, the makers of said bond, and John J. Hayes, the maker of the mortgage, were not indebted to the complainant, in the sum of thirty thousand dollars ($30,000.00), or in any other sum or amount. The said bond and mortgage, were entered into pursuant to a contract or agreement between complainant and Michael A. Maloney and John J. Hayes, for the loan of money, whereby complainant agreed to loan John J. Hayes the sum of twenty-four thousand three hundred seventy-five dollars ($24,375.00), and requested John J. Hayes and Michael A. Maloney to execute a bond as collateral for said loan in the sum of thirty thousand dollars ($30,000.00), while John J. Hayes execute a mortgage of even date to accompany said bond in the sum of thirty thousand dollars ($30,000.00), to one Bertha M. Hayes, single woman, in behalf of the complainant, which mortgage and bond were immediately assigned by said Bertha M. Hayes, acting in behalf of complainant to the complainant. Said contract or agreement for the loan of money was made with corrupt attempt to evade the provisions of P. L. 1877, page 519, as amended, commonly known as the "Act against Usury."

2. The bond and mortgage which are by this suit

sought to be foreclosed are the bond and mortgage executed pursuant to the above agreement or contract for the loan of money.

3. Complainant accordingly loaned to John J. Hayes the sum of twenty-four thousand three hundred seventy-five dollars ($24,375.00), which said sum was the total and full amount loaned to said John J. Hayes, and the total amount which said John J. Hayes received from complainant, pursuant to the execution of the said bond and mortgage.

4. Said contract or agreement and the bond and mortgage executed pursuant thereto and here sought to be foreclosed are contrary to the statute above recited, for the reason that the complainant has thereby taken and does thereby take from the defendants who thereby are obliged to pay for the loan of the said sum above the value of six dollars ($6.00), for the forbearance of one hundred dollars ($100.00) for a year, contrary to said statute.

Second Defense.

1. For the sake of brevity the allegations of the first defense are here repeated insofar as the same apply to this defense.

2. The total amount due under the said mortgage sought by this suit to be foreclosed, if the said mortgage or any part thereof is due, is the sum of twenty-four thousand, three hundred seventy-five dollars ($24,375.00), actually loaned, without any

interest thereon or costs of this suit, which said amount, if the Court shall find the same presently due, or such other amount as this Court shall find to be presently due thereon, these defendants tender themselves ready and willing to pay to complainant.

PATRICK H. HARDING,
Solicitor for and of Counsel with Defendants.

ORDER SUPPRESSING ANSWER.

(Filed Mar. 12, 1928.)

IN CHANCERY OF NEW JERSEY.

Between JERSEY MORTGAGE INVESTMENT COMPANY, *Complainant,* and ANDREW J. MALONEY, *et als.*, *Defendants.*	On Bill, Etc. On Motion to Suppress Answer of the Defendants, Andrew J. Maloney and Mrs. Andrew J. Maloney. Order Suppressing Answer.

This matter being opened to the Court by Walter R. Carroll, solicitor for and of counsel with the complainant, and Patrick H. Harding, appearing

for the defendants, Andrew J. Maloney and Mrs. Andrew J. Maloney; and the complainant having moved upon due notice to suppress the answer of the defendants, Andrew J. Maloney and Mrs. Andrew J. Maloney, on the ground that said answer was filed out of time without leave of the Court and without the consent of the solicitor of the complainant and sets up no defense except that of usury; and the Chancellor having heard and considered the arguments of counsel and inspected the bill and other pleadings on file and being of the opinion that the complainant's application ought to be granted, and that the answer of the defendants, Andrew J. Maloney and Mrs. Andrew J. Maloney, ought to be suppressed:

It is thereupon, on this 12th day of March, A. D. 1928, on motion of Walter R. Carroll, solicitor for and of counsel with the complainant, ordered that the answer heretofore filed by the defendants, Andrew J. Maloney and Mrs. Andrew J. Maloney, be and the same is hereby suppressed, and that the complainant be at liberty, notwithstanding the filing of said answer, to enter a decree *pro confesso* against said defendants, Andrew J. Maloney and Mrs. Andrew J. Maloney, and to proceed thereunder in accordance with the rules and practice of this Court.

E. R. WALKER,
C.

Respectfully advised,
R. H. INGERSOLL,
V. C.

FINAL DECREE.

(Filed April 4, 1928.)

IN CHANCERY OF NEW JERSEY.

Between
JERSEY MORTGAGE INVESTMENT COMPANY,
Complainant,
and
ANDREW J. MALONEY, *et als.*,
Defendants.

On Bill, Etc.
Final Decree.

This cause coming on to be heard in the presence of Walter R. Carroll, solicitor for and of counsel with the complainant, and the complainant's bill having been heretofore taken as confessed against the said defendants, Andrew J. Maloney, Mrs. Andrew J. Maloney and Lehigh University, whereupon and upon reading a report upon file, made by George H. Jacobs, Esquire, one of the Masters of this court, bearing date the third day of April, in the year of our Lord one thousand nine hundred and twenty-eight, from all of which it appears that there was due to the complainant on the date of said

report, for principal and interest, on its said mortgage in said report mentioned, the sum of thirty-one thousand eight hundred dollars ($31,800), and no cause being shown or appearing to the contrary:

It is, thereupon, on this 4th day of April, in the year of our Lord one thousand nine hundred and twenty-eight, by Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor doth, by virtue of the power and authority of this Court, hereby order, adjudge and decree that the said report and all matters and things therein contained do stand ratified and confirmed, and that the said mortgaged premises be sold to raise and satisfy the sum of money due the said complainant, that is to say, the sum of thirty-one thousand eight hundred dollars ($31,800), together with lawful interest thereon, to be computed from the third day of April, in the year of our Lord one thousand nine hundred and twenty-eight, being the date of the Master's report, with the complainant's costs in this cause to be taxed, and that a writ of *fieri facias* do issue for that purpose out of this court, directed to the Sheriff of the County of Camden, commanding him to make sale according to law of the mortgaged premises, and that out of the money arising from such sale, to pay to the complainant or to its solicitor, its said debt, interest and costs, and in case more money should be raised by the said sale than shall be sufficient to answer such demands, such surplus be brought into this court to abide the further order of the Court unless previously disposed of by the order of this Court, and that the said sheriff make return without delay of his proceedings by virtue of the said writ.

And it is further ordered, adjudged and decreed that the defendants, Andrew J. Maloney, Mrs. Andrew J. Maloney and Lehigh University, stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises, when sold as aforesaid by virtue of this decree.

And it is further ordered, adjudged and decreed that the sum of two hundred and ninety dollars, be allowed and paid to the solicitor of the complainant, instead of the retaining fee now allowed to counsel by statute, and that the same be included in the taxed bill of costs and collected with the other items of the said bill.

$31,800.

E. R. WALKER,
C.

CONCLUSIONS.

(Filed April 9, 1929.)

LEAMING, V. C.:

I do not think I shall take this case under advisement. My views are defined, and I think as accurately as they would be should I give the matter further reflection.

The present bill has been referred to by counsel as a bill for strict foreclosure. I think it should be more nearly accurately characterized as a bill to be entertained under the *quia timet* jurisdiction of this Court; a bill designed to remove from this title—a title made under process of this Court—any possible cloud that may exist.

This alleged cloud has been first suggested by the title company when called upon to insure the title. I find no defect in the original foreclosure of this mortgage in the suit of the Jersey Mortgage Investment Company v. Andrew J. Maloney, *et als.* Had there been a defense of usury made in that suit it could unquestionably have been successfully made as the testimony now discloses; but defendant Andrew J. Maloney in that case neglected to answer in time, and in consequence the defense of usury was not entertained. The suggestion of the title company, which has caused the filing of the present bill, has arisen from the fact that the conveyance from John J. Hayes to Andrew J. Maloney, a defendant in the former foreclosure suit, being in form an absolute deed, recited a consideration of "one dollar and other valuable consideration," and the suggestion is that that expressed consideration put the mortgagee upon notice that there may have been some trust associated with that title; that by the circumstances of that expressed consideration a duty was cast upon the mortgagee to make inquiries to ascertain whether or not there was such an absolute title in the vendee as the deed purported to create. I had occasion in the case of Lougheed v. Armstrong, which has just been cited—reported in 84 Equity—to consider that question, and I considered it as carefully then as I could if I now reconsidered it, and my determination was to the effect that there is no such notice imported and that no duty is imposed upon a mortgagee to make inquiry by reason of such a recitation of consideration in a subsequent deed that is absolute in form; a deed conveying the title and use. The reasons which I gave in that opinion are probably stated more clearly than I could from memory repeat them now,

but even though the deed were not for a money consideration, but a mere gift, the law favors gifts except as against creditors, and the rights of creditors of that vendor are not involved in that transaction. The law imports validity, and not invalidity, in such a conveyance; they are perfectly lawful unless rights of creditors of the vendor intervene. Creditors of the vendor who might be defrauded by a gift could, of course, in proper circumstances, set aside such a conveyance as against the vendee; but the law imports validity, and if the law imports validity it cannot import at the same time invalidity and place a duty of inquiry on the prior mortgagee who is about to foreclose his mortgage. Therefore, I hold in this case that the conveyance from John J. Hayes to Andrew J. Maloney for a consideration of "one dollar and other valuable consideration," I think it reads, must be treated, so far as the prior mortgagee holding the mortgage which was being foreclosed is concerned, as an absolute conveyance and that the title made at sheriff's sale under that foreclosure was a valid and perfect title.

It is claimed now that this conveyance from Hayes to Andrew J. Maloney was for the purpose of security, was in effect a mortgage and not an absolute deed, and this bill is filed to shut out or quiet any claim of that nature, and I think complainant is entitled to a decree to that effect. So far as John J. Hayes, who made the conveyance, is concerned, he may be eliminated as a factor in the case, for all the testimony agrees that he was a mere shadow, a mere name, that he was a mere instrument representing Michael A. Maloney, brother of John J. Maloney, and that if any trust arose, or if that conveyance was as security, it was security for Michael A. Maloney for money due from Andrew J. Maloney and

that John J. Hayes never had any real interest in this property at any time and has not at this time. So far as Michael A. Maloney is concerned, he is clearly estopped. His own testimony, as well as the testimony of Mr. Carroll, shows that he is equitably estopped from ever asserting against complainant or the purchaser at the foreclosure sale any right or claim to ownership of or redemption right in this property. Inquiry was made of him in behalf of the owner of the mortgage, as his testimony discloses, and as Mr. Carroll's testimony likewise discloses, touching Andrew J. Maloney, to whom this controverted conveyance was made; he knew by that inquiry that the foreclosure suit was to be brought by the owner of the mortgage against Andrew J. Maloney, as the purchaser and owner of the record legal title, and if Michael A. Maloney had any interest of the nature he now claims, if he claimed to be the owner of the legal title, or claimed a right of redemption, or claimed the absolute deed to his brother, Andrew, was a mere mortgage for his, Michael's benefit, if he claimed any interest then in his own behalf, knowing as he did, as a lawyer, that the record disclosed Andrew J. Maloney as the absolute owner, by the conveyance which he himself had directed, it was then his duty to speak, and his failure to speak at that time will forever close his mouth. He cannot equitably say now, "That property is mine," or, "That deed was a mortgage security to me," so I have no hesitance in making this decree in this case by reason of any possible right of redemption, or other right of Michael A. Maloney. While Michael A. Maloney is not a party defendant in this suit, he has been in fact the real and active defendant; defendant Hayes is admittedly the representative of Michael A. Maloney, and

it is through defendant Hayes that he claims; his rights and claim of rights are before this Court for adjudication as fully and completely at this time as though he were the sole and formal defendant.

I will advise a decree to that effect.

(Heard and determined March 11 and 12, 1929.)

FINAL DECREE.

(Filed Mar. 18, 1929.)

IN CHANCERY OF NEW JERSEY.

Between
E. R. C. Co. and JERSEY MORTGAGE INVESTMENT COMPANY,
Complainants,
and
JOHN J. HAYES, *et ux.*,
Defendants.

On Bill, Etc.
Final Decree.

This cause coming on to be heard, upon due notice, on March 11th and 12th, A. D. 1929, on the bill of the complainant, E. R. C. Co., the answer thereto of the defendant, John J. Hayes, and the replication thereto of the complainant, E. R. C. Co., and the special replication to said answer of the complainant, Jersey Mortgage Investment Com-

pany (said Jersey Mortgage Investment Company heretofore having been admitted as a party complainant and given leave to file said special replication), and proofs taken in open court in the presence of Harvey F. Carr and Walter R. Carroll, solicitors for and of counsel with said complainants, and Samuel P. Hagerman, solicitor for and of counsel with said defendant, John J. Hayes; and the Chancellor having read the pleadings and having heard the said proofs and having heard and considered the arguments of respective counsel and being of the opinion that the complainants are entitled to the relief prayed for in said bill of complaint and said special replication; and it appearing that the complainant, Jersey Mortgage Investment Company, heretofore filed its bill of complaint in this court against Andrew J. Maloney, Mrs. Andrew J. Maloney and Lehigh University (Docket 66, page 227) for the foreclosure of a certain mortgage on the premises described in the bill of complaint in this cause made by John J. Hayes, a single man, to Bertha M. Hayes, dated October 9, A. D. 1925, and of record in the office of the Register of Deeds of Camden County in Book 267 of Mortgages at page 305, for the sum of $30,000, and that said mortgage, by assignment in writing dated October 9, A. D. 1925, and of record in the office of the Register of Deeds of Camden County in Book 67 of Assignments of Mortgages, at page 17, etc., was transferred, assigned and set over by the said Bertha M. Hayes to the said complainant, Jersey Mortgage Investment Company; and that by deed dated December 1, A. D. 1925, and recorded on the same day in the office of the Register of Deeds of Camden County in Book 613 of Deeds, at page 333, etc., said defendant, John J. Hayes, a single man, granted and conveyed said mortgaged

premises to the aforesaid Andrew J. Maloney; and that such proceedings were thereafter had in said foreclosure suit that on April 4, A. D. 1928, a final decree was entered therein in favor of said complainant, Jersey Mortgage Investment Company, and against said Andrew J. Maloney, Mrs. Andrew J. Maloney and Lehigh University, pursuant to which an execution was issued out of this court directed to the Sheriff of Camden County, who, in obedience to the command thereof, advertised the said mortgaged premises to be sold at public vendue according to law; and that the said complainant, E. R. C. Co., became the purchaser, by assignment of bid, at said sheriff's sale; and that upon said sale being duly confirmed, Walter T. Gross, Sheriff of the County of Camden, executed and delivered a deed of conveyance for said mortgaged premises to said complainant, E. R. C. Co.; and that prior to the delivery of said deed said defendant, John J. Hayes, notified and informed said complainant, E. R. C. Co., that he had and retained an interest in said mortgaged premises which had not been foreclosed and cut out by the aforesaid final decree in foreclosure because the aforesaid deed from him, the said John J. Hayes, to the said Andrew J. Maloney was intended to be security for a loan of money and was, therefore, in effect a mortgage; and the Chancellor being of the opinion that with respect to and as against the complainants, E. R. C. Co. and Jersey Mortgage Investment Company, said deed must and ought to be deemed, taken and regarded as an absolute deed of conveyance, operative and effective to divest the said John J. Hayes of all his estate, right, title and interest of, in and to the said mortgaged premises, and that the said John J. Hayes was not a necessary party to the

aforesaid foreclosure suit; and that the aforesaid deed from Walter T. Gross, Sheriff of the County of Camden, to the said E. R. C. Co. was and is operative and effective to convey to and vest in the said E. R. C. Co., its successors and assigns, a good, valid, effectual and subsisting title to said mortgaged premises, in fee simple absolute, free, clear and forever discharged of and from any and all claims, equities and demands whatsoever of the said defendant, John J. Hayes, his heirs and assigns, at law or in equity, therein and thereagainst:

It is, thereupon, on this 18th day of March, A. D. 1929, on motion of Harvey F. Carr and Walter R. Carroll, solicitors for and of counsel with the complainants ordered adjudged and decreed by Edwin Robert Walker, Chancellor of the State of New Jersey, and the said Chancellor doth, by virtue of the power and authority of this Court, hereby order, adjudge and decree as follows:

1. That with respect to and as against the complainants, E. R. C. Co. and Jersey Mortgage Investment Company, their respective successors and assigns, and all other persons claiming or to claim under them or either of them, the aforesaid deed of conveyance for said mortgaged premises made by John J. Hayes, single man, to Andrew J. Maloney, dated December 1, A. D. 1925, and recorded on the same day in the office of the Register of Deeds of Camden County in Book 613 of Deeds, at page 333, etc., was and is an absolute deed of conveyance in fee simple, operative and effective to divest the said John J. Hayes, his heirs and assigns, of all his estate, right, title and interest therein and thereto.

2. That with respect to and as against the said

complainants, E. R. C. Co. and Jersey Mortgage Investment Company, their respective successors and assigns, and all persons claiming or to claim under them or either of them, the said Andrew J. Maloney was seized in fee simple absolute of said mortgaged premises, being those described in the bill of complaint in this cause, at the time of the filing of the bill of complaint by the Jersey Mortgage Investment Company in the aforesaid foreclosure suit, by virtue of the aforesaid deed from the said John J. Hayes to the said Andrew J. Maloney.

3. That the said defendant, John J. Hayes, was not a necessary party to the aforesaid foreclosure suit of said Jersey Mortgage Investment Company, inasmuch as the said John J. Hayes, at the time of the filing of said foreclosure bill, had no estate, right, title or interest in and to and no equity, claims and (or) demands against said mortgaged premises.

4. That said John J. Hayes, his heirs and assigns, are forever debarred and estopped from asserting and setting up or attempting to assert and set up, directly or indirectly, in any way, form or manner whatsoever, any right, title, interest or estate in and to, and any claim, equity or demand against said mortgaged premises.

5. That the aforesaid deed from Walter T. Gross, Sheriff of the County of Camden, to the said E. R. C. Co., dated July 14, A. D. 1928, was and is operative and effective to convey to and vest in the said E. R. C. Co., its successors and assigns, a good, valid, subsisting and effectual title, both at law and in equity, to said mortgaged premises in fee simple absolute, free, clear and forever discharged of and

from any and all claims, equities and demands whatsoever of the said defendant, John J. Hayes, his heirs and assigns, therein and thereagainst.

6. That as established by said final decree in the aforesaid foreclosure suit of the Jersey Mortgage Investment Company, there was due on said mortgage of the Jersey Mortgage Investment Company at the time of the entry of said final decree on April 4 A. D. 1928, the sum of thirty-one thousand eight hundred dollars ($31,800), with lawful interest thereon to be computed from April 3, A. D. 1928, besides costs taxed at four hundred thirty-two dollars and sixty-four cents ($432.64) and sheriff's fees and charges on said sale since ascertained to be the sum of seventy dollars and seventy-four cents ($70.74).

7. That the defendant, John J. Hayes, pay the costs of this suit to be taxed, and that complainants have execution therefor according to law and the rules and practice of this Court.

E. R. Walker,
C.

Respectfully advised,
E. B. Leaming,
V. C.

Approved as to form.

Solicitor of Defendant, John J. Hayes.

AMENDED NOTICE OF APPEAL.

(Filed July 10, 1929.)

IN CHANCERY OF NEW JERSEY.

Between
E. R. C. Co.,
Complainant,
and
JOHN J. HAYES,
Defendant.

On Bill, &c.
Amended Notice of Appeal.

The defendant, John J. Hayes, hereby appeals from the final decree made by the Chancellor on the advice of Vice-Chancellor Leaming, in the above-entitled cause, on March 18th, 1929, and from the whole and every part thereof to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated June 17th. 1929.

SAMUEL P. HAGERMAN,
Solicitor for and of Counsel with Defendant.

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

SAMUEL P. HAGERMAN,
Of Counsel with Defendant.

[ENDORSED.]

Service of the within notice is hereby acknowledged this 22 day of June, A. D. 1929.

Walter R. Carroll,
Solicitor for Complainant.

PETITION OF APPEAL.

(Filed July 5, 1929.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

E. R. C. Co. and JERSEY MORTGAGE INVESTMENT COMPANY,
Complainants-Appellees,
v.
JOHN J. HAYES,
Defendant-Appellant.

On Appeal from the Court of Chancery. Petition of Appeal.

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

The petition of John J. Hayes, the appellant in the above-entitled cause, respectfully shows that:

1. Petitioner finds himself aggrieved by a final decree made in the Court of Chancery, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of the Honorable Vice-Chancellor, Edmund B. Leaming, bearing date March 18th, 1929, in a certain cause in said Court of Chancery, wherein the said E. R. C. Co. and Jersey Mortgage Investment Company are complainants, and the said John J. Hayes was defendant, in this respect, to wit: that the said decree adjudges that the said John J. Hayes was not a necessary party to the foreclosure suit in the proceeding where he was the original obligor and mortgagor between the Jersey Mortgage and Investment Company, and Andrew J. Maloney and others, in Chancery of New Jersey, that said Hayes be debarred from his right of redemption, and from asserting any right, title or interest to the said premises, that the title in said E. R. C. Co. be declared valid, and marketable, and free from the equities of said John J. Hayes, and that the amount due on said mortgage was the sum of $31,800 with costs, etc.

2. And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that the Chancellor refused to regard said suit for the purposes of strict foreclosure, and denied its characteristics as such;

3. And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the further ground that the same is erroneous in that the bill of complainant should have been dismissed in that as a suit for strict foreclosure, it did not show either in the bill of complainant, or in the proofs,

any merger of the legal and equitable title in the complainants.

4. And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the further ground that the same is erroneous in that the Chancellor found no defect in the original foreclosure of the mortgage in the suit of the Jersey Investment Company v. Andrew J. Maloney, *et al.*

5. And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the further ground that the same is erroneous, in that it holds that the conveyance from John J. Hayes to Andrew J. Maloney be treated as an absolute conveyance and the sheriff's deed under the foreclosure was a valid and perfect title.

6. And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the further ground that the same is erroneous, in that it holds that said conveyance was an absolute deed, and not in effect a mortgage.

7. And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the further ground that the same is erroneous, in that it holds the said John J. Hayes to be debarred from asserting any right, title or interest in said premises.

8. And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the further ground that the same is erroneous in that it holds Michael A. Maloney is clearly estopped from asserting against the complainant any right or

claim to ownership or of redemption right in this property.

9. And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the further ground that the same is erroneous in that it finds a defense of usury wherein it could unquestionably have been successfully made, but denies any relief as provided by the laws relating to usury without showing that the taint has ever been removed.

10. And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the further ground that the same is erroneous in that it finds the amount due on said mortgage in suit, to be the sum of $31,800 with lawful interest to be computed from April 3rd, 1928, besides costs to be taxed and sheriff's costs;

11. And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the further ground that the same is erroneous in that it directs the said John J. Hayes to pay the costs of the suit to be taxed.

Plaintiff therefore prays that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper.

SAMUEL P. HAGERMAN,
Solicitor for and of Counsel with Appellant.

ANSWER TO THE PETITION OF APPEAL.

(Filed July 9, 1929.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

E. R. C. COMPANY and JERSEY MORTGAGE INVESTMENT COMPANY, *Complainants-Appellees,* v. JOHN J. HAYES, *Defendant-Appellant.*	On Appeal from the Court of Chancery. Answer to the Petition of Appeal.

The answer of E. R. C. Company, a New Jersey corporation, and Jersey Mortgage Investment Company, a New Jersey corporation, the above-named appellees to the petition of appeal of John J. Hayes, the above-named appellant:

These appellees not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto, nevertheless, admit that a final decree was, on March 18, A. D. 1929, made and entered in the Court of Chancery of New Jersey in the above-entitled cause for the purpose in said petition mentioned and as therein set forth; but as to the substance and form of said final decree these appellees beg leave to refer thereto when the same shall be produced.

These appellees are advised and believe that the said final decree is agreeable to equity; and they pray that the same may be affirmed with costs to be taxed in favor of these appellees.

WALTER R. CARROLL,
Solicitor for and of Counsel with Appellees.

I. F. Huntzinger Co., *Appellate Printers*, Camden, N. J.

New Jersey Court of Errors and Appeals

Between

E. R. C. COMPANY,
Complainant-Appellee,

and

JOHN J. HAYES,
Defendant-Appellant.

On Appeal from Decree of Chancery Court, advised by Vice-Chancellor Edmund B. Leaming.

POINTS AND BRIEF OF DEFENDANT-APPELLANT.

This is an appeal from a decree entered on a bill for strict foreclosure under the following circumstances, to wit:

Michael A. Maloney, applied for a loan of $30,000 to the Jersey Mortgage Investment Company, which they agreed to make with certain premises in the City of Camden as security for a bonus of 12½%,

whereupon the following scheme or device was entered into in an effort to circumvent the usury laws; a straw man, John J. Hayes, became, on October 9, 1925, obligor and mortgagor to one, Bertha M. Hayes, a straw woman, no consideration passing; she then assigned the mortgage to Jersey Mortgage Investment Company, also without any consideration, who settled by paying the said sum of $30,000 after deducting this bonus, so that "the amount actually lent" was the sum of $26,250. At the end of a year a like bonus of 12½% was again charged and paid, together with interest @ 6% on $30,000 which was in excess of the "amount actually lent." On December 1st, 1925, said Hayes conveyed the title to one, Andrew J. Maloney, for a consideration of one dollar; on November 22, 1927, after refusal of payment of additional bonus, the Jersey Mortgage Investment Company filed a bill to foreclose the said bond and mortgage, but failed to join the said John J. Hayes, the original obligor and mortgagor to the usury contract; the said Andrew J. Maloney, filed an answer setting up the defense of usury, but which answer was suppressed on motion by reason of it being filed one day too late; at a sale by the sheriff it was bought in by one, another straw man, Robert W. Richman, for $100, who assigned his bid to the E. R. C. Company, the decree calling for $32,848.68, and not giving credit for the two bonuses of $7500 and excessive interest exacted contrary to the usury laws.

In his conclusions, the learned Vice-Chancellor states as to the above transaction:

> "Had there been a defense of usury made in that suit it could unquestionably have been successfully made, as the testimony now discloses, but the defendant, Andrew J. Maloney, in that case neglected to answer in time and in conse-

quence the defense of usury was not entertained."

The E. R. C. Company then applied for title insurance, and the title company noted as an exception, the fact that the deed from Hayes to Maloney had stated merely a consideration of one dollar, whereupon a suit in strict foreclosure based on the same bond and mortgage joining the said John J. Hayes was started, which is the subject of this appeal; to this suit Hayes filed two defenses of the following nature, to wit:

1. Usury and claiming that said deed was given as collateral to a loan of $5,000 in lieu of a mortgage, which was but partly paid off; and that he claimed an interest in equity of redemption.

2. Usury; and claiming a right to the same in the capacity of original obligor and mortgagor.

To this the E. R. C. Co. filed a replication claiming estoppel as to the deed of Hayes to Maloney, and denying usury.

As stated, the learned Vice-Chancellor found plenty of evidence of undoubted taint of usury, but denied the said Hayes any relief on the ground that he was estopped in not fully answering the inquiry as to ownership, in the original foreclosure when questioned as to the said deed from Hayes to Maloney, and that information as to the deed given as security should have been given. Although counsel urged that Hayes as original obligor and mortgagor was entitled to a decree, in this separate and independent capacity, and that his right was not affected by the ruling on the other defense, relief to

said Hayes was, nevertheless refused, and the appeal is based largely on this right.

SPECIFICATIONS OF ERRORS IN DECREE.

Appellant finds himself aggrieved from the decree entered in said case, and appeals from the following parts of said decree as erroneous, to wit:

"3. That the said defendant, John J. Hayes, was not a necessary party to the aforesaid foreclosure suit of said Jersey Mortgage Investment Company, inasmuch as the said John J. Hayes, at the time of the filing of said foreclosure bill, had no estate, right, title or interest in and to and no equity, claims and (or) demands against said mortgaged premises.

4. That said John J. Hayes, his heirs and assigns, are forever debarred and estopped from asserting and setting up or attempting to assert and set up, directly or indirectly, in any way, form or manner whatsoever, any right, title, interest or estate in and to, and any claim, equity or demand against said mortgaged premises.

5. That the aforesaid deed from Walter T. Gross, Sheriff of the County of Camden, to the said E. R. C. Co., dated July 14, A. D. 1928, was and is operative and effective to convey to and vest in the said E. R. C. Co., its successors and assigns, a good, valid, subsisting and effectual title, both at law and in equity, to said mortgaged premises in fee simple absolute, free, clear and forever discharged of and from any and all claims, equities and demands whatsoever of the said defendant, John J. Hayes, his heirs and assigns, therein and thereagainst.

6. That as established by said final decree in the aforesaid foreclosure suit of the Jersey Mortgage Investment Company, there was due on said mortgage of the Jersey Mortgage Investment Company at the time of the entry of said final decree on April 4, A. D. 1928, the sum of thirty-one thousand eight hundred dollars ($31,800), with lawful interest thereon to be computed from April 3, A. D. 1928, besides costs taxed at four hundred thirty-two dollars and sixty-four cents ($432.64) and sheriff's fees and charges on said sale since ascertained to be the sum of seventy dollars and seventy-four cents ($70.74).

7. That the defendant, John J. Hayes, pay the costs of this suit to be taxed, and that complainants have execution therefor according to law and the rules and practice of this Court."

POINT I.

THAT DECREE AGAINST HAYES BASED ON ESTOPPEL AS TO DEED GIVEN TO MALONEY FOR SECURITY, IS LIMITED TO HIS CAPACITY AS CLAIMANT OF OWNER OF THE EQUITY OF REDEMPTION, AND HIS RIGHT TO CLAIM IN THE CAPACITY OF ORIGINAL OBLIGOR AND MORTGAGOR TO THE DEFENSE OF USURY IS INDEPENDENT AND NOT AFFECTED THEREBY.

The following cases clear up and define the status of Hayes in the present case:

The defense of estoppel which is contained in paragraph 2 of the replication is confined entirely

State of case p 21 & 22

to the said deed from Hayes to Maloney, and its only effect is to bar it as evidence, and hence from claiming any rights under it; the transaction as a whole was not affected thereby and the extent of estoppel has been declared as follows:

> Estoppel "can neither be extended beyond or cut below the natural and reasonable import of the representation. It in no case extends beyond the act done or omitted in reliance on the conduct or representation of the party sought to be estopped."
>
> Title "Estoppel," 16 Cyc. 783;
>
> See, also, *Phillipsburg Bank v. Fulmer,* 31 N. J. L. 52, 55.

State of Case p 81

The original bond and mortgage as well as the record showed that Hayes was the original mortgagor, and Hayes and Michael A. Maloney, the original obligors; there were no acts in the nature of any estoppel whatsoever as to their interest in this capacity; it is respectfully submitted that both the pleadings and the law do not extend beyond the effect of the said deed itself, and it has no effect on a separate and independent defense.

A claimant to the defense of usury is not guilty of any act prejudicing him in his claim:

> "It is otherwise well settled that the doctrine of unclean hands in a usury case, does not apply to a complainant who is seeking to recover back moneys usuriously paid. Hintze v. Taylor, 57 N. J. L. 239, 243."
>
> *Martin v. Morales,* 142 Atl. Rep. 31.

POINT II.

A PERSON MAY HAVE DISTINCT INDEPENDENT AND SEPARATE RIGHTS IN REAL ESTATE, AND TO BE CONCLUSIVE AS TO HIM, HE MUST BE JOINED IN A SUIT AND PLEADED AND DECREED AGAINST IN EACH SEPARATE CAPACITY, OTHERWISE HE RETAINS THE INTEREST IN THE CAPACITY IN WHICH HE WAS NOT JOINED.

> "A person may hold interests in same realty in two or more capacities, in which even judgment against him in one capacity does not bind him in the other."
>
> *Langlotz v. Traverso,* 140 Atl. 229.

In this case, Hayes was the original obligor and mortgagor, in which capacity he claims in this appeal, and was also claimant of owner of equity of redemption, after giving deed as security for loan; the decree and finding of the Court was only in its terms limited to this second capacity; Hayes is free therefore to pursue his remedy in the other capacity unaffected by said decree.

Moreover, Hayes can not be affected by not having been made a party to the original suit.

> "The Paramount Investment Corporation was not a defendant to this foreclosure suit and its rights cannot be affected by any decree made therein (Zeitler v. Bowman, 6 Barb. 133)."
>
> *Merchants & Traders Realty Co. v. Stern,* 101 N. J. E. 629, 632.

POINT III.

THAT THE RIGHT TO CLAIM PROTECTION OF THE USURY LAWS IS PERSONAL TO THE ORIGINAL OBLIGOR AND MORTGAGOR, AND THE LEARNED COURT ERRED IN HOLDING THAT HAYES WAS NOT A NECESSARY PARTY TO THE FIRST FORECLOSURE, AND THEN NOT ALLOWING HIM TO HAVE THE BENEFIT OF HIS DEFENSE IN THE SUIT FOR STRICT FORECLOSURE.

Although an answer setting up usury was filed too late in the first suit by Andrew J. Maloney, the grantee of Hayes, the original mortgagor, nevertheless, had it been in time, the answer would no doubt have been stricken off.

> "It is undoubtedly thoroughly well settled, that the purchaser of the equity of redemption in premises covered by a usurious mortgage who takes title subject to such mortgage cannot set up the defense of usury."
>
> *Scull v. Idler,* 79 N. J. E. 466.

On the other hand,

> "It is well settled that the defense of usury is personal to the debtor, and that while he lives, no other person can interpose it except with his consent and concurrence."
>
> *Berk v. Isquith Productions, Inc.,* 98 N. J. E. 608.

We have this anamolous situation, that Hayes, the original mortgagor, was not joined as a defendant in the first foreclosure and hence had no opportunity to plead his defense, and was not affected by

the decree to which he was not a party; afterwards, a suit on strict foreclosure, based on the same bond and mortgage and the same in all respects both as to subject matter and object, was stated whereby Hayes is joined; and now when for the first time he is made a defendant to a foreclosure of mortgage tainted with usury, his personal right based on his being original mortgagor and obligor is ignored and relief denied him, for reasons not connected in any way with this separate and distinct defense. It is respectfully submitted that under all the rights provided that the defendant was entitled to his day in Court somewhere at sometime in one or the other of said suits.

POINT IV.

THE RIGHT OF THE ORIGINAL OBLIGOR AND MORTGAGOR TO CLAIM THE DEFENSE OF USURY IS NOT AFFECTED BY A CONVEYANCE BY THE MORTGAGOR, NOR CAN THE PARTIES DO ANYTHING WHICH WILL HAVE THE EFFECT TO VALIDATE IT, SO AS TO DEPRIVE THE DEBTOR OF HIS RIGHT EXCEPT BY EXPUNGING THE USURIOUS ELEMENT.

The case of *Berks v. Isquith Productions, Inc., supra,* is in many of its features on all fours with the case at hand. The defendant, Staw, made a first mortgage to complainant, Berk; he then made a second mortgage to the Kayjay Corporation; then he made a conveyance to the Isquith Productions, Inc., who gave him a third mortgage. The defendant, Staw, mortgagor, on a bill to foreclose the first

mortgage was made a defendant in the suit as third mortgagee. Among his defenses, was usury in the original mortgage, by reason of his liability upon the bond for the deficiency.

The Court states:

> "The complainant, concedes, however, that the defendant, Staw, as mortgagor, notwithstanding these conveyances of the mortgaged property, would have the right to interpose the defense of usury here, because of his liability on the bond for a deficiency, but, in view of this admitted right, the complainant on this motion brings the bond secured by the mortgage into court, and tenders it to the defendant mortgagor and waives any claim thereon for deficiency."

After citing from the case of *Truesdale v. Dowden,* 47 N. J. E. 396, at pages 398 and 399, to the effect that:

> "The doctrine is undoubtedly thoroughly well settled that the purchaser of the equity of redemption in premises covered by a usurious mortgage, who takes title subject to such mortgage cannot set up the defense of usury"

the Court takes up the question of considering the availability of this defense to the defendant, Staw (the original mortgagor).

After determining as above that the conveyance by the mortgagor did not give the grantee the right, the Court speaks of other acts of the parties, as follows:

> "In Trusdell v. Dowden, *supra,* it was said, that the parties to a usurious contract can do nothing which will have the effect to validate it,

so as to deprive the debtor of his right to defend on the ground of usury, except by expunging its usurious element,"

and also, at page 399:

"But this doctrine does not at all rest on the theory that the taint, by the conveyance, has, as between the original parties, been purged from the mortgage—on the contrary, THE FACT IS THE TAINT AS TO THEM STILL EXISTS IN ALL ITS ORIGINAL FORCE."

The Court also quotes from *Scull v. Idler,* to the effect, that "the defense of usury may still be available to the mortgagor," after a conveyance by him.

The Court continues:

"It is urged by the complainant that the defendant, Staw, appears as a defendant in a dual capacity, first, as the owner of the equity of redemption, and that as such he is estopped from setting up the defense of usury; and, second, as the obligor on the bond, and that, if the bond is surrendered, the defense of usury is no longer available to him, the argument being, that his liability on the bond, for a deficiency, constitutes the only reason for permitting him to advance the defense of usury, and that as the complainant's offer of the surrender of the bond, removes this liability, the defense fails because the reason ceases to exist."

"While it appears in most of the New Jersey cases that his liability on the bond is advanced as a reason for permitting a defendant obligor to interpose the defense of usury, after a conveyance by him of the mortgaged premises, I apprehend that the FUNDAMENTAL

REASON FOR THE DEFENSE LIES IN THE ILLEGALITY OF THE USURIOUS CONTRACT, which the legislature has denounced; and that so LONG AS THE PERSON FOR WHOSE BENEFIT THE USURY ACT WAS ENACTED, IS A DEFENDANT IN THE FORECLOSURE SUIT, IT MATTERS NOT IN WHAT CAPACITY HE APPEARS AS DEFENDANT, AND that, until the usurious contract has been purged of its taint, or until the personal right of the mortgagor to recover the usurious exaction, or his right to interpose the defense of usury, has been expressly waived or relinquished, the rights secured to him by the act, still obtain in all their original force."

"It is not contended here that the original usurious contract has been purged of its taint, as, of course, it has not; but only that the defendant, Staw, is estopped by the two conveyances to which he was a party from setting up this defense. The first conveyance was not a waiver nor a purgation of the usurious element of the contract as between the mortgagor and the mortgagee. 'The taint as to them still exists in all its original force' * * * Staw is now a defendant, not only as obligor on the bond, but also as mortgagor, and I am of the opinion that the defense of usury is available to him. * * * It will be noted that in the instant case the defendant, Staw, is made a defendant in the capacity of a subsequent mortgagee, and under the decision of Trusdell v. Dowden, *supra,* the defense of usury is available to him as such."

In this case John J. Hayes, the original obligor and mortgagor made a conveyance to Andrew J.

Maloney; under the above case, he alone can claim the right to interpose the defense of usury, and his right to do so, is not affected by the said conveyance; the Court held in the above case, that the tender of the bond secured by the mortgage was not such an act that could be held to waive the claim thereon for deficiency; the failure to join Hayes or his predecessor in the first foreclosure as means of barring him from claiming usury is submitted as also being of such a character that it too can not be construed as waiving or depriving Hayes of his right to plead defense of usuryy. In other words, can the mortgagee by ignoring the original mortgagor, and proceeding without him, deprive him of his defense of usury, should it afterwards become available?

POINT V.

THAT AN ORIGINAL OBLIGOR AND MORTGAGOR WHO HAS MADE A CONVEYANCE BY DEED IS A NECESSARY PARTY, IN FORECLOSURE OF THE MORTGAGE WHERE USURY IS INVOLVED AND MAY BE MADE A PARTY ON HIS APPLICATION.

The rules of Chancery provide as follows:

Part of Rule 13. "Where a person not a party has an interest or title which the decree will affect, the Court on his application shall direct him to be made a party."

"In proceedings involving trust estates, defendants having an interest in trust estate which would be affected by Court's determination were necessary parties, and no decree binding on

them can be made unless they are brought into court."

In *re Kiger's Estate,* 98 N. J. E. 512:

"The rule has a much wider sweep than the superseded sections 29 and 30, and also than Sec. 58, of the Chancery Act (1 Comp. St. 1910, p. 432), and lets in parties in all manner of suits whose interests will be affected by the decree, so that they may have their day in court, and be heard in the pending suit and upon all pertinent issues they may present, without limitation or restriction, save only as to convenience of trial. See Weinberger v. Goldstein, 99 N. J. E. 1."

Fisovitz v. Cordosco Const. Co., 140 Atl. 573.

In the first suit, the proceedings on their face appear regular, and the learned Vice-Chancellor found this foreclosure, to be apparently proper; of course, when usury is involved, the papers are not so labeled, but, as in this case, all kinds of schemes are devised to make it appear otherwise; however, had Hayes applied to the Court to be admitted as a party, he would have been permitted to do so, under the opinion of the Court, as stated in the case of *Berk v. Isquith Productions, supra,* to wit:

"Staw is now a defendant, not only as obligor on the bond, but also as mortgagor, and I am of opinion that the defense of usury is available as to him. The same result, in a similar case, has been reached by the New York Court of Appeals. See Knickerbocker Life Ins. Co. v. Nelson, 78 N. Y. 140. In that case Nelson executed a usurious mortgage to the insurance company,

> and then conveyed the mortgaged premises to Leinbeck expressly subject to the mortgage. Leinbeck conveyed to Watkins, also subject to same mortgage. Foreclosure proceedings were brought against Watkins, and, after issue joined, he conveyed to Nelson, the original mortgagor, who then applied to be made a party defendant, and, on being admitted, set up the defense of usury. It was held that such defense was available to him, notwithstanding his conveyance expressly subject to the mortgage."

It is also to be noticed that he was admitted on a petition to be made a party. In this case, Hayes did not apply by petition, but he was brought into court as a defendant, on a foreclosure of the identical bond and mortgage, and as stated in said case, "it matters not in what capacity he appears as defendant" the said Hayes was in court, and being at last made a party, was entitled to set up the defense of usury.

This is further shown by the fact, that having been in court, and not setting up the defense of usury, he would afterwards be estopped from doing so, should there be a proceeding on the bond for a deficiency.

> "Before the bill was filed, Andrews' equity of redemption the whole of the mortgaged premises had been sold, and it is insisted that he cannot, therefore, set up the defense of usury in this case. Andrews, having no interest in the disposition of the mortgaged premises, is not a necessary party to the bill; and if that constituted the test, he would not be in a position to challenge the propriety of the decree. * * * But the complainant made him a party and called upon him to answer, and if the decree of the

Court below is unreversed, it will bar the defense of usury which Andrews might otherwise set up to a suit on the bond, it being a judgment between the same parties with regard to the same subject matter. A decree, sentence, or judgment of a court of competent jurisdiction is conclusive in any future litigation of the same question, between the same parties or those claiming under them."

Andrews v. Stelle, 22 N. J. E. 478, 479.

POINT VI.

THAT THE PURCHASER AT THE FORECLOSURE SALE BECOMES SUBJECT TO THE JURISDICTION OF THE COURT, AND IS PUT UPON INQUIRY AS TO ALL FACTS APPEARING IN THE SUIT, AND THE RULE OF CAVEAT EMPTOR APPLIES TO HIM.

At the foreclosure sale, the property was bid in by one, R. W. Richman, who assigned his bid to the complainant; and who was to all practical purposes the real purchaser; these facts set up in complainant's pleadings, make the complainant the assignee of the bid and the practical purchaser; they have therefore become a party to the original foreclosure proceedings between the Jersey Mortgage Investment Co. and Andrew J. Maloney, and by signing the conditions of sale also become a party to the suit, chargeable with notice of all the facts to be ascertained from an examination relative to said proceedings.

"By becoming a purchaser he subjects himself to the jurisdiction of the Court."

National Bank v. Sprague, 21 N. J. E. 458.

"At a judicial sale the rule of caveat emptor applies, and the purchaser buys only such estate or interest as the debtor has."

Brady v. Cartaret Realty Co., 67 N. J. E. 641.

"Whatever puts a party on inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, and would lead to a knowledge of the facts by the exercise of ordinary intelligence and understanding.

Commercial Credit Corp. v. Coover, 101 N. J. L. 530.

The present complainant or appellee stands in this case, therefore, merely in the shoes of the original mortgagee, charged with knowledge of the tainted mortgage; as previously stated, Vice-Chancellor Leaming found facts which led him to state, "Had there been a defense of usury made in that suit, it would unquestionably have been successfully made," the original mortgagor and obligor in this case has his first and only day in court; and it is respectfully submitted that he is entitled to claim the benefits of said defense in the capacity of original mortgagor and obligor, for as between him and the mortgagee, "the fact is the taint as to them exists in all its original force."

It is hereby certified that the cases cited in other than official reports do not appear to be officially reported.

SAMUEL P. HAGERMAN,
Counsel for Defendant-Appellant.

New Jersey Court of Errors and Appeals

Between

E. R. C. Co.,
Complainant-Appellee,

and

JOHN J. HAYES,
Defendant-Appellant.

On Appeal from Decree of Court of Chancery.

BRIEF FOR COMPLAINANT-APPELLEE.

STATEMENT OF THE CASE.

The statement of the case contained in the defendant-appellant's brief falls so far short of accurately presenting the situation on the facts, as developed at the final hearing before Vice-Chancellor Leaming, that we are constrained to ~~convert~~ controvert the same.

The facts of the case are as follows:

During the real estate "boom" which prevailed in and about Camden from the late Summer of 1924 until its collapse, about two years later, a large number of outside speculators were attracted

to Camden, and among these was one Michael A. Maloney, a member of the Philadelphia Bar, but whose activities were chiefly devoted to real estate speculations.

Some time prior to October 9, 1925, Michael A. Maloney had an opportunity to purchase for $25,000.00 in cash a property at the northeast corner of New Broadway and Lawrence Street, Camden, New Jersey, and anticipated being able to resell the same in a short time at a substantial profit. He had at the time, however, no ready money of his own, and accordingly applied to the Jersey Mortgage Investment Company to finance the transaction for him. He submitted the proposition to the Jersey Mortgage Investment Company on the general basis of that company putting up enough money to complete the purchase and receiving some share of the profit on a resale. It is a disputed question of fact whether the form which the transaction between Michael A. Maloney and Jersey Mortgage Investment Company finally took was first proposed by Maloney himself, or by the investment company, but this point is wholly immaterial. Maloney operated through a straw man, John J. Hayes, and it is admitted and established that in the entire transaction John J. Hayes was merely a straw man for Michael A. Maloney, and had, himself, no interest whatsoever in the transaction. As Vice-Chancellor Leaming said in his opinion "*So far as John J. Hayes is concerned he may be eliminated as a factor in the case for all the testimony agrees that he was a mere shadow, a mere name, that he was a mere instrument representing Michael A. Maloney.*"

The negotiations between Michael A. Maloney and the investment company ripened into the following transaction:

On October 9, 1925, Michael A. Maloney and John

J. Hayes executed to one Bertha M. Hayes (a straw woman for Maloney) a bond for $30,000.00, payable within one year with interest at 6%, and to secure payment of the bond said John J. Hayes executed to Bertha M. Hayes a mortgage of even date upon the premises at New Broadway and Lawrence Street, aforesaid. Bertha M. Hayes then assigned the bond and mortgage to the investment company and John J. Hayes delivered to the investment company a declaration of no set-off. The amount advanced by the investment company was $26,500.00 and Maloney took title to the property in the name of John J. Hayes, simultaneously with the execution and delivery of the bond and mortgage, and it is clearly established that the $25,000.00 paid in cash to Maloney's grantor, A. H. Green, came out of the monies advanced by the investment company so that Maloney, without having advanced a penny of his own, acquired title to the property and had $1,500.00 in hand to boot.

On November 25, 1925, Maloney placed a second mortgage on the property for $17,200.00 and received the whole amount of this loan in cash. Even allowing, therefore, for the bonus which Maloney subsequently paid the investment company for an extension of time, and the interest which he paid upon the first mortgage, Maloney, by his own admission, without having put a penny of his own money into the transaction emerged from it with a net cash gain to himself of $10,874.30 aside from being careful not to pay any taxes or municipal charges and leaving the property burdened with encumbrances of that nature to the extent of $9,000.00.

Default was made by Maloney in the mortgage of the investment company and thereupon, on November 22, 1927, the investment company filed its bill ~~to~~ in this Court for the foreclosure of the mort-

gage. The foreclosure search showed that John J. Hayes had, by deed dated December 1, 1925, conveyed the mortgaged premises to Andrew J. Maloney (a brother of Michael A. Maloney), which deed was recorded on the same day in the office of the register of deeds of Camden County. This deed was an absolute deed upon its face, containing a covenant of general warranty, and the recited consideration was "One Dollar and other good and valuable consideration." As it was well known to the investment company that Hayes was merely a straw man for Michael A. Maloney, and that the latter was the principal in the transaction, the investment company's solicitor, shortly prior to the filing of the foreclosure bill, had a telephonic conversation with Michael A. Maloney (Record, pp. 47-77), the primary purpose of which was to ascertain whether Andrew J. Maloney, to whom Hayes had conveyed, was a married man and, if so, his wife's name, which information Michael A. Maloney declined to furnish, stating that he had nothing more to do with the matter, and that Andrew J. Maloney was the owner of the mortgaged premises. Although a full opportunity was thus affored Michael A. Maloney to state to the investment company's solicitor what he later claimed to be the fact, namely, that the deed from Hayes to Andrew J. Maloney was intended to secure a loan of money and was, therefore, really a mortgage with a reservation of ownership in Hayes undisclosed by anything contained in the deed, Michael A. Maloney made no statement or claim to this effect in the course of this telephonic conversation; and in connection with this Vice-Chancellor Leaming says in his opinion: *"So far as Michael A. Maloney is concerned he is clearly estopped. His own testimony, as well as the testimony of Mr. Carroll, shows*

that he is equitably estopped from ever asserting against complainant or the purchaser at the foreclosure sale any right or claim to ownership of or redemption right in this property. Inquiry was made of him in behalf of the owner of the mortgage as his testimony discloses, and as Mr. Carroll's testimony likewise discloses, touching Andrew J. Maloney, to whom this controverted conveyance was made; but he knew by that inquiry that the foreclosure suit was to be brought by the owner of the mortgage against Andrew J. Maloney, as the owner and purchaser of the record legal title and if Michael A. Maloney had any interest of the nature he now claims, if he claimed to be the owner of the legal title or claimed a right of redemption, or claimed the absolute deed to his brother, Andrew, was a mere mortgage for his, Michael's benefit, if he claimed any interest in his own behalf, knowing, as he did as a lawyer, that the record disclosed Andrew J. Maloney was the absolute owner by the conveyance which he, himself, had directed, it was then his duty to speak, and his failure to speak at that time will forever close his mouth.''

In belief, therefore, that Andrew J. Maloney, by the deed from Hayes, was the owner of the mortgaged premises, and that Hayes and his principal, Michael A. Maloney, had by said deed parted with all interest in the property the bill was filed without making Hayes or Michael A. Maloney defendants. The defendants named in the bill were Andrew J. Maloney, his wife, and Lehigh University, the holder of the second mortgage for $17,200.00 above referred to. All of these defendants were proceeded against as non-residents under an order of publication. The bill was taken as confessed against Lehigh University, but Andrew J. Maloney filed an answer admitting that allegation of the bill which

charged the conveyance to him, in fee, of the mortgaged premises. This answer made no claim that the deed from Hayes to Andrew J. Maloney was given merely as collateral security for a loan, but on the contrary was filed by Andrew J. Maloney as owner of the mortgaged premises. It is admitted that this answer was procured to be filed by Michael A. Maloney, and that he employed the solicitor by whom the answer was filed. This answer of Andrew J. Maloney set up a defense of usury, but having been filed one day too late was stricken out on motion of the investment company's solicitor. The foreclosure suit then proceeded to a final decree, under which execution was issued, pursuant to which the sheriff of Camden county advertised the mortgaged premises for sale.

At no time did either John J. Hayes or Michael A. Maloney seek to intervene in the foreclosure suit or apply to be made parties thereto, although they well knew that said foreclosure suit was pending and there can be no doubt that an application by them or either of them to be admitted as parties would have been entertained and allowed.

The E. R. C. Co., a close corporation, controlled byRaymond L. Warren, a prominent real estate man in Camden, had become interested in acquiring the mortgaged premises as a site for erecting a small office building and prior to the sale proposed to the investment company to purchase the property at sheriff's sale for an amount sufficient to satisfy the investment company's foreclosure decree in full. An arrangement was then made between the E. R. C. Co., and the investment company, whereby the E. R. C. Co., was to buy in the mortgaged premises at a nominal bid, in the absence of competitive bidding at the sale, and then pay to the investment company the amount due on the foreclosure decree.

This arrangement was carried out and the property was purchased by Robert W. Richman for a nominal bid of $100.00, there being no competitive bidding, and Richman thereupon assigned his bid to the E. R. C. Co., and upon the sale being confirmed the sheriff delivered a deed to the E. R. C. Co. It will, therefore, be noted that the investment company was really paid in full and, therefore, entertained no idea of entering any judgment on the bond, although the nominal bid of $100.00 technically left a large deficiency. The property was sold by the sheriff on June 29, 1928, and the time for entering a deficiency judgment on the bond expired December 29, 1928, but no deficiency judgment was entered, and the investment company has at all times regarded the decree as being entirely satisfied as a result of the sheriff's sale.

Following its acquisition of title from the sheriff the E. R. C. Co. applied to the West Jersey Title and Guaranty Company of Camden for a policy of title insurance. The settlement certificate issued pursuant to this application referred to the deed from John J. Hayes to Andrew J. Maloney and called "for proof satisfactory to this Company of such facts and circumstances attending the transmission of the title to the insured premises as will enable us to determine from the statement made of such facts and circumstances whether said conveyance was upon any secret trusts or confidences, as collateral security or otherwise. Said deed being a voluntary conveyance for a nominal consideration, the purchaser is put upon inquiry as to the bona fides of the transmission of the title." The E. R. C. Co., without consulting the investment company's solicitor, prepared an affidavit to meet this exception and sent it by mail to John J. Hayes with the request that he execute and return it. Hayes and his principal,

Michael A. Maloney, immediately perceiving the opportunity offered, wrote a letter to the title company asserting that the deed from Hayes to Andrew J. Maloney was intended merely as collateral security for a loan of money and asserting that John J. Hayes still retained an interest in the property as owner unaffected by the foreclosure suit.

The title company refused to remove this exception, unless a bill was filed by the E. R. C. Co., for a strict foreclosure of the mortgage, and accordingly the E. R. C. Co., retained the investment company's solicitor to file this bill because of his familiarity with the entire transaction. A bill for strict foreclosure was accordingly filed which prayed, among other things, that the defendants might set forth and discover what right, title, interest and estate, if any, they might have in and to said premises.

Michael A. Maloney then procured an answer to be filed in the name of John J. Hayes, as defendant, asserting that the deed from Hayes to Andrew J. Maloney was intended merely as collateral security for a loan; that Hayes still retained ownership of the premises unaffected by the foreclosure suit, and also charging usury. An application was made to strike out this answer which was denied, but as the E. R. C. Co., was obviously ignorant of the original transaction between the investment company and Michael A. Maloney, the investment company, in order to protect the E. R. C. Co., as purchaser at the sheriff's sale, applied to be admitted as a party complainant in the strict foreclosure suit and for leave to file a special replication asserting estoppel against Hayes and Maloney to claim ownership or right of redemption. This application was allowed.

The record will show that none of the material

facts were in dispute; and upon the situation disclosed by the evidence, a resumé of which we have just given, Vice-Chancellor Leaming held that there was no defect in the original foreclosure suit; that John J. Hayes was not a necessary party in the original foreclosure suit; that the investment company as the holder of the mortgage was not put upon inquiry by reason of the deed from Hayes to Andrew J. Maloney reciting a consideration of "One Dollar and other good and valuable consideration"; and that so far as the Investment Company was concerned, and that so far as the E. R. C. Co., the sheriff's vendee, was concerned, the deed in question must be regarded as an absolute conveyance, and that the title made at sheriff's sale under the original foreclosure suit was a valid and perfect title, and, further, that the inquiry made of Michael A. Maloney and his failure to avail himself of the opportunity thus offered to disclose the real nature of the deed, assuming that the claim of collateral security was not an afterthought, estopped Michael A. Maloney and his straw man, John J. Hayes, from asserting any claim of ownership to or right of redemption in the premises.

STATEMENT OF QUESTIONS INVOLVED.

Upon the facts of the case the following questions are presented:

FIRST.

Is a mortgagee, about to foreclose his mortgage, put upon inquiry to ascertain whether the grantor in a deed of the mortgaged premises, absolute upon

its face, made subsequent to the date of the mortgage, but reciting only a nominal consideration retains any interest in the mortgaged premises; or whether the mortgagee may rely upon the recorded deed and omit, without prejudice to his proceedings, as defendants from the bill of complaint, the grantors in all deeds intervening between the mortgage and the last recorded conveyance?

SECOND.

Assuming that such duty of inquiry exists was it not discharged by the inquiries made of Michael A. Maloney, and is he not estopped from asserting that the deed from Hayes to Andrew J. Maloney was merely a mortgage, when in the face of an opportunity to do so he failed to disclose that which he later claimed to be the fact, namely that the deed in question was intended to be merely a mortgage?

THIRD.

Has John J. Hayes or his principal, Michael A. Maloney, any standing to plead usury as against the complainant, E. R. C. Co., the purchaser at the sheriff's sale?

ARGUMENT UPON THE FIRST QUESTION.

That no such duty of inquiry exists was squarely decided by Vice-Chancellor Leaming in the case of *Lougheed v. Armstrong,* 84 N. J. E., 49, and the reasoning of that case is entirely sound and convincing. It is difficult to conceive of a transaction involving real estate which cannot accurately be expressed in some deed or instrument well known in the law. If,

therefore, the transaction is a pledge of real estate as security for a loan, no reason exists why the transaction should not be expressed in the appropriate terms of a bond and mortgage. If the grantor in a deed retains any interest in the premises, or if the conveyance be other than an absolute conveyance in fee, it is extremely easy to set forth in the instrument itself the terms and conditions upon which the conveyance is made. Just why a man should be permitted to make and record a deed of conveyance, absolute upon its face, and then later be permitted to claim as against an innocent third party such as, in the instant case, the purchaser for value, without notice, of a property sold by the sheriff under the foreclosure of a prior mortgage, that the deed was really a mortgage, it is difficult to perceive. Why should a mortgagee, who is about to foreclose, be put to the pains, delay and expense of affording that protection, which results from notice by legal process of the suit, to persons who, with the fullest opportunity to make their interests in the premises a matter of public record, deliberately conceal such interests?

Every consideration, therefore, of reason, fair dealing and public policy operates in favor of Vice-Chancellor Leaming's decision in *Lougheed v. Armstrong, supra,* and in the present case, holding that no such duty of inquiry exists and that a mortgagee, about to foreclose, is entitled to rely upon the fact that a recorded deed, absolute upon its face, is precisely what it purports to be and nothing else.

ARGUMENT UPON THE SECOND QUESTION.

It seems unnecessary to cite any cases or seriously to argue the soundness of Vice-Chancellor Leam-

ing's conclusions that as a result of the conversation which took place between the investment company's solicitor and Michael A. Maloney relative to the deed from Hayes to Andrew J. Maloney, Michael A. Maloney and his straw man, Hayes, having thus been given an opportunity fully to disclose the situation and having failed to do so, are estopped from asserting that said deed was intended to be a mortgage.

ARGUMENT UPON THE THIRD QUESTION.

Upon the question of the standing of Michael A. Maloney to plead as against the complainant, E. R. C. Co., the purchaser at sheriff's sale, the usury in the original transaction between Maloney and the investment company to which the E. R. C. Co. was not a party, it is important to bear in mind that the issue in the present suit is not between the investment company and Michael A. Maloney, *but between the E. R. C. Co., the sheriff's vendee, and Maloney.* Michael A. Maloney, through his straw man, Hayes, was brought into court in the present suit to test the claim asserted by him in his letter to the title company that he retained ownership notwithstanding the deed from Hayes to Andrew J. Maloney, and by reason thereof had a right to redeem as against the E. R. C. Co. It must be clear that as against the E. R. C. Co., the right to redeem, if any existed, rested upon an ownership or equity of redemption remaining unaffected by the original foreclosure suit; and not upon the fact that Hayes was the obligor and mortgagor in the original bond and mortgage. Assuming that the deed from Hayes to Andrew J. Maloney could be effective as a mortgage, and that Hayes retained an equity of redemption

which was not affected by the original foreclosure suit, because he was not made a defendant therein, it follows that as against the sheriff's vendee he would have a right to redeem, and in ascertaining the amount necessary to redeem he might be entitled to credit for usurious payments made in the original transaction. BUT IF HE HAD NO EQUITY OF REDEMPTION EITHER BECAUSE HE WAS ESTOPPED FROM ASSERTING THE SAME, OR BECAUSE THE INVESTMENT COMPANY IN THE ORIGINAL FORECLOSURE SUIT WAS ENTITLED TO REGARD THE DEED FROM HAYES TO ANDREW J. MALONEY AS AN ABSOLUTE CONVEYANCE, TRANSFERRING ALL OF HAYES' INTEREST, THEN AS AGAINST THE E. R. C. CO., HAYES HAD NO RIGHT TO REDEEM AND IT BECAME UNNECESSARY TO ASCERTAIN WHAT AMOUNT WAS REQUIRED TO REDEEM.

It is well established that the obligor and mortgagor in a bond and mortgage, who subsequently conveys all his interest in the mortgaged premises, is not a necessary party to a foreclosure suit. If he be omitted as a party defendant he can, of course, intervene and apply to be admitted as a party defendant, and thus secure to himself the right to interpose any defense that he thinks necessary to a protection of his interests. Again if the obligor claims usury, but is not made a party defendant in the foreclosure suit by reason of having conveyed away all his interest in the premises, it is still open to him to set up the usury in any proceedings that may be instituted to enforce a deficiency judgment on the bond. He cannot be barred from so doing, unless he has been made a party defendant in the foreclosure suit. In the foreclosure suit of the investment company against Andrew J. Maloney it

was accordingly not necessary to make him a party defendant, and the fact that he was not made a party defendant would have left it open for him to resist any attempts made to enforce a deficiency judgment on the ground of usury in the original transaction. As we have already pointed out, however, the complainant was paid in full as a result of the foreclosure sale and no deficiency judgment was ever entered against Hayes and Michael A. Maloney, the obligors in the bond, nor was it ever contemplated that any such judgment should be entered; and, moreover, the time for entering such judgment has long since expired. If, therefore, Hayes has no status as the owner of an equity of redemption, and it is clear that he has not, the only status remaining to him is that of obligor in the bond, but since he is entirely safe from being called upon to answer for any deficiency, the reason which would have made it proper for him to have been joined as a party defendant in the original foreclosure suit failed when the sheriff's sale resulted in the investment company being paid in full. This situation is well covered by what Vice-Chancellor Leaming said in the case of *Scull v. Idler,* 79 N. J. E. 468, where, after pointing out that where a person acquired mortgaged premises subject to the mortgage he could not set up the defense of usury against the foreclosure thereof, the learned Vice-Chancellor observed as follows:

> "It necessarily follows that the original mortgagor, notwithstanding his conveyance subject to the mortgage, is still entitled to be protected against liability on his bond in the event of a deficiency at sale; and if such mortgagor is made a party to a foreclosure suit against his vendee, the decree will be operative as a bar to such defense on the bond, unless the defense

> is asserted by him in the foreclosure suit in which he is made a party. This is expressly held in *Andrews v. Steele,* 22 N. J. Eq. (7 C. E. Gr.) 478."

It is, therefore, obvious from this decision that if the obligor, who has conveyed the mortgaged premises, is not a party defendant in a foreclosure suit he may resist proceedings to enforce the deficiency judgment if there was usury in the bond and mortgage; but it must be also equally clear that if, at the time it is attempted to assert the usury there is no deficiency for which judgment could be entered or if, by lapse of time, no deficiency judgment can be entered, the obligor has no standing to plead usury because the situation which afforded him the right to do so as a measure of self-protection has ceased to exist.

Conceding that a transaction from which Michael A. Maloney emerged upwards of $10,000.00 in cash to the good, without having put a penny of his own money in the deal, is, nonetheless, usurious under our Usury Law, and that usury in the original transaction was admitted and established, it is interesting to inquire how the usury can avail Hayes and Michael A. Maloney in the present suit. No counterclaim was filed by Hayes in the present suit seeking affirmative relief either against the E. R. C. Co., or the investment company. It is obvious that no way exists for giving to Hayes and Michael A Maloney any affirmative relief as against the E. R. C. Co., because of usury in the original transaction between Maloney and the investment company to which the E. R. C. Co., was an entire stranger. The investment company was paid in full out of the proceeds of the sheriff's sale; and as the E. R. C. Co., was not a party to the usurious contract, but appeared upon

the scene merely as the purchaser at the sheriff's sale, it is clear that the E. R. C. Co., cannot in any way or manner be called upon to answer for any usury with which the original transaction may have been tainted.

We, therefore, submit that the E. R. C. Co., having bought the premises at sheriff's sale by paying the full amount due on the complainant's decree, and not having been in any way a party to the alleged usurious contract between Hayes and the investment company, and having received no part of the usurious charges, cannot be made to respond or answer in any way for any usury with which the original transaction between Hayes and the investment company may have been tainted.

Respectfully submitted,

HARVEY F. CARR,
Of Counsel with Complainant-Appellee.