INDEX

	Page
Bill of Complaint	1
Answer and Answer in Lieu of Plea of the Defendant, Wm. V. Carpenter	6
Testimony	10
Conclusions	87
Final Decree	97
Order Refusing Consideration	102

RECORDS IN COURT OF CHANCERY

Bill of Complaint	143
Answer of Mar. 21, 1900	158
Decree Pro Confesso of Mar. 14, 1900	162
Order of Reference	163
Master's Summons in Chancery	165
Master's Report	166
Final Decree	175
Bill to Redeem	178
Order for Payment	195
Order to Pay Into Court	196
Order Dismissing Bill	198
Bill for Relief	199
Opinion by the Chancellor	203
Notice of Motion to Strike Out Bill	208
Order Striking Out Bill	209
Amendment to Bill	210
Order for Time to Answer	212
Demurrer	213
Order Sustaining Demurrer	215
Order Discharging Order to Show Cause	216
Amended Notice of Appeal	217
Petition of Appeal	218
Answer to Petition of Appeal	224

New Jersey State Library

New Jersey Court of Errors and Appeals

BILL OF COMPLAINT.

(Filed Aug. 7, 1929)

IN CHANCERY OF NEW JERSEY

To the Hon. Edwin Robert Walker, Esq.,
Chancellor of the State of New Jersey:

Your complainants, David A. Brown and George H. Brown, residing in the Township of Woodbridge, County of Middlesex and State of New Jersey, respectfully show unto your Honor:

1. That they are the owners in fee of certain lands hereinafter described and which they became seized of on the 9th day of November, 1897, by deed of Charles H. Gardner and Mary G. Gardner, his wife, and which said deed is recorded in the Middlesex County Clerk's office in Book 296 of Deeds on page 210.

2. Said lands are described as follows:

> ALL that certain tract, situate in the Township of Woodbridge, County of Middlesex and State of New Jersey, and consisting of forty-nine acres of land, more or less, and being bounded as follows: On the West by property of Albert D. Brown, Port Reading Railroad, and estate of Jonas Codington. On the North by lands of the estate of Jonas Codington and lands of James Edgar. On the East by lands of James Edgar and prop-

erty known as the Honer Estate property. On the South by lands of Mary G. Gardner and Albert D. Brown.

Being the same lands conveyed to Charles H. Gardner by Louis Van Sycle, deceased.

3. That at the time your complainants became seized of the above described lands and premises, the Perth Amboy Savings Institution, a corporation of the State of New Jersey, held a mortgage upon said lands and premises in the sum of Eight Hundred ($800.00) Dollars, which said mortgage was dated April 10, 1893, and recorded on April 12, 1893, in Book 123 of Mortgages for Middlesex County on page 33; and which said mortgage was subsequently, to wit: on the 10th day of October, 1899, assigned by the said Perth Amboy Savings Institution to one, Robert Adolph Hirner, and which said assignment was recorded on the 12th day of October, 1899, in Book T of Assignments for Middlesex County on page 617.

4. That the aforementioned Robert Adolph Hirner did institute an action out of this court to foreclose the abovementioned mortgage, and on or about the 2nd day of April, 1900, a final decree of foreclosure was entered in favor of the aforementioned Robert Adolph Hirner. And subsequently, to wit: in the year 1900, the defendant, William V. Carpenter, who occupied said lands as lessee, and in addition thereto held a second mortgage upon said lands and premises, as will more fully hereafter be set forth, paid the amount due upon said final decree into the Court of Chancery, in an action to redeem.

5. That at the time your complainants became seized of said lands and premises the defendant, William V. Carpenter, held a mortgage upon said lands and premises in the sum of Thirty-five Hundred ($3500.00) Dollars, which said mortgage was dated December 19, 1894, and recorded on the 9th day of January, 1895, in Book 130 of Mortgages for Middlesex County on page 239.

6. Your complainants have paid no interest on account of said mortgage or any part of the principal thereof from the time they became seized of said lands and premises until the present time, and no payment has ever been demanded of them or their predecessor in title, and charge and allege that said mortgage was fraudulently procured by the defendant, William V. Carpenter, and that said mortgage was executed without any consideration.

7. That on or about the 10th day of August, 1899, the said lands hereinabove described were conveyed by deed of Bruce L. Drummond, Collector, to the inhabitants of the Township of Woodbridge, in the County of Middlesex, for the nonpayment of taxes, and which said tax certificate was recorded on the 17th day of October, 1899, in Book 309 of Deeds for Middlesex County, on page 569, and that subsequently the above described lands and premises were again sold for taxes by Leonard M. Campbell, Collector, to the Township of Woodbridge, in the County of Middlesex, as evidenced by a tax certificate dated February 8th, 1906, and recorded on the 21st day of February, 1906, in Book 189 of Mortgages for Middlesex County on page 85.

8. That on or about the 1st day of February, 1912, the defendant, William V. Carpenter, acquired two certain paper writings purporting to be deeds to the foregoing described lands and premises, which said instruments were recorded on the 22nd day of January, 1915, in Book 15 of Releases for Middlesex County, on pages 382 and 383 respectively. The abovementioned instruments were again recorded on the 14th day of April, 1928, in Book 915 of Deeds for Middlesex County on pages 75 and 77 respectively.

9. The defendant, William V. Carpenter, by virtue of the abovementioned payment of moneys into the Court of Chancery, and said paper writings claims title to said lands and premises.

10. Your complainants are and have at all times been ready, willing and able to pay the amount due and owing unto the defendant, William V. Carpenter, together with interest thereon, but have been unable to ascertain the exact and true amount of said indebtedness, in order to satisfy and discharge the foregoing liens of record.

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

1. That William V. Carpenter, who is the defendant to this suit, may answer this bill of complaint and each statement therein made.

2. That complainants may be decreed to be entitled to redeem the said mortgages and tax title certificates.

3. That this Honorable Court ascertain the true amount due unto defendant, William V. Carpenter, by virtue of the foregoing mortgages, decree and tax title certificates.

4. That the said defendant, William V. Carpenter, may be decreed, upon payment or tender to him by complainants of whatever amount is deemed to be equitably due to said defendant on said mortgages, decree and tax title certificates, to deliver to complainants the said mortgages, decree and tax title certificates, after having first duly endorsed the same for cancellation.

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.

6. That your complainants shall have such further and other relief as shall be equitable and just.

BERNARD W. VOGEL,
Solicitor of Complainants.

Leo S. Lowenkopf,
Of Counsel.

ANSWER AND ANSWER IN LIEU OF PLEA OF THE DEFENDANT, WM. V. CARPENTER.

(Filed Sept. 10, 1929)

IN CHANCERY OF NEW JERSEY

Between:

DAVID A. BROWN and GEORGE H. BROWN,

Complainants,

and

WM. V. CARPENTER,

Defendant.

On Bill to Redeem, Etc.

This defendant, William V. Carpenter, of the Township of Woodbridge, County of Middlesex and State of New Jersey, answering the Bill of Complaint, says that:

1. The allegations of paragraph one are denied.

2. The allegations of paragraph two are admitted.

3. The allegations of paragraph three are admitted except that the recording date of said assignment should be October 10, 1899.

4. The allegations of paragraph four are admitted.

5. The allegations of paragraph five are admitted.

6. The allegations of paragraph six are denied.

7. The allegations of paragraph seven are admitted.

Answer and Answer in Lieu of Plea of the Defendant, Wm. V. Carpenter

8. The allegations of paragraph eight are admitted.

9. The allegations of paragraph nine are admitted, but in addition thereto defendant says that he also holds by virtue of a judgment in ejectment entered in the Middlesex County Circuit Court dated August 14th, 1929.

10. Allegations of paragraph ten are denied.

First Answer in Lieu of Plea

This defendant by way of answer in lieu of plea as to so much of the bill of complaint as seeks redemption of the lands from the mortgage dated April 10th, 1893, for $800.00, says that said defendant was in possession of the said lands, tenements and hereditaments described in the mortgage for more than twenty years after default of payment by the mortgagor and that the right or equity of redemption is forever barred.

Second Answer in Lieu of Plea

This defendant by way of answer in lieu of plea as to so much of the bill of complaint as seeks redemption of the lands from the mortgage dated December 9th, 1894, for $3500.00, says said defendant was in possession of lands, tenements and hereditaments described in the mortgage for more than twenty years after default of the payment by the mortgagor and the right or equity of redemption is forever barred.

Third Answer in Lieu of Plea

This defendant by way of answer in lieu of plea as to so much of the bill of complaint as alleges

that the mortgage dated December 9th, 1894, for $3500.00 was fraudulently procured and executed without adequate consideration says that this matter is *res judicata* between the parties.

FOURTH ANSWER IN LIEU OF PLEA

This defendant by way of answer in lieu of plea as to so much of the bill of complaint as alleges a cause of action to repossess or recover the lands described in the aforementioned mortgages exists says that said action should have been brought within twenty years next after the right or title thereto accrued and not having been so done it is barred by the Statute of Limitations.

FIFTH ANSWER IN LIEU OF PLEA

This defendant by way of answer in lieu of plea as to so much of the bill of complaint as effects redemption of the lands described in the mortgages and tax certificates, said tax certificates being dated August 10th, 1899, and February 8th, 1906, respectively, says there has been no redemption therefrom in twenty years after the said defendant entered into open possession, since continued under the respective sales and that the right of redemption is accordingly barred.

SIXTH ANSWER IN LIEU OF PLEA

This defendant by way of answer in lieu of plea as to so much of the bill of complaint as seeks delivery of said mortgages and tax certificates endorsed for cancellation says that in an action of ejectment instituted in the Middlesex County Circuit between the parties to this pres-

ent action, the Court decided as part of its findings that the defendant was in possession as mortgagee under the aforementioned $3500.00 mortgage and that by virtue of such possession thereunder could not be ejected in a law court.

SEVENTH ANSWER IN LIEU OF PLEA

This defendant by way of answer in lieu of plea as to so much of the bill of complaint as alleges plaintiff in possession under a deed from Chas. H. and Mary G. Gardner recorded in the Middlesex County Clerk's Office, Book #296 of Deeds, page 210, and bearing date the ninth day of November, 1897, says that said deed was a fraudulent conveyance for the purpose of defrauding the defendant of his rights in said premises and the said deed was without support of an adequate consideration and for the purpose of hindering and defrauding creditors, one of whom was the defendant in this action.

EIGHTH ANSWER IN LIEU OF PLEA

This defendant by way of answer in lieu of plea as to so much of the bill of complaint as claims the right to redemption under the aforementioned mortgages and tax certificates says that the right of redemption is barred because of the fact that the complainants are estopped by laches.

FREDERICK F. RICHARDSON,
Solicitor of Defendant,
Wm. V. Carpenter.

September 19, 1929. Replication in common form.

September 24, 1929. Order of Reference to Hon. Maja Leon Berry, Vice Chancellor.

Designation November 4, 1929.

TESTIMONY.

IN CHANCERY OF NEW JERSEY

Between:

DAVID A. BROWN and GEORGE H. BROWN,

Complainants,

and

WILLIAM V. CARPENTER,

Defendant.

Transcript of stenographer's notes of proceedings in the above entitled cause before the HONORABLE MAJA LEON BERRY, Vice Chancellor, at the Chancery Chambers, Long Branch, New Jersey, on Thursday, May 15th, 1930, at 10:30 A. M.

Appearances:

BERNARD W. VOGEL, Esq., THOMAS L. HANSON, of Counsel, Solicitor for the Complainants.

FREDERICK F. RICHARDSON, Esq., Solicitor for the Defendant.

Mr. Hanson: This is a bill to redeem property in the Town of Woodbridge, upon which there is erected what is known as the Woodbridge Race Track, to redeem the property from the first mortgage and tax certificates, or possibly instead of a first mortgage, a decree which was secured as the result of a foreclosure of the mortgage. The facts briefly are that the complainants claim to be the owners of this property by virtue of a deed from Charles and Mary Gardner, which was

executed to them on November 9th, 1897. That at the time they acquired this property the defendant was holding same by virtue of a lease which he had executed with the grantors to the complainants, Charles and Mary Gardner, and which lease had not expired. It was a ten-year lease, I believe, and the defendants had been in possession under this ten-year lease for seven years. At the time they purchased the property there was an $800 mortgage held by the Perth Amboy Savings Institution, which mortgage was subsequently assigned to a party by the name of Hirner, who lived in Woodbridge, and who subsequently instituted foreclosure proceedings on the mortgage and obtained a decree. There was another mortgage on the property which had been given by Gardner, the grantor of the complainants, to the defendant a short time after he entered into possession of this property by virtue of the lease with Gardner.

The Court: That is the one in controversy in the present suit?

Mr. Hanson: Yes, sir; the mortgage was for $3500.00.

After the complainants acquired the property from Gardner, they attempted to set aside the $3500.00 mortgage.

The Court: That was not involved in the other foreclosure suit?

Mr. Hanson: No, sir; not involved.

The Court: And they were not parties?

Mr. Hanson: No, sir; to my knowledge, he was not brought in as a party. However, the file is here and we can find out whether they were made

defendants or not. The complaint which was filed to set aside this mortgage urged that the mortgage had been given without consideration, and also to secure and preserve the said property and the amount of the mortgage from any losses which the said Gardner, that is the mortgagor and the grantor of the complainants, from any losses which the said Gardner might thereafter incur. A demurrer was filed to the bill of complaint and Chancellor Magie sustained the demurrer for two reasons, first, that it appeared from the complaint and the allegations of the complaint, that the mortgage had been given to protect the mortgagor against possible creditors, and therefore was given in fraud of creditors, and if it were not given for that purpose, that the language of the complaint was so vague and indefinite and contradictory that—the words of the Chancellor were "uncertain, vague and indeterminate in its statement of material fact" that the bill was bad upon demurrer and therefore the bill to redeem, or the bill to set aside the mortgage of $3500 was set aside, and for the reasons that I have just stated.

In addition, the defendant secured by assignment from the Township of Woodbridge two certain tax certificates which he recorded, for reasons best known to himself, and which he rerecorded, or rather, because they had been originally recorded by the Clerk of the Township of Woodbridge as mortgages and which he had rerecorded as deeds, in other words, in two separate books of deeds in the County Clerk's Office of Middlesex County.

Discussion

Going back to the mortgage of $800 which was held by the Perth Amboy Savings Institution and assigned to Hirner and subsequently foreclosed, the defendant paid into the Court of Chancery sometime after 1900, the amount of the decree, but did not secure an assignment of the mortgage nor an assignment of the decree; he simply paid the money into the Court of Chancery. It is the contention of the complainants that the title is still vested in them because of the deed from Gardner, and the interest of the defendant, if any, is limited solely to the moneys which he has expended in securing an assignment of the tax certificates and the decree in the Savings Bank mortgage foreclosure and any money which he might have actually advanced on the $3500 mortgage, and the complainants are ready and willing to pay that amount of money into court in order to redeem the property.

The Court: What became of the money that was paid into court in the other foreclosure?

Mr. Hanson: I believe it was turned over to the complainant; at least, that is my understanding.

The Court: So far as I can see from this file in Hirner v. Gardner, the defendant, Carpenter, that is the mortgagee who held the $3500 mortgage, while he was made a party defendant, was not served and did not appear in the suit. You may check up upon it.

Mr. Hanson: There is a Master's report there, I believe.

The Court: Let's see what the final decree says. I do not understand this, the final decree bars all the defendants, including the defendant

Carpenter—there does not seem to be anything to indicate service on Carpenter—Oh, yes, there is; I am wrong—it was served on him, subpoena was served on Carpenter.

Mr. Richardson: Later Mr. Carpenter filed a bill to redeem and paid the money into court. We have a certificate that it was paid into court by the attorney for the mortgagee. If the court please, the last time we were here was on a motion by us, or rather, a bill to quiet title, which bill was dismissed without prejudice pending the decision of Judge Kirkpatrick in the common law court. At that time there was pending another action of ejectment, and the court held that the pendency of the ejectment action would defeat the bill to quiet title. Since that time Judge Kirkpatrick has decided the ejectment suit in our favor and I have a copy of his conclusions here which I would like to file with the court. If the Court please, Mr. Carpenter claims under two mortgages, he claims that on the default in payment of the $3500 mortgage he stayed in possession, having already been in there under a lease expiring in 1903, and that in 1903 he continued to stay there under his mortgage, it not being paid, and has had the property by his possession under that mortgage, and we claim that that possession is sufficient to give him a legal title, because the mortgage was defaulted on, and having stayed in possession during all that time without objection by these complainants, that that ripened into title.

We also claim that we were there in possession under the second mortgage. Now, the second mortgage, the so-called Hirner mortgage, it

is true that we did not take an assignment of that, but we paid the money into court and the decree in that case read that upon the payment of the money into court by Mr. Carpenter, Mr. Hirner should assign uncancelled the bond and mortgage to Mr. Carpenter. That was never done and if we have any standing under the mortgage it is probably by equitable subrogation. We claim under both those mortgages, possession under both those mortgages. We also claim by virtue of the decision in the ejectment suit in which Judge Kirkpatrick has decided that our possession under the $3500 mortgage was for a sufficient length of time as to give us proper legal title.

We also claim that the complainants in this suit, Messrs. Brown, have been guilty of laches in not asserting their right years ago. We have been in possession since 1903 under our mortgages and nothing has ever been done until very recently when we attempted to lease this tract for the purposes of a speedway, when Mr. Brown came in and asserted his rights. We claim that he is guilty of laches. The property has appreciated in value to where it is now worth approximately eighty to one hundred thousand dollars, having originally been worth probably six thousand dollars, or somewhere in that neighborhood. It is on those two grounds, our possession under the mortgage and laches, that we claim that our title is a good title.

The Court: In the ejectment suit who was the plaintiff?

Mr. Richardson: Mr. Brown.

Discussion

The Court: Well, of course, he failed by the weakness of his own title, I suppose. That does not necessarily say that the one in possession had good title, does it?

Mr. Richardson: No, not necessarily. Perhaps I overstated that.

The Court: The weakness of the title of the man in possession would not give the plaintiff the right to a verdict on a judgment in ejectment. He has got to stand on his own title.

Mr. Richardson: But the Court does say this in this action by this Court, he (referring to Carpenter) "is entitled to and is in possession as mortgagee under his mortgage; Gardner could not dispute his right without satisfying the mortgage and the present plaintiffs taking on notice, have no rights superior to their grantor."

The Court: But did the possession, which was originally under a lease, change to possession under a mortgage? What was there to indicate any change of the character of possession?

Mr. Richardson: He demanded payment from the Browns, who then held the paper title, and Brown refused to pay it, and Mr. Carpenter told them that he was going to stay there until the thing was paid, that he had certain things to be satisfied and intended to stay there until the claims were satisfied.

The Court: Well, suppose I let you put in your proofs in this matter. Let's settle it one way or the other.

Charles H. Gardner—Direct

CHARLES H. GARDNER, a witness called in behalf of the complainants, being first duly sworn, according to law on his oath, testified as follows:

Direct-examination by Mr. Hanson:

Q. Where do you live, Mr. Gardner? A. Woodbridge.

Q. How long have you lived there? A. All of my life.

Q. How old are you now? A. 83.

Q. You were at one time the owner of what is known as the Van Sickle tract, were you not? A. Yes, sir.

Q. And that is the property where the race track is now located? A. Yes, sir.

Q. Mr. Gardner, when did you acquire this property? A. I could not tell you the date today.

Q. Well, approximately when, if you recall? A. It must be over thirty years ago.

Q. You know Mr. Carpenter, William V. Carpenter, the defendant? A. Yes, sir.

Q. Did Mr. Carpenter ever lease this property from you? A. He leased it for ten years.

Q. When did he make this lease with you? A. Let's see, I think it was in 1892.

Q. Where were you living at that time? A. In Woodbridge.

Q. On this property? A. Not on this property, but in the house adjoining it.

Q. And at that time what did this property consist of? A. A farm.

Q. Any buildings on it? A. No.

Q. For what purpose did you lease it to Mr. Carpenter? A. For farming purposes.

Q. Was that a written lease? A. Yes, sir.

Q. What rent did Mr. Carpenter agree to pay? A. I was to receive a certain portion of the proceeds of the place.

Q. And what was to be done with reference to the payment of taxes? A. Well, I don't know, hardly, about that.

The Court: It was a written lease; won't the lease speak for itself?

The Witness: There was a written lease in existence; I don't know what has become of it.

Q. Was it ever recorded in New Brunswick, to your knowledge? A. Not to my knowledge.

Q. Did you ever pay the taxes after Mr. Carpenter leased the property from you? A. I don't think I did.

Q. Did Mr. Carpenter ever tell you that he had paid the taxes? A. Well, that I don't know, either. I don't remember that.

Q. In 1894 did you execute a mortgage on this property to Mr. Carpenter? A. For $3,500; I don't know what date it was.

Q. Well, you executed a mortgage for $3,500 to Mr. Carpenter? A. Yes.

Q. That was the only mortgage covering this property that you did execute to him, wasn't it, the one for $3,500? A. I never received a cent for it.

Q. How did you come to sign this mortgage or give this mortgage to Mr. Carpenter? A. It was supposed to protect him in his lease, that is what I understood, and it was to be cancelled at the ex-

piration of the lease. I never received a cent for that mortgage.

Q. From whom did you get the understanding that it was to be cancelled upon the expiration of the lease? A. Why, Mr. Carpenter and his lawyer that came to my house.

Q. Who was his attorney, if you recall? A. I don't remember his name. I think he is dead. He was from Rahway. Mr. Carpenter probably could tell you his name.

Q. Will you just explain the circumstances surrounding your giving Mr. Carpenter this mortgage for $3,500? A. He brought his lawyer to my house—

Mr. Richardson: I object, if the Court please, for this reason; this $3,500 mortgage is *res adjudicata;* it has been in the Court of Chancery once on the application to set aside as fraudulent, and the application was denied and the Court left the parties where they were. My objection in this case is that it is absolutely irrelevant; it has no bearing on this issue one way or the other.

Mr. Hanson: I did not say it was set aside as fraudulent. I am reading the opinion of the Chancellor himself. He said if it was the purpose to defraud creditors the demurrer would be sustained, and if that was not the purpose, then the language was so vague, uncertain and indeterminate in its statement of material fact that the bill is bad upon demurrer. Now, appar-

ently the state of facts as it was presented in this bill was such that the Chancellor was either confused—

The Court: I am going to hear the testimony; I am going to hear all the evidence, and if it proves on examination of this file that it has no place in the cause because it is *res adjudicata,* it will not be considered.

Q. Will you explain how you came to give Mr. Carpenter this mortgage? A. The reason I gave it to him was he told me that it was necessary to protect him in his lease, and I took it for granted that he was right.

Q. Where was the mortgage executed? A. In my house.

Q. Who was present at that time? A. My wife and son; I had a very sick boy there dying at the time.

The Court: Did he explain how it was to protect his lease?

The Witness: Well, I don't know. He told me it was necessary to give it to him to protect his lease and I took it for granted that that was so. I trusted that man. I never received anything from the proceeds of the place except two loads of nubbins of corn; that is all I received in the four years before I sold the place.

Q. Is Mr. Carpenter related to you in any way? A. His wife was my niece.

Q. You had confidence in him at that time? A. I did; I thought he was a nice man; I took his word for it.

Q. In what room of your house was this mortgage executed? A. Well, the back room, in the sitting room; my boy laid there on the couch, we thought he was dying at the time.

Q. In the same room where the mortgage was executed? A. Yes, he had a fever at the time.

Q. You sold this property to Mr. Brown in 1897, did you not? A. I don't know the date; it was four years after the lease had been running. The lease had been running about four years when I sold it to him subject to the lease and the mortgage of $800 that the Perth Amboy Savings Bank held on the property. I drew the deed to him subject to that lease and that $800 mortgage. I did not mention the $3,500 mortgage because I supposed it would be cancelled at the end of the lease.

Q. Now, Mr. Gardner, between the time of your signing that mortgage and the time that you conveyed this property to the Browns, did Mr. Carpenter ever ask you for interest on that mortgage? A. No.

Q. Did you see him during that period? A. Oh, yes; quite often.

Q. Would he come to your house? A. After I sold the place?

Q. I mean, before you sold the place? A. Well, when I first leased it to him, but we seemed to have trouble about his furnishing manure, one thing or another cropped up, either the stock died or there wasn't any proceeds from the place, and eventually we had some trouble and he assaulted me, and I had him indicted and taken into court for assault. (Oh, you can smile, Mr. Carpenter.)

Q. Now, Mr. Gardner, did you tell Mr. Brown about this $3,500 mortgage at the time you sold the property to him? A. Yes, because I told him it was to be cancelled at the end of the lease. I never received a cent for that mortgage.

Q. What did you receive from the Browns for consideration for this deed? A. I owed them a bill, and I received some money from them, besides.

Q. What, in your opinion, was the property worth at the time you sold it to the Browns? A. I could not tell you. I did not know the value of it. I had very little knowledge of property at that time.

Q. Now, after—were you indebted to many people at the time you sold the property to the Browns? A. No.

Q. Just owed them a bill? A. That is all.

Q. Now, did you go to Mr. Carpenter at any time after conveying this property to the Browns with reference to this mortgage? A. I don't know as I did; I don't remember.

Q. Did you go to Mr. Carpenter before you sold the property to the Browns with reference to this mortgage? A. Yes, that was the occasion when he assaulted me.

Q. What was the reason of your going to Mr. Carpenter at that time? A. Well, he insulted me every opportunity he got; my wife could not sit on the porch when he went by without his passing and trying to insult her. I had a little hut built for my children down by the brook and he went down there and threw the things out and did everything he possibly could to annoy me. I

did not know why he did it. I never thought he was sane.

Q. When you saw Mr. Carpenter shortly before you sold the property to the Browns, did you say anything to him about this mortgage, this $3,500 mortgage? A. I don't remember whether I did or not.

Q. Have you been familiar with this property since the time you sold it to the Browns? A. Why, yes; I live right in the neighborhood, my property, my wife's property, adjoins it.

Q. How far from the property do you live now? A. Oh, probably two or three hundred yards. It is in the rear of my property, not mine; it was my wife's, but now it is my son's.

Q. What has been done with the property since the time you sold it, with the exception of the erection of the race track on it? A. Why, I don't know. He undertook to farm it but he did not farm it at all; he never got anything off of it.

Q. Did he ever plant any crops there, to your knowledge? A. Oh, yes; partly. I never saw a good crop raised on the place, though.

CROSS-EXAMINATION by Mr. Richardson:

Q. Mr. Gardner, you owed Mr. Carpenter some money at the time this $3,500 mortgage was executed, did you not? A. No, I did not.

Q. Didn't you owe him some six or seven hundred dollars? A. No.

Q. On a grocery bill? A. No, the Browns?

Q. No, Mr. Carpenter? A. Mr. Carpenter, I never owed him a cent.

Q. Didn't Mr. Carpenter sue you shortly afterwards and get a judgment against you for some money? A. No.

Q. Hasn't he a judgment against you today, outstanding against you today, Mr. Carpenter? A. Yes, but may I explain that matter?

Q. Yes, surely, that is what I want to know. A. After I sold this property to Mr. Brown, Mr. Carpenter came to me and wanted to know what right I had to sell that to him. Previous to that I had borrowed money of my old aunt and borrowed of my uncle for other purposes and he went to her and told her that I was a bankrupt—this I got from her—that I was bankrupt and that if she would turn those notes over to him—I had given her notes, I think it was for $300, turn those notes over to him he would get what he could from them. I offered to settle with my aunt, to deed that to her, my interest in my mother's property, a big piece of property, but she turned those notes over to him, but that was after I had sold this property to the Browns.

Q. Well, Mr. Gardner, let me ask you this, when Mr. Carpenter told you that he needed this mortgage to protect his lease, what did you ask him in reply to that? A. What did I what?

Q. Did you ask him why it was necessary to protect his lease? A. No, I took it for granted that it was so, because I thought he was an honest man and I believed him.

The Court: I have examined the file in *Brown* v. *Carpenter,* docket 21/684, which apparently is the suit referred to in which

a bill was filed to compel the cancellation of the $3,500 mortgage. The opinion of the Chancellor in that cause, which I have read, does not adjudicate the question of whether the mortgage was fraudulent or whether it was not. It merely sustains the demurrer to the bill of complaint on the ground that the bill of complaint is not sufficiently definite in its allegations to state a cause of action. There is a suggestion that perhaps the language of the bill means that the mortgage was executed in fraud of creditors, but the Chancellor does not base his order sustaining the demurrer on that ground alone, so that I cannot see that it can be claimed that the question of the validity of the mortgage because of the alleged fraud of creditors being *res adjudicata,* can be sustained. This question, however, arises in my mind; it may or may not preclude the taking of testimony on the validity of the mortgage. The conveyance to Brown is expressly subject to a mortgage, as I understand it from the statement of counsel and as appears from the Chancellor's opinion, to which I have referred in the previous suit. If the $3,500 represented a part of the purchase price of the property and the defendant, the complainant in this suit, had the benefit of it there, I don't see why it is necessary now to go into the question of the consideration of that mortgage. It is not clear whether the bill filed in this cause is for

redemption from that mortgage or not. Is it, Mr. Hanson?

Mr. Hanson: No, sir; it is our contention, and I think we have shown it by the testimony of Mr. Gardner, that this property was conveyed subject, and that is Mr. Gardner's direct testimony, subject to the $800 mortgage; that Mr. Gardner told Mr. Brown of the $3,500 mortgage on the property and said that that was given to protect the lease and would be cancelled upon the expiration of the lease. I don't know what the conveyance—whether the deed itself, the deed does not recite it.

The Court: If the point is in issue you may proceed, but I did not want to take up time to consider it if it were not. You may proceed with your cross-examination.

Mr. Richardson: I may say that this bill does seek to redeem under that $3,500 mortgage. Mr. Hanson told you that it did not, but my reading of the bill is that it seeks to redeem under that mortgage.

Mr. Hanson: We do say this, if the Court please. We say that there is this mortgage open of record and that mortgage was, we say, fraudulently procured, and that the said mortgage was executed without any consideration. That is in the complaint.

The Court: All right, you may proceed. We will now take a recess until two o'clock.

After recess.

CHARLES GARDNER resumes the stand.

CROSS-EXAMINATION by Mr. Richardson:

Q. Mr. Gardner, you stated this morning that you received no consideration for this mortgage at all. Isn't it a fact that subsequent to this mortgage Mr. Carpenter was advancing you certain moneys? A. No.

Q. Isn't it a fact that he was paying your taxes? A. Well, he was to pay the taxes for the use of the place.

Q. And you were not to reimburse him for those taxes? A. No.

Q. Is that a letter that you wrote to Mr. Carpenter (showing witness letter)? A. That is my writing.

Q. And in that letter you asked him to pay the taxes for you, did you not? A. According to that, yes.

The Court: What is the date of the letter?

Mr. Hanson: July 13, 1897.

The Court: What was the date of the lease?

Mr. Richardson: It was in 1893, I have not got the exact date.

Q. Now, in addition to paying the taxes at your request, didn't he lend you other sums of money? A. No.

Mr. Richardson: I would like to offer that letter, if there is no objection.

(Marked Exhibit D-1.)

Q. You have said, Mr. Gardner, that you sold this property to Mr. Brown in 1897, did you not? A. I think that was about the date, the lease had run about four years.

Q. How many acres in this Van Sickle farm? A. That was supposed to be about forty.

Q. What was it valued at per acre at that time? A. I could not tell you; I don't know. There has never been any value put onto it.

Q. Haven't you any idea? A. No.

Q. Not the least idea? A. No.

Q. You don't know whether it was worth $50 or $200 an acre? A. No.

Q. You sold it to Mr. Brown for what you thought it was worth, didn't you? A. Well, I sold it to him for a bill, and I received money from him besides.

Q. Now, how much did you receive besides what is expressed in the deed? A. What's that?

Q. How much money did you receive besides what is expressed in the deed? A. I don't remember; I could not tell you. I don't remember now.

The Court: What is expressed in the deed?

Mr. Richardson: $400, subject to the $800 mortgage.

The Witness: Subject to the mortgage and the lease.

Q. You told Mr. Brown at the time he bought it that there was the $3,500 mortgage on there, did you not? A. Yes, he knew that, and he knew why it was given and he also knew that I had never received anything for it.

Q. He knew that from what you told him? A. Yes, from what I told him, and he (meaning Mr. Carpenter) knows it, too.

Q. Isn't it a fact, Mr. Gardner, that this mortgage was drawn at your request, this $3,500 mortgage; didn't you tell Mr. Carpenter to draw that, or have it drawn up? A. I don't remember that I told him so; he brought his lawyer to my house for this mortgage, and he claimed that it was necessary for him to have it to secure him in his lease.

Q. Hadn't you previously talked it over with him before he brought the lawyer to your house with the mortgage? A. Yes, and that was the subject.

Q. That was the subject? A. Yes.

Q. Weren't you the one that suggested that the amount of it should be $3,500? A. I don't remember about that.

Q. You would not say that you did not suggest that? A. No, I would not.

Q. And it was to cover moneys that he might advance you and loan you in the future? A. No, nothing of the kind, simply to secure him in his lease, and that mortgage was to be cancelled at the expiration of the lease, and I sold the property six years before the lease was out.

Q. Can you tell us why you did not put a clause in there that the mortgage was to be cancelled upon the expiration of the lease? A. I did not think it was necessary, because I thought he was an honest man and I took his word for it.

Q. The mortgage was read to you, wasn't it? A. Yes.

RE-DIRECT EXAMINATION by Mr. Hanson:

Q. Do you know the lawyer that came to your place? A. I cannot remember his name; he used to live in Rahway.

Q. Do you know whether it was an attorney by the name of Schaffer? A. Schaffer, no, that was not the lawyer.

Q. I call your attention to this letter which has been marked Exhibit D-1, will you state the reason for the writing of that letter to Mr. Carpenter? A. Well, I suppose it was because I had received notice from the tax collector that the taxes were due on it.

Q. Do you recall whether that referred to any other taxes than the taxes on this property? A. No, I don't.

Q. You owned other property, did you not? A. I did not own any other property except at Port Reading, by mother's property.

Q. Port Reading, I call your attention to the $300 which you owed your aunt, was it? A. $300.

Q. Had you given her any security for the loan of that money? A. I gave her $300 worth of Ostrander Fire Brick Company stock as security.

Q. Do you know what happened to that security? A. No, I could not tell you; I think I was notified it was to be sold, those shares, and if I mistake not, I think Mr. Ostrander came to see me and wanted me to sign those shares over to Mr. Carpenter and I refused to do it. At the time he got those notes, it was after I had sold this

property to the Browns, and he came to see me and told me that I had no business to sell that property to the Browns, and he visited my aunt and told her that I was a bankrupt and to give him those notes and he would collect what he could on them.

The Court: Who said that?
The Witness: Mr. Carpenter.

Q. Was the judgment that he obtained against you based upon the notes that you had given to your aunt and which had been turned over to him? A. Yes, after the sale of this property to the Browns that made him mad; I don't know what he was after; he was trying to send me to the poor house, I guess.

The Court: How old are you?
The Witness: How old am I?
The Court: Yes.
The Witness: 83, I was born in 1847.
The Court: Were you adjudicated a bankrupt?
The Witness: Why, he told my aunt that I was a bankrupt.
The Court: I know, you said that before, but were you?
The Witness: No.
(Witness excused.)

David A. Brown—Direct

DAVID A. BROWN, one of the complainants, called as a witness in his own behalf, being first duly sworn according to law, on his oath testified as follows:

Direct-examination by Mr. Hanson:

Q. Where do you live, Mr. Brown? A. Woodbridge, New Jersey.

Q. How long have you lived there? A. 65 years.

Q. How old are you? A. 65.

Q. Born there. I call your attention to the piece of property which is the subject of this litigation, in 1897 did you and your brother secure a deed or purchase this property from Mr. Gardner? A. We did.

Q. Do you recall specifically how much you paid him for the property? A. I cannot, it is so long ago, I know—no, I could not tell you just exactly.

Q. Did you pay all cash for it? A. No.

Q. Do you know the nature of the consideration? A. Why, we carried on a store there and Mr. Gardner traded there and he had borrowed some little money, it did not amount to much, and we helped him along, and then we took so much cash, just how much it was I don't remember; my brother ran the business at that time.

Q. In other words, the store? A. Subject to the first mortgage, but I figured at the time it was around, would come about $2,000, perhaps, something like that.

Q. And you have owned property in and around Woodbridge all your life, have you not? A. Yes, sir.

Q. Bought and sold it? A. Yes, sir.

Q. Familiar with values? A. Yes.

Q. What value would you place on this property at the time you bought it from Mr. Gardner? A. Why, I should say at that time around $40 an acre along the highway, or thereabouts, because we owned sixteen acres along the highway in front of all this property, which is back, and I bought that at the time at public auction from Van Cleave, I think it was, that was selling it at that time for $1,000 and it had nearly half a mile of highway and railroad and we figured $50 an acre; I figured at that time.

Q. This tract contains 49 acres. A. 40 acres more or less.

Q. 40 acres? A. Yes.

Q. At the time you purchased this property did you know of the existence of an $800 mortgage held by the Perth Amboy Savings Institution? A. I did.

Q. Did you know that Mr. Carpenter was in possession by virtue of a lease? A. I did.

Q. Do you recall how long that lease had to run from the time you bought it? A. I don't— I think it was about five or six years, something like that.

Q. Did you know of the existence of a $3,500 mortgage on this property held by Mr. Carpenter? A. I did.

Q. Where did you receive your information regarding this mortgage? A. I think at that time from the seller, Mr. Gardner.

Q. From Mr. Gardner. Did you ascertain from Mr. Gardner the amount due on this mortgage? A. $3,500?

Q. Yes. A. He said there was nothing due on it, it was just security to protect him in his lease, when the lease expired it would go out, I supposed.

Q. Did you ever see a copy of that lease, Mr. Brown? A. No, sir; not that I remember.

Q. Do you recall the consideration of the rental set forth in the lease? A. No, I think not.

Q. And what information you had regarding the lease you secured from Mr. Gardner, did you not? A. Yes.

Q. After you purchased the property did you inform Mr. Carpenter that you were the owner? A. We did.

Q. Do you recall how long after you bought the property? A. Why, it was soon after we went up there. He was working on the place and I understood that he had not paid anything to anybody so we had the man that worked on the place arrested for trespass.

Q. That is, Mr. Carpenter's man? A. Mr. Carpenter's man for trespass.

Q. Well, as the result of that action of yours there was litigation over the possession of the property, was there not? A. Yes.

Q. And did or did not Mr. Carpenter establish his lease at that time? A. Well, yes; I believe he did establish that his lease ran for five or six years longer.

Q. Do you recall at the hearing the consideration of the rental of this lease as stated by Mr. Carpenter? A. Well, he said that Mr. Carpenter was to pay a proportion of the stuff grown on the place—

Mr. Richardson: I object.

Mr. Hanson: I am referring to the statement by Mr. Carpenter, whether Mr. Carpenter stated at the hearing the consideration of the lease.

The Court: All right.

A. He said the consideration of the lease was that he was to have a certain per cent of the stuff raised on the place. I don't remember well enough to state positively anything else about it.

Q. Are you related to Mr. Carpenter in any way? A. I don't think I am.

Q. Or to Mr. Gardner? A. No, sir.

Q. Now, at the expiration of this lease which you say expired six or seven years after you acquired the property, did Mr. Carpenter remain on the property? A. Yes, he did.

Q. Did you see him around that time? A. I did.

Q. Where did you see him? A. Upon the place, went up there on purpose.

Q. What was your purpose of going up there? A. I wanted to find out what he was going to do.

Q. Did you ask him what he was going to do? A. Yes.

Q. What did he say to you? A. Well, he did not say anything in particular.

Q. What, if anything, did you say? A. Oh, I told him that as long as he would pay the taxes on the place we would let the lease continue just as it was.

Q. Did you ever pay any taxes on the land, Mr. Brown? A. I don't remember; I don't think I did.

Q. Did you ever check up yourself to find out if the taxes were paid at the collector's office? A. No, sir.

Q. Did Mr. Carpenter ever ask you to return to him any of the moneys which he paid for taxes? A. He positively did not.

Q. Did Mr. Carpenter ever say anything to you about the $3,500 mortgage? A. Nothing in particular that I know of.

Q. Did he ever ask you to pay the interest on the $3,500 mortgage? A. No, sir; positively did not, never.

Q. Did he ever ask you to pay the principal on the $3,500 mortgage? A. No, sir; he did not.

Q. Did he ever ask you to pay interest on any mortgage? A. No.

Q. Did he ever ask you to pay the principal on any mortgage? A. No, sir; never.

Q. Did he ever ask you to redeem any tax certificates which he held? A. No, sir.

Q. Did he ever serve notice on you that he was the owner of any tax certificates? A. No, sir.

Q. Did he ever make any demand that you redeem any tax certificates that he held? A. No, sir; not in any way.

Q. Did you receive anything in writing from him at any time since you acquired this property? A. No, sir.

Q. Now, you stated previously, Mr. Brown, that you owned a number of parcels in and around Woodbridge? A. Yes, sir; that is the estate and my own personal.

Q. The estate of your father? A. Yes, sir.

Q. And your own? A. Yes, sir.

Q. Was any of that farm land? A. Yes, sir.

Q. Similar to the property which Mr. Carpenter was occupying? A. Yes, sir.

Q. Did you lease any of that property? A. Yes, sir; rented it, leased it, yes.

Q. What was the customary rental that you charged for property of this kind? A. Well, we have had several farms and we generally got all we could, sometimes a basis of $30 and as high as $40 a month for a house and buildings and things.

Q. I am referring particularly to vacant farm land. A. The vacant properties, only with this place there. We would offer to any man to give him the farm and let him have the farm if he will pay the taxes. Now, we have a farm down at Port Reading that we get about $35 a year rent for it. I think our taxes are around $70.

Q. Then it was nothing unusual at that time to lease farm land for the payment of taxes? A. No, sir; if we could get payment of the taxes we would think that we were doing well.

Q. Did Mr. Carpenter ever advise you, or anyone representing Mr. Carpenter, ever advise you that he had paid into the Court of Chancery $1100 for the redemption of the Hirner mortgage? A. No, sir.

Q. Did he ever demand that you repay him this sum of money? A. No, sir.

Q. Did he ever give you notice, either verbally or in writing that he was no longer a tenant of this property but was holding the land as mortgagee? A. No, sir; not that I know of.

Q. Did you know that he was holding as a mortgagee? A. No, sir.

Q. When was the first time, to your knowledge, that Mr. Carpenter ever claimed that this property belonged to him? A. I don't know; I could not answer that exactly because I don't remember. I don't know as he ever told me the property belonged to him.

Q. In June of 1928 you started an ejectment proceeding, did you not? A. Yes.

Q. Had you known, prior to that time, that Mr. Carpenter claimed title to this property? A. No, sir; I did not. I even notified the people that bought it—

Q. Did you, in October, 1914, together with your brother, convey to the Tidewater Pipe Company a right of way over this property? A. We did.

The Court: When was that? 1914, you say?

Mr. Hanson: October 2nd, 1914.

The Court: Have you the original deed from Gardner to Brown?

Mr. Richardson: We have it here, your Honor.

The Court: Have you the deed you just referred to for this right of way to the Pipe Line Company?

Mr. Richardson: We will admit there is such a deed.

Mr. Hanson: We are able to prove it by a search of the property.

Mr. Richardson: You will also admit that we gave a deed at the same time?

Mr. Hanson: Oh, yes; anything that shows up in the record.

CROSS-EXAMINATION by Mr. Richardson:

Q. Mr. Brown, did you know at the time you purchased this property from Mr. Gardner that there was a $3500 mortgage on there? A. Yes, sir.

Q. Did you go to see Mr. Carpenter after hearing about that $3500 mortgage before you purchased the property? A. No, sir.

Q. Well, if you knew that there was a $3500 mortgage, you knew, of course, it had been recorded? A. Yes.

Q. Why didn't you go to see Mr. Carpenter to find out from him? A. Because Mr. Gardner explained it to us, and Mr. Gardner is a very reliable man, always bears that reputation, and we did not want anything further, we just transacted the business.

Q. But you have bought and sold a lot of property, have you not? A. Some.

Q. And you rely on yourself, do you not? A. Yes, and rely on character a good deal, too.

Q. You did not think it worth your while to see Mr. Carpenter and ask him his side of this $3500 mortgage? A. No.

Q. Now, when did you take it up with Mr. Carpenter about this $3500 mortgage? A. That I don't remember.

Q. You have just testified that Mr. Carpenter never mentioned the $3500 mortgage to you at any time; is that correct? A. That is as near as I can remember, yes.

Q. How, then, did you come to bring suit in the Court of Chancery in 1898 to set the mortgage aside? A. Because we found out the mortgage was on there.

Q. But didn't you first go to see Mr. Carpenter and discuss it with him and ask him to surrender that mortgage? A. I don't think I did.

Q. You just started your suit without seeing Mr. Carpenter at all? A. I think we put it in the hands of Mr. Vail.

Q. Didn't you allege in the bill filed in that cause that part of the consideration for that mortgage was to secure and preserve said property and the amount of said mortgage from any loss which the said Gardner might thereafter incur? A. I don't remember; I did not understand what—

Q. In the bill that you filed in the Court of Chancery in an effort to set the mortgage aside, Mr. Brown— A. Yes.

Q. Didn't you say in that bill that a part of the consideration for the mortgage was to secure and preserve said property and the amount of the said mortgage from any loss which Mr. Gardner might thereafter incur? A. I don't remember; I don't know. We put that in the hands of Mr. Vail and Mr. Vail attended to it. We had no hearing, either.

Q. Were you friendly with Mr. Carpenter at the time you took this conveyance? A. No, not particularly.

Q. Not particularly. Were you an enemy of his? A. No, I don't say I was an enemy of his.

Q. Was there any reason why you could not go to see him about the $3500 mortgage? A. Because I did not like the way the man acted.

Q. Now, isn't it a fact, Mr. Brown, that this property, at that time, was worth about $6,000?

A. It is not a fact because we sold part of it, all of the front, at public auction there.

Q. When was it that you bought that? A. Why, a few years prior to this. I don't know just when it was, the date is there when we bought it. I know it was a year or two; it was not more than one or two years.

Q. Wasn't this land we are talking about, the Van Sickle farm, the premises in question, wasn't that partially clay lands, Mr. Brown? A. That clay is no good; it is soft, red shale.

Q. It had been worked, had it not, as a clay bank? A. For common brick and stuff like that. There is lots of that everywhere, but there is very little of that and that is way up on top of the hill.

Q. Nevertheless, it was clay land, or some of it was clay land, and you based an estimate of $40 an acre? A. Yes, around about that, $40 an acre. I have appraised them in accordance with what property of that kind can be—

Q. Now, you have stated that you are not a relative of Mr. Gardner. Isn't it a fact that your brother married his daughter? A. That does not make me a relative of him. I am no relative of him. I don't see it.

The Court: I cannot, either.

Q. Now, you have said you had a conversation with Mr. Carpenter and you would let him stay if he paid the taxes; is that right? A. What?

Q. You have stated that you said to Mr. Carpenter that he can stay in possession if he, Mr. Carpenter, paid the taxes? A. Yes.

Q. When was that conversation? A. About the time that the lease expired.

Q. Around 1903? A. I forget when it was; about the time that the lease expired.

Q. Wasn't there any conversation at that time about the $3500 mortgage? A. Not that I can remember; I cannot remember—if there was, it is too far back.

Q. Now, from that day in 1903 in which you said you talked to Mr. Carpenter, until the present time, you have never taken the trouble to check up on the taxes, have you? A. No, I don't know as I have.

Q. Why not? A. Why, we have so much property there, so much taxes, I supposed of course he was paying right along, and even if he did not pay along, we thought we would let it go by rather than spend the money at the present time to pay the taxes, but Mr. Carpenter paid the taxes, you know, when we started in, and then when he quit, I forget, I didn't know. I did not check up on it.

Q. The only right of ownership which you have exercised since 103 is this deed to the Tidewater Oil Company; is that right? A. That is right; they came right to us, the Tidewater Oil, and wanted a deed for it and we gave them a deed, or sold it to them.

Q. What is the value of that property now, Mr. Brown? A. I don't know; I am not real estate man enough to tell you.

Q. Well, is it considerably more than what you paid for it? A. Why, yes; certainly it is. That that I bought in front is worth considerably more.

Q. In 1903, Mr. Brown, you did not enter into any written agreement with Mr. Carpenter; all you had was a verbal conversation; is that correct? A. That is correct.

Q. Did you bring any action against Mr. Carpenter between 1903 and the time you started injunction proceedings here about a year ago in this court? A. I don't know. I told you we had to put the colored people off the place there.

Q. That was before 1903, of course? A. No, I don't know whether there was anything after 1903 or not; I don't remember.

Q. And Mr. Carpenter has worked that farm and been on there ever since 1903, has he not? A. Well, he has worked it; he has had possession of it. There is no house or buildings on it or anything, just merely stark land lying in back there, forty acres; sometimes he would go through and plow up a field and put some corn in and get a crop. So long as the taxes were paid—I am sure if anybody down in that section paid the taxes on any farm that we have got, they can use it.

Q. You knew, of course, after the Chancery suit in 1898 that Mr. Carpenter claimed that the mortgage was a good mortgage, did you not, the $3500 mortgage? A. No, I did not know that he claimed it was a good mortgage. What grounds did he have?

Q. Well, you attempted to set that aside as a fraudulent mortgage? A. Yes.

Q. And he defended it? A. Yes.

Q. And alleged that he had paid certain moneys as consideration for that, did he not? A. Paid

$100 or something like that, on $3500; that does not give him any ground—

The Court: That does not appear from the pleadings in that suit?

Mr. Hanson: I was going to raise that question. I did not want anybody—

The Court: I have examined the file and the pleadings in that suit, and I do not see where the defendant, Mr. Carpenter, claimed anything there except that the bill of complaint was an insufficient statement of a cause of action. He filed a demurrer.

Mr. Richardson: This was the language of the Chancellor. I take it, it was raised in the answer.

The Court: There was not any answer.

Mr. Richardson: In the demurrer, the Court says one of the purposes in subdivision A was to secure Carpenter against obligations to be assumed for Gardner.

The Court: That is what the bill says.

Mr. Richardson: I see.

The Court: That is what the bill stated, but there is no proof and the Chancellor stated that that statement was too insufficient and too indefinite to charge the defendant and put him on a defense.

Mr. Richardson: I see.

RE-DIRECT EXAMINATION by Mr. Hanson:

Q. Mr. Brown, this property was located directly in back of other property that you owned on the highway, was it not? A. Yes, sir.

Q. It had no access to the highway outside of that right of way? A. Ten foot right of way, that is all it has got today.

Q. Now, you spoke of Mr. Vail handling this matter for you? A. Yes, sir.

Q. Did you appear in the Court of Chancery in any of these hearings? A. No, sir.

Q. I show you this paper writing, Mr. Brown, and ask you whether that is in your handwriting?

The Court: You are just asked if that is in your handwriting.

A. Yes, sir.

Q. To whom was that given, Mr. Brown? A. Mr. Gardner, I think.

Q. Mr. Gardner.

Mr. Hanson: I would like to have that marked for identification, if your Honor please, and have the opportunity of recalling Mr. Gardner just to prove that.

The Court: All right.

(Marked Exhibit C-1 for identification.)

Examination by the Court:

Q. Mr. Brown, when you spoke of Mr. Vail, he was a member of the firm of Vail & Ward, who were solicitors of this court? A. Yes, sir.

Q. Now, this suit which you brought against Carpenter to have this $3500 mortgage cancelled was brought in 1898. Why was it that after the demurrer was sustained in that suit that you did not ask leave to amend your bill and prosecute the suit on the amended bill, and state such facts as would entitle you to a decree cancelling the mortgage, if the mortgage was an invalid one?

A. Well, we left it to our counsel, Mr. Vail; he took all the papers at the time, and that is all.

Q. I know, and that was in 1898, and so far as appears from the file, nothing happened in that case after January 17, 1899, when an order was filed sustaining the demurrer. Now, from that time until the filing of the present bill, which was on August 7, 1929, a period of over thirty years, you apparently did nothing to assert any claim in opposition to the $3500 mortgage. Now, why didn't you? A. Well, we thought that the $3500 mortgage, according to my advice from Mr. Vail, did not amount to anything; that he could not collect it. Vail says let him foreclose it—so, depending on the advice from Senator Vail, let him foreclose it. Now, I said, what will we do next? And he said, "Let him foreclose it," just like that; so we waited for him to start foreclosure suit onto it.

The Court: All right, that may be the explanation, I don't know.

The Witness: That is as true as I am sitting here. Mr. Vail said, "Let him start," and I said, "What'll we do next?" and he said, "Let him start to foreclose it if he can, but he cannot get nothing."

Q. Now, you say that since the expiration of this lease there has never been any statement by Mr. Carpenter to you indicating that he was holding possession under the mortgage? A. No, sir; no indication whatever.

Q. Has he ever demanded payment of the principal or interest of the mortgage? A. No, sir; positively not.

Q. At no time since you obtained title? A. No, sir; positively not.

RE-CROSS EXAMINATION by Mr. Richardson:

Q. You have stated, Mr. Brown, that there was a valuation put on certain property on the front of that road that led you to arrive at the valuation of $2,000 or $2,200 for the Van Sickle farm; now, isn't it a fact that the property you purchased along the road was purchased at a Special Master's sale under a mortgage held by your father? Wasn't your father the mortgagee of that property? A. He was the mortgagee, but there was several bid onto it; there was people bidding onto it; Mr. Carpenter bid onto it for clay land, the clay land people bid onto it. It was an open sale; there was at least fifteen or twenty people there.

GEORGE H. BROWN, one of the complainants, called as a witness in his own behalf, being first duly sworn according to law on his oath testified as follows:

Direct-examination by Mr. Hanson:

Q. Mr. Brown, where do you live? A. Woodbridge.

Q. How long have you lived there? A. All my life.

Q. How old are you? A. Sixty-two.

Q. You are a brother of David Brown, the last witness? A. Yes, sir.

Q. And together with your brother, you secured a deed in 1897 from Charles and Mary Gardner covering this property in question? A. We did.

Q. Do you recall the consideration for that deed? A. No, I know there was a grocery bill and some money. That was so long ago I don't know how much there was.

Q. You were in the grocery business at that time? A. Yes, sir.

Q. Did Mr. Gardner deal with you? A. He did.

Q. Are you familiar with the value of properties in Woodbridge in the vicinity of this property at the time you purchased it? A. No, I was not, but if you like, my brother made a mistake; there was 21 acres in that piece of property that he bought.

Q. Twenty-one acres fronting on the road? A. He said sixteen, and we sold the Pennsylvania Railroad five acres, so there was twenty-one acres in that piece of property.

Q. So that the parcel your brother testified to a short time ago as having been bought at public sale, consisted of twenty-one acres instead of sixteen? A. Yes, sir.

Q. At the time you purchased this property, together with your brother, did you know that there was in existence an $800 mortgage held by the Perth Amboy Savings Institution? A. I did.

Q. Did you know that Mr. Carpenter had a lease on this property? A. I did.

Q. Do you recall what information you received regarding the lease? A. No, I don't.

Q. Do you recall how long the lease was to run after you bought the property? A. I know he said it was a ten year lease.

Q. Do you recall the consideration or the rental set out in the lease? A. No, I don't.

Q. Did you ever see a written copy of that lease? A. I don't know as I did.

Q. How long after you purchased this property did you see Mr. Carpenter? A. Oh, I suppose within two or three weeks.

Q. Where did you see him, if you recall? A. Up on the farm.

Q. Did you go there purposely to see him? A. Yes.

Q. What was the reason for going there? A. I wanted to know what he was going to do.

Q. Did you tell him that you were one of the owners of the property? A. I told him I was one of the owners and he could keep on right along if he paid the taxes.

Q. Who was with you? A. I don't know who was with me.

Q. What did Mr. Carpenter say to you when you told him that? A. He did not say anything; he shrugged his shoulders and went on.

Q. Did you ever receive any money from Mr. Carpenter for rental of this property? A. No, sir.

Q. Did you know of your own knowledge if Mr. Carpenter paid the taxes? A. I did not.

Q. Did you ascertain from the collector's office whether or not the taxes were being paid on this property? A. Well, twice I found the taxes were paid. I did not know; I supposed he was paying them.

Q. On two separate occasions you went there and got this information? A. Yes.

Q. And you found that the taxes were being paid? A. Yes, I found that the taxes were paid.

Q. Were the tax bills sent to you at any time? A. No.

Q. At any time that you saw Mr. Carpenter, did he tell you that he was the holder of a $3500 mortgage on this property? A. No, sir.

Q. Did he ever ask you to pay the interest on this mortgage? A. No, sir.

Q. Did he ever ask you to pay the principal on this mortgage? A. No, sir.

Q. Did he ever inform you that he had paid into the Court of Chancery approximately $1100 for an assignment of this mortgage or the decree? A. No, sir.

Q. Did he ever ask you to return that money to him? A. No, sir.

Q. Did he ever serve you with notice, either written or oral, to redeem any tax certificates which he held on the property? A. No, sir.

Q. Did he ever advise you that he had purchased any tax certificates against this property? A. No, sir.

Q. Did he ever tell you that he was the owner of this property or the holder of this property under his mortgage? A. No, sir; not that I know of.

Q. Or did anyone representing Mr. Carpenter tell you? A. No, sir.

Q. Did anyone representing Mr. Carpenter ever make demand upon you to pay the taxes? A. No, sir.

Q. Have you received any written communications whatever from Mr. Carpenter from the time his lease expired until the institution of this suit? A. Never had any communication with him in my life.

Q. Have you seen Mr. Carpenter during that time? A. I have seen him off and on, yes.

Q. You executed a deed with your brother, did you not, on October 2nd, 1914, to the Tidewater Pipe Company granting a right of way across this property? A. Yes, sir.

Q. Did you know what use Mr. Carpenter made of this property? A. Well, he was supposed to farm it.

Q. Do you know of your own knowledge just what he did? A. Why, he farmed it. As long as he farmed it there was no objection. Two or three years ago he started an aeroplane up there and I went up there and objected to it because it was not farming. So long as he was farming I had no objection.

Q. Do you know just what year it was that he started this aeroplane there? A. I think it will be two years this August.

Q. Where did you see Mr. Carpenter at that time? A. Up on the farm; I went up on the farm.

Q. Was anybody with you? A. My father-in-law and son were with me.

Q. Your father-in-law and son? A. Yes.

Q. Will you state just what you told Mr. Carpenter at that time? A. I saw the man and told the man that Mr. Carpenter did not own the property.

Q. I asked you what you told Mr. Carpenter, not the flyer? A. Mr. Carpenter was away, I told the man; I did not bother Mr. Carpenter at all, and the man quit then.

The Court: Didn't you have any conversation with Mr. Carpenter at all at the time?

The Witness: No, I have not spoken to him in a long while.

Q. What is the character of this land? A. Why, it is rolling a little, rolls toward the brook and then rolls up toward the front, it is kind of a rolling place.

Q. Well, what is it good for? A. I don't know what it is good for; it might be good for clay or brick or something like that.

Q. Well, is it good for anything; you say he was supposed to farm it; is it farm land? A. Yes, sir.

Q. So then, it is good for farming? A. Yes, sir.

Q. Is the whole 40 acres good for farming? A. Yes, I think the whole of it; it is a little low in one corner of it.

Q. Has anybody ever farmed the whole of it, so far as you know? A. Well, I know a man by the name of Van Sickle used to farm it. I remember when he farmed it.

Q. Has Carpenter ever farmed the whole of it? A. No, I don't think he has.

Q. What part of it has he farmed? A. Well, he used to plow up one place and then another place and then cut some hay off it, and the like of that.

Q. Is the property fenced in? A. No, I don't think it is; I think the fence is all down, was at that time.

Q. Well, how long has the fence been down? A. I could not tell you; the only fence up is along the Port Reading Railroad.

Q. Was there a fence between your property, that is, the 21-acre tract which your brother testified concerning, and this property? A. You mean my brother's property?

Q. He said he purchased a tract of 16 acres; you say it is 21 acres, and that this particular 40-acre tract lies in back of it; is that right? A. Yes.

Q. Is there a fence between the two properties? A. No, there is a brook, a brook runs along and divides it. It was originally all one piece of property.

Q. How is access to the 40-acre tract gained? A. By a right-of-way or driveway.

Q. Where? A. Crosses the brook up above, just a driveway in, that is all.

Q. Across your property, across the other property? A. Yes.

Q. Is there any other means of access to this 40-acre tract except over this? A. By going through the field, somebody else's property.

Q. I mean, it does not abut on any road? A. No, it does not abut on any road at all.

Mr. Hanson: I will be very glad to indicate to the Court just the character of this property.

The Court: I think I have a fair picture of it now.

George H. Brown—Cross

The Witness: It is property way in back, no frontage on the road at all.

Q. And this property that you sold to the Port Reading was not from this Van Sickle property?

The Court: That was from the 21 acres.

The Witness: That did border on the Lincoln Highway.

CROSS-EXAMINATION by Mr. Richardson:

Q. Mr. Brown, didn't you have a conversation with Mr. Carpenter some time around the time of the expiration of this lease about this property? A. No, sir.

Q. Didn't you testify before Judge Kirkpatrick in this last ejectment suit that before and after the expiration of the lease Carpenter laughed at me and said he owned it? A. I may have made some statement like that; I don't know; I would not say; I don't remember. If I made it, I must have made it, that is all.

Q. You now say you did not say it? A. No, I don't say I did not say it.

Q. So he may have told you that he did own the property about the time of the expiration of the lease? A. Yes, he may have said it.

Q. Did you marry Mr. Gardner's daughter, Mr. Brown? A. I did.

Q. And at the time of the conveyance to you and your brother from Mr. Gardner you were on very friendly terms, were you not, with Mr. Gardner? A. Yes, I have always been all my life on friendly terms, I have known him all my life.

Q. When, in connection with the transfer of this property, did you marry his daughter? A. Two or three years after.

Q. Were you going with her at the time of the transfer? A. Quite probably.

Q. Now, you say you went to the tax office on two occasions; what did the tax records show, do you recall? A. No, I cannot recall; they were paid.

Q. They were marked "paid"? A. So the collector told me. Mr. Drummond told me that they were paid; that is all I know.

Q. Didn't he tell you there were tax certificates out? A. No, sir.

Q. Did you visit the property at any time between 1903, or the expiration of the lease and the time you saw the aeroplane? A. Yes, I was on it lots of times, gunned all over it.

Q. Beg pardon? A. I gunned all over it.

Q. Did you ever have any conversation between those intervening years with Mr. Carpenter? A. I don't think I have spoken to Mr. Carpenter in ten or twelve years.

Q. Were you a party to the proceeding in the Court of Chancery with your brother against Mr. Carpenter in 1898? A. Yes, I suppose I was, if it is the one Mr. Vail had.

Q. You knew Mr. Carpenter claimed a $3,500 mortgage, did you not? A. No, I never knew he claimed it. I don't know as I ever saw the papers, Mr. Vail had them.

Q. Why didn't you think it was worth while to talk to Mr. Carpenter about this $3,500 mortgage? A. I never talked to him about it.

Q. I know, but I wondered why you did not think it worth your while to talk to him about it. A. Because the mortgage was supposed to be cancelled when the lease was up; it was only a security mortgage, that is all.

Q. Did you have the property searched when you bought it? A. No, I did not.

Q. Sure of that? A. Yes, sir.

Q. But you did know about the mortgage, the $3,500 mortgage? A. Why, yes; Mr. Gardner told me about that.

The Court: What did he tell you?

The Witness: He said the mortgage was given for security for the lease.

The Court: Is that all he told you?

The Witness: Yes, all he said. He gave Mr. Carpenter that mortgage to secure the lease. I told him at the time he was foolish.

By the Court:

Q. Well, you knew there was a $3,500 mortgage on there; didn't you expect to have to pay the mortgage? A. Not the way I understood it, because the mortgage was no good, it was only given, there was nothing paid for it.

Q. Why did you think it was no good? A. The only thing is Mr. Gardner told me why he gave it; that is the reason why.

Q. What did he tell you? A. He told me that he gave the mortgage to secure the lease, that is all.

Q. What good would a mortgage to secure anything be if it was not to be paid? A. I don't know, I am not—

Q. Was there anything said about how much you would have to pay to get the land released from the mortgage? A. No, sir.

Q. What is your explanation for not having taken any other proceeding after the suit that has been referred to which Mr. Vail conducted for you to have this mortgage cancelled? A. I saw Mr. Vail all of a dozen times and every time he said everything is all right, everything is all right, and then after two or three years he said, "Wait until they start to foreclose the mortgage, then we will meet the question." That is all I knew. I saw him a year before he died and talked to him about it and he said things were all right. That was a year before he died, up in his office.

Q. When was that? A. About three or four years ago, I went up and seen him about it.

RE-DIRECT EXAMINATION by Mr. Hanson:

Q. I show you Exhibit C-1 for identification and ask you if that lower signature is yours? A. Yes, sir; that is my signature.

Q. Was that signed at the same time as your brother's signature? A. At about the same time; I think he drew it up, Mr. Gardner came right from his house up to my house and I signed it.

Mr. Hanson: I would just like to recall Mr. Gardner for the purpose of identifying this paper writing.

CHARLES GARDNER, recalled.

Direct-examination by Mr. Hanson:

Q. Mr. Gardner, I show you Exhibit C-1 for identification and ask you whether or not that paper has been in your possession? A. Ever since November 14, 1919.

Q. And there is mention therein of Charles Gardner; is that you? A. That is me.

Q. From whom did you secure that? A. From Dave and George Brown. I wanted to cross the property and I got permission from them to cross the property so that there would be no interference.

Mr. Hanson: I would like to offer that.

Mr. Richardson: I have an objection to it on the ground that it is a self-serving declaration.

The Court: Well, it is also evidence of the exercise of dominion and ownership of the party, isn't it? It is just as much evidence, in other words, as the deed for the right-of-way to the Tidewater Pipe Company. That also is a self-serving declaration, perhaps. I will admit it for what it is worth. I don't know whether it is worth anything; I have not read it, but you may have it marked in evidence.

Mr. Hanson: We are only offering it for the purpose of showing exercise of ownership.

(Marked Exhibit C-1.)

Mr. Hanson: May I ask Mr. Gardner a few more questions?

Q. Mr. Gardner, was there any fence around this property? A. No.

Q. What is the nature of the property? A. There is no line fence at all.

Q. Just open? A. Just open.

Q. What kind of ground was it? A. All cleared ground.

Q. Was it—what was it suitable for? A. Farming purposes.

Q. How much farming did Mr. Carpenter do on it? A. He did not do much farming; he pretended to farm; he cut his hay, probably. In the fall of the year I was to receive a certain portion for my share at the time I leased it to him. I got about two or three lots of little nubbins of corn. That is all I ever received off the place, and he also cut down—

The Court: You have told us that before.

CROSS-EXAMINATION by Mr. Richardson:

Q. Mr. Gardner, did you ever go on this property in 1919? A. Why, I crossed over to the depot, and I would go up along the edge of this property, which is right back of where I live and I did not want to be ordered off the property as he had ordered other people off, so there would be no trouble in my going over this property.

Q. Had he ever ordered you off it before? A. No, he had never ordered me off, but he had other people, and I wanted this paper to show it to him so that I would have permission to go across this property. It is simply across the end of the prop-

erty over to the depot. It is a short cut from my house.

(Witness excused.)

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

DEFENDANT'S EVIDENCE.

WILLIAM V. CARPENTER, the defendant, called as a witness in his own behalf, being first duly sworn according to law, on his oath says:

Direct-examination by Mr. Richardson:

Q. Mr. Carpenter, you took a mortgage from Mr. Gardner for the old Van Sickle farm back in 1894, did you not? A. Yes, sir.

Q. That mortgage was for $3,500?

Mr. Richardson: I want to offer it, a certified copy.

(Marked Exhibit D-2.)

Q. You went on the Van Sickle farm as lessee, originally, did you not? A. Sir?

Q. You went on the Van Sickle farm under a lease, originally? A. Yes, sir.

Q. That lease was dated when? A. 1893.

Q. A ten year lease? A. Ten year lease.

Q. Why was the mortgage for $3,500 given? A. That was money that I advanced Mr. Gardner for taxes and for a horse and wagon, and different things that I sold him, and for moneys that he might need during the lease time.

Q. And at whose suggestion was this mortgage drawn? A. Mr. Gardner's.

Q. What did he say in connection with it? A. Why, to protect my lease and these moneys.

Q. Well, what did he say, did he tell you to draw the mortgage? A. Yes, he told me to have the mortgage drawn and to bring it there, and he signed it at his house for the convenience of his wife.

Q. Who suggested the amount of it? A. Mr. Gardner.

Q. And had you previously talked it over before you brought the mortgage to his house to sign? A. Yes, sir.

Q. Were you at that time loaning him certain moneys? A. Yes, sir.

Q. What happened in 1897 between Gardner and the Browns? A. In 1897?

Q. Yes. A. Why?

Q. Was there a conveyance of this property? A. Yes, Dave Brown came to me and told me that he had bought the property and wanted me to get off.

Q. Yes. A. I said, "Get off what property?" and he said the Van Sickle property; that he had bought it. "Well," I said, "There are certain claims there that I have that have got to be settled before I think about moving off." And he said he did not buy it subject to any claims. I said, "I don't know what terms you bought it, but they are there on the record, and they have got to be gotten rid of." He said he had more money than I had and he would fight me out.

Q. Who else did you see about that transfer at that time; did you see Mr. Gardner? A. Yes, after Mr. Brown went away I drove up to the factory where Mr. Gardner was foreman and he came out and I said, "How are you, Charley?" and he said, "How are you?" and I said, "Mr. Gardner, is this so, what I heard?" and he said, "I don't give a damn what it is you heard." I said, "Hold on, I haven't told you what I heard, maybe when I tell you, you might give a damn." He said, "Your business is not with me, it is with the Browns." I said, "No, you are wrong again, my business will be with you and will continue to be with you until I get through, then if I think it is worth my while I can have my talk with the Browns." He said, "I can beat that mortgage, that the mortgage did not amount to anything" and he knows it did not amount to anything. I said, "You oughn't to say those things, that is not very kind." So we left it.

Q. What happened next? A. I brought suit against him on December the 6th, 1897, on two notes that I held that he had given his aunt for $300 that she had advanced. She came to me and wanted me to buy the notes. She said that—

Mr. Hanson: I object.

The Court: Objection sustained. Do not repeat any conversation that you had with the aunt.

Q. Did you tell the aunt that Gardner was bankrupt? A. No, sir; I never said that he was bankrupt.

Q. Now then, after that, what happened in that suit; was there a judgment? A. Why, he filed his

answer on the 16th and on the 23rd he assigns all interest in any property that he had or might have to Mr. A. D. Brown for $136, and then let's the judgment go by default.

Q. And did Brown then start a suit to cancel this mortgage? A. Yes, sir.

Q. You appeared in that suit, did you not? A. Why, he filed his bill—

The Court: The record shows what happened. The question is, you appeared in the suit. Allen Strong represented you, didn't he?

The Witness: Yes, sir; he represented me, but I was not in court.

Q. Now, after that did you have any conversation, after this Chancery suit did you have any conversation with either of the Browns or Mr. Gardner? A. Well, when they put my man off the farm.

Q. When was that? A. 1928, I think.

Q. 1928? A. 1898.

Q. 1898, and then you continued to hold under your lease, did you not, after that? A. Yes, sir.

Q. Until your lease expired in 1903? A. Yes, sir.

Q. Did you have any conversation with the Browns after the expiration of the 1903 lease? A. Well, I told Dave Brown that I was fully in possession under my mortgage.

Q. When did you tell him that? A. In the fall of 1903.

Q. Did he come over to the farm to see you; was that that occasion? A. Yes, sir.

Q. And you had a conversation also with George Brown about that time, did you not? A. I did not see George.

Q. You did not see George? A. No.

The Court: Which is George, the older or the younger?

Mr. Hanson: George is the last witness, the younger one.

Q. There was an $800 mortgage on this property, Mr. Carpenter, was there not? A. Held by the Perth Amboy Savings Institution, afterwards assigned to Robert A. Hirner.

Q. And you paid certain moneys into court in order to purchase that decree, did you not? A. Yes, sir; I was made a party to the suit on three counts.

Q. Now, did you ever get an assignment of that bond and mortgage?

Mr. Hanson: I submit the assignment is the best evidence, if he has it.

The Court: It was stated here this morning that the decree directing that the money which was paid into court be paid to the complainant, also directed that an assignment of the mortgage to Mr. Carpenter be made. That is incorrect. The decree which directed the payment of the money out of court directed that the mortgage and the assignment from the Perth Amboy Trust Company to Hirner be delivered to Mr. Carpenter, but there was no direction of an assignment of those papers to him, there was a direction in the decree

that the decree be held for the benefit of Carpenter thereafter, but no proceedings were taken under that decree, so that the matter stands exactly as it did at that time. Undoubtedly Mr. Carpenter is entitled to subrogation. The order directing the payment of the money out of court so states. There is no question but what he is entitled to subrogation for the $800 mortgage.

Mr. Hanson: We do not dispute that. We admit that.

The Court: That, as I understand, is one of the things from which you ask to redeem this property?

Mr. Hanson: Yes, sir.

Q. Has this $3,500 mortgage or the $800 mortgage ever been paid to you? A. No, sir.

The Court: Did you ever demand payment of the $800 mortgage from either of the Browns?

The Witness: When Dave Brown came and ordered me off the place that time—

The Court: I know, but that was in 1898?

The Witness: Yes, sir.

The Court: What did you say to him then?

The Witness: I told him he had to satisfy it.

The Court: Let me see, that was in 1898?

The Witness: Yes, sir.

Mr. Hanson: The decree was in 1900 and the lease expired in 1903.

The Court: When did you demand payment of the $800 mortgage?

The Witness: I say, when he told me to get off the place, when he notified me he bought it.

The Court: That was in 1898, also?

The Witness: Yes, sir.

The Court: You are sure of that?

The Witness: Yes, sir; that is when he notified me that he bought the property, 1897—1897.

By the Court:

Q. In 1897 you demanded payment of the $3,500 mortgage? A. Yes, sir.

Q. Have you ever demanded payment of it since? A. No, sir.

Q. Have you ever demanded payment of any interest on the mortgage? A. No, sir.

Q. Have you ever demanded payment of any interest on the $800 or the $1,100 and some odd dollars you paid into court? A. No, sir.

Q. Have you ever had any conversation with either of the Browns with respect to the $800 mortgage or the $3,500 since the expiration of the lease? A. No, sir; except that time I told them I was holding possession.

Q. Well, what did you say then? A. I told them I was holding possession of the property under my mortgage.

Q. Which mortgage? A. $3,500.

Q. And you told him about the $800 mortgage at that time? A. Well, they were both holding—

Q. I am not asking you what the situation was, I am asking you what you said. A. I just told you, I just said to him—

Q. I am holding under the $3,500 mortgage, is that what you said? A. Yes, sir.

Q. Just when did you say that? A. In the fall of 1903.

Q. You have never demanded any interest on that mortgage since then? A. No, sir.

Q. Have you ever presented to either of the Browns or to Gardner a statement of the amount of principal or interest which was due on the $3,500 mortgage? A. No, sir.

By Mr. Richardson:

Q. Mr. Carpenter, why didn't you ever take the matter up with the Browns? A. Because I had possession of the property.

Q. What difference did that make in your mind? A. I thought the property was good for it.

Q. Did you continue to hold possession from 1903 down to the present time? A. Yes, sir.

Q. Mr. Brown said you continued there in 1903 under a lease, or renewal of the lease, I suppose; was that lease renewed in 1903? A. No, sir.

Q. Was there any lease after 1903? A. No, sir.

By the Court:

Q. I think you said this lease was executed in 1893, wasn't it? A. 1893, September 19th.

Q. What rent were you to pay under that lease? A. I was to pay one-half of the produce.

Q. Did you ever keep any account of the products of the farm? A. Up to the time that it was

sold, yes, sir; I rendered a statement to Mr. Gardner the first of January of each year.

Q. That is, up until 1897? A. Yes, sir.

Q. Have you kept any account since then? A. No, sir.

Q. And you brought suit against the Browns to establish your lease, didn't you? A. Yes, sir.

Q. And it was held, the Court decided that your lease was still in force when you brought that suit? A. Yes, sir.

Q. Do you remember when that was? A. In 1898, I think.

Q. 1898? A. The fall of 1898, I think.

Q. Did you keep any account of the produce that you raised on the farm for that year? A. I think I did; yes, sir.

Q. What did you do with the proceeds of it? A. I kept it.

Q. And you have done that ever since 1897, have you? A. Yes, sir; because the Browns put a—

Q. Never mind why, I will give you a chance to explain that. Has there been any change in the conditions under which you held that property so far as the income from it is concerned, or so far as the expense of maintaining the property is concerned, since 1897 up to date? A. I don't just understand the question, your Honor.

Q. Well, now, in 1897, after Gardner sold the property, you stopped giving him any statements of the produce, didn't you? A. Yes, sir.

Q. And you did not pay either him or the Browns any of the proceeds of the crops you raised on the property, did you? A. No, sir.

Q. You went ahead and kept it and paid the taxes just the same as you had before, didn't you? A. Well, I paid the taxes; yes, sir.

Q. You had paid them before? A. Yes, sir.

Q. And you continued to pay them? A. Yes, sir.

Q. And you continued to farm the place? A. Yes, sir.

Q. And you continued to keep the money which you got for the produce, didn't you? A. Yes, sir.

Q. And you have done that ever since? A. Yes, sir.

Q. In 1902 you were still doing the same thing, weren't you? A. Yes, sir.

Q. And in 1903 you were still doing the same thing? A. Yes, sir.

Q. And you have continued to do the same thing ever since? A. Yes, sir.

Q. What change was there in your method of operation of the farm or your conduct of the business between 1902 and 1903? A. The Browns put up a dam there, and flooded—put a dam across the brook and flooded a part of the property and I was advised by my attorney, Allen Strong, not to pay any more rent as long as the dam was there, and that dam is there yet.

Q. And that is the reason you did not pay any more rent? A. Yes, sir; I thought I had paid my rent.

Q. But there has been absolutely no change in the conditions under which you held that property from 1897 right down to the present time? A. No, sir.

Q. Have you kept an account of the taxes you have paid on the property? A. Yes, sir.

Q. But you have not kept any account of the crops that you raised or the proceeds of those crops? A. No, sir; it did not amount to very much, anyhow.

Q. And, as I understand it, you have never given Gardner or either of the Browns a statement of the amount of principal or interest which you claim to be due on either the $800 mortgage or the $3,500 mortgage? A. No, sir.

The Court: All right.

By Mr. Richardson:

Q. You bought this property from the township for taxes, did you not? A. Yes, sir.

Mr. Richardson: I want to offer a certified copy of these.

Mr. Hanson: No objection.

The Court: I suppose both sides agree on these files going in evidence.

Mr. Richardson: We do.

Mr. Hanson: Yes, sir.

The Court: Suppose that he have them marked now to save time. There is offered and admitted in evidence on behalf of both parties to the suit the following files:

Docket 23/316, in the Chancery Clerk's office, Robert Adolf Hirner, complainant, against Charles H. Gardner, *et al.*, defendants;

Docket 23/457, William V. Carpenter, complainant and Robert A. Hirner, *et al.*, defendants.

Exhibits Offered in Evidence

Docket 21/684, David A. Brown, *et al.*, complainants, against William V. Carpenter.

There is also offered in evidence certified copy of deed, Charles H. Gardner *et ux*, to David A. Brown and George H. Brown, dated November 9, 1897, recorded in the office of the Clerk of Middlesex County in Book 296 of deeds, page 210, etc.

Mr. Hanson: This tax certificate, Leonard M. Campbell, Collector of the Township of Woodbridge, dated February 8, 1906, recorded in Book 189 of Mortgages, page 85.

(Marked Exhibit D-3.)

Certificate from Bruce L. Drummond, Collector to the Inhabitants of the Township of Woodbridge, dated October 16, 1899, recorded in Book 309 of Deeds, page 569.

(Marked Exhibit D-4.)

The Court: What is that, tax certificate?

Mr. Hanson: Yes, sir.

The Court: What is the date of the other one you first read?

Mr. Hanson: Assignment, Township of Woodbridge to William V. Carpenter, dated February 1, 1923, recorded April 14, 1928, Book 915 of Deeds, page 75.

(Marked Exhibit D-5.)

Recorded also in Book 15 of Releases, page 383, on January 22, 1925.

Assignment, Township of Woodbridge to William V. Carpenter, dated February 1,

1912, recorded January 22, 1915, Book 15 of Releases, page 382, and recorded April 14, 1928, in Book 915 of Deeds, page 77.

(Marked Exhibit D-6.)

Mr. Richardson: I would also like to introduce the original mortgage from Gardner to the Perth Amboy Savings Institution, dated April 10, 1893, for $800, and assignment of the mortgage to Robert A. Hirner, dated October 10, 1899.

(Marked Exhibit D-7.)

The Court: That is the mortgage which is the subject of the suit Hirner vs. Gardner, docket 23/316?

Mr. Hanson: That is correct.

The Court: Now, you both referred to two rights of way deeds, one given by the complainants and one by the defendant to the Tidewater Pipe Company. You haven't certified copies of that? Just read them into the record so far as you can.

Mr. Lowenkopf: Right of way agreement from David A. Brown and George H. Brown, dated October 2nd, 1914, recorded October 16, 1914, in Book 553 of Deeds, for Middlesex County, page 174, to the Tidewater Pipe Company, Ltd. Our abstract of title shows that.

The Court: Shows a conveyance of what?

Mr. Lowenkopf: A right of way for the purpose of constructing and erecting on same an iron pipe for the transportation of petroleum in such manner and

such quantity as may be deemed necessary and with direct ingress and egress, to construct, operate, repair, replace and maintain and from time to time to alter or remove the same in such manner as it may desire, provided the said pipe or pipes shall be so laid as not to interfere with the usual cultivation of the premises nor with any buildings thereon, and that the actual damage done to crops, temporary or otherwise, by the construction and operation of said pipe line shall be paid in full by the said grantees. The said lands are described as follows, and goes on to give the description.

The Court: Now, defendants offer in evidence a similar agreement executed by Mr. Carpenter, is that correct?

Mr. Richardson: It is.

(Complainant's agreement marked Exhibit C-4.)

The Court: At about the same time?

Mr. Richardson: Is that true, Mr. Carpenter? You gave a right of way?

Mr. Carpenter: No, they came through and paid me so much a foot for the right to go through.

The Court: Did you ever execute a deed?

The Witness: No, sir.

The Court: No deed at all.

The Witness: No, sir.

The Court: Did not sign any papers?

The Witness: Just a receipt for the money.

The Court: Is there anything further from this witness?

Mr. Richardson: I have one or two more questions.

Q. The entrance to this property, Mr. Carpenter, was over property owned by the Browns? A. It is not over it, it is a continuation of the highway from the road into this property.

Q. Was that property Brown's property? A. It was part of the original Van Sickle, Brown never owned that; no, sir, not that entrance part.

Q. How wide was that entrance, ten feet? A. No, fifty feet.

Q. Was it a road? A. No, fifty feet from the road.

Q. Was it a road, this entrance into your property? A. It is a highway; it is now called Kelly Street, fifty feet wide.

CROSS-EXAMINATION by Mr. Hanson:

Q. Mr. Carpenter, will you state in particular just what you gave Mr. Gardner as consideration for this $3,500 mortgage? A. I said cash, a horse and buggy and harness.

Q. How much cash? A. $500, I think $500.

Q. Did you give that all at one time? A. No, sir.

Q. Different times? A. Yes, sir.

Q. When did you first start to give him any? A. At first I loaned him $50 to pay someone that he had borrowed $50 off of to pay his taxes before I had this lease, and then he borrowed of me the next year and I paid that year's taxes off.

Q. Pay the rest of the taxes? A. Sir?

Q. Pay the rest of the taxes? A. Yes, sir.

Q. From that time until he gave you this mortgage you loaned him altogether $500? A. Yes, sir.

Q. You say you gave him a horse and wagon? A. Horse and wagon.

Q. How much was that worth? A. The horse and wagon and harness, I believe, was $175.

Q. Then when you said you loaned him money for a horse and wagon and money for his taxes, or paid his taxes, you referred to this $500 as the tax money, you never paid the taxes yourself, for him, did you? A. Sir?

Q. You never paid any taxes yourself, did you? You loaned him the money to pay the taxes with? A. Yes, sir.

Q. Did you keep a store of any kind? A. No, sir.

Q. Now, before Judge Kirkpatrick, the hearing before Judge Kirkpatrick, didn't you say in response to a question from me as to what consideration did you receive for this mortgage, didn't you say that Gardner owed you $400 for manure that I furnished him? A. That was another item.

Q. Well, isn't that the only thing you told me that time that Gardner owed you for? A. No, sir.

Q. Didn't you say in response to a question from me that Gardner owed me $200 before the mortgage was signed? A. I don't recall that.

Q. You don't recall that? A. No, sir.

Q. And didn't you further testify at that hearing that you cut down the trees to square up the Gardner debt? A. No, sir.

The Court: Have you a transcript of the testimony?

Mr. Hanson: I have not got it here. I will be very glad to send it down.

The Court: Have you a transcript of the testimony?

Mr. Richardson: No, sir; I have not.

The Court: I don't know what good it is going to do to ask these questions if you have not got a transcript of the testimony, unless somebody goes on the stand and contradicts him.

Q. Now, Mr. Carpenter, you testified before Judge Kirkpatrick that day that, in your opinion, at the time Mr. Brown bought it the property was worth between nine and ten thousand dollars? A. The property was worth that.

Q. Yes. A. Yes, sir.

Q. Isn't that what you said? A. Yes, sir.

Q. Was there any material increase in the value of this property between the time you entered into possession under your lease, which was in 1893, and the time that the Browns purchased the property in 1897? A. Yes, sir.

Q. Well, what was it worth at the time you entered into possession under your lease? A. About six thousand dollars.

Q. About six thousand dollars. Now, in an affidavit in a suit instituted by Brown against the Perth Amboy Speedway, Inc., did you say this: "The statement that in the year 1903"—you probably meant 1893—"Charles H. Gardner

named in the bill of complaint let and rented unto me said lands for the period of ten years is true''? Did you say that? A. From 1893 to 1903—

Q. Did you say that in the affidavit? A. Yes, sir.

Q. Did you say this: ''The property was then of very little value, perhaps not worth more than the amount of the mortgages hereinafter stated''? A. No.

The Court: Did you say that? You didn't say that?

The Witness: I say I don't remember saying that.

The Court: What are you reading from, Mr. Hanson?

Mr. Hanson: I am reading from a copy of an affidavit that was furnished to the solicitors for the complainants on the return day of the order to show cause.

The Court: Does that purport to be a copy of an affidavit taken by this witness which was filed in the cause?

Mr. Hanson: Yes, sir.

Q. Did you lend Mr. Gardner any money during the time or between the time you entered into possession and the time he sold the property to the Browns? A. Some, but I just don't know how much.

Q. You don't know how much? A. No, sir; I don't recall now.

Q. Now, these notes that you referred to, Mr. Carpenter, that you say you prosecuted same to judgment against Gardner; you started suit in

your own name, did you not? A. The notes were mine; yes, sir.

Q. You started suit in your own name, did you not? A. Yes, sir.

Q. And the notes had been originally given by Mr. Gardner to his aunt? A. Yes, sir; to his aunt.

Q. And you purchased these notes from his aunt? A. Yes, sir.

Q. Didn't you purchase these notes from his aunt for the express purpose of instituting suit and getting judgment on them? A. No, sir.

Q. Right after you acquired them you did start suit, did you not? A. Yes, sir.

Q. And as a result of that judgment that you obtained you set aside a conveyance that Mr. Gardner had made? A. Set aside—I can't quite get that.

The Court: I don't quite see what the notes have to do with the suit, Mr. Hanson.

Mr. Hanson: Nothing, if the Court please, except they are followed—

The Court: I don't think it has any.

Mr. Hanson: I won't follow them up.

Q. When did you first make up your mind that you claimed possession under this mortgage? A. At the expiration of the lease.

Q. At the expiration of the lease, did you purchase the property at a tax sale? A. Yes, sir; I had a tax sale and bought it from the township.

Q. You secured an assignment of two tax certificates? A. Yes, sir.

Q. In 1912? A. 1912.

Q. Isn't it a fact that that was the first time you made up your mind to claim possession of this property under your mortgages? A. No.

Q. Didn't you state before Judge Kirkpatrick on cross-examination that, "I held as a tenant until I got my first tax title in 1912"? A. Under the mortgage.

Q. Did you say that? A. I held it under the mortgage; yes, sir.

Q. I am asking you this, didn't you say that you held as a tenant until, "I got my first tax title in 1912"? A. No, sir; I did not say that.

The Court: Was it in 1912 that these tax certificates were assigned to you by the township?

The Witness: Yes, sir.

The Court: What right is given under those tax certificates; are they a term of years?

Mr. Richardson: One is and one is in fee. One is for thirty years and that has expired, expired in 1929.

The Court: Which one is that for thirty years, the earlier one?

Mr. Richardson: I think that is the first one; yes, sir.

By the Court:

Q. After you got that tax certificate, what were you holding under then, how were you holding possession of the property after you got that tax certificate, the thirty-year tax certificate? A. Well, I went right along the same, the mortgage and then I had that as an addition.

Q. Which were you holding under? A. The mortgage.

Q. Then you did not pay any attention to the term of years you got in that tax certificate, you are not making any claim of possession under that? A. I held that right—

Q. I want to know whether you claimed a right to possession and exercised that right under the tax certificate? A. No, I did not.

Q. You did not then and you do not now, is that right? A. No, I claim it under my mortgage.

Q. You never did claim possession under the tax certificate? A. No, I claim title to it, though.

Q. And you do not claim the right to possession under either of the tax certificates, is that correct? A. Well, whatever right the tax certificates call for I claim; yes, sir.

Q. Well, it may make a whole lot of difference whether you claim under the tax certificates or whether you claim under the mortgage or whether you claim under your lease, and I want to know which it is. A. I said it was under the mortgage.

The Court: All right, just so we understand each other.

Mr. Richardson: We claim, if the Court please, under both mortgages, not only one, but under both of them.

The Court: Now, you said that one of these tax certificates conveyed the property in fee?

Mr. Richardson: Yes, sir.

The Court: Has there ever been any proceedings indicating any foreclosure of either one of the tax certificates?

Mr. Hanson: I thought I covered that so far as my clients were concerned.

Mr. Richardson: We admit that.

The Court: No proceedings to foreclose the tax title; all right.

Mr. Hanson: Mr. Carpenter, did you ever serve notice on either of the Messrs. Brown to redeem these tax certificates which you held?

The Witness: No, sir.

RE-DIRECT EXAMINATION by Mr. Richardson:

Q. You have stated that in 1903 you had a quarrel with Mr. Brown, isn't that so? A. Well, some time after 1903.

Q. And since then have you been on friendly terms? A. No, sir.

Q. Did you speak to him over the period of years that we are talking about? A. Just to pass the time of day, that is all.

(Witness excused.)

The Court: Now, there has been handed to me a copy of Judge Kirkpatrick's conclusions in the ejectment suit in Middlesex Circuit, the suit of Brown vs. Carpenter. I have read it, and I don't know just exactly how you want me to consider it.

Mr. Hanson: If the Court please, may I suggest this, that we furnish you with a complete transcript of the proceedings before Judge Kirkpatrick. I think that might simplify matters.

The Court: If you are both willing that a copy of the transcript of those proceedings be offered or be submitted, I have no objection.

Mr. Richardson: I am perfectly willing.

The Court: All right; it will be understood that a transcript of the proceedings and the testimony will be submitted?

Mr. Hanson: The testimony; yes, sir.

Mr. Richardson: That is our case.

Mr. Hanson: I would like to call Mr. David Brown in rebuttal.

REBUTTAL.

DAVID A. BROWN, heretofore sworn, recalled in rebuttal.

Direct-examination by Mr. Hanson:

Q. Mr. Brown, it has been testified by Mr. Carpenter that in the fall of 1903 on his property he stated to you that he was holding possession under his mortgage; is that correct? A. It is not correct; he never made such a statement, to the best of my knowledge.

CROSS-EXAMINATION by Mr. Richardson:

Q. Mr. Brown, didn't you have a conversation with him in 1903 at the expiration of the lease? A. Well, 1903 is a good many years ago and I cannot remember, but I do know that he never in the world told us that he was holding anything under the mortgage.

Q. Do you remember any part of the conversation in 1903? A. No, I don't know, I might remember if I tried to, but I cannot remember any-

thing now; I do not even remember holding a conversation with him in 1903.

Q. You have testified previously that you went to see Mr. Carpenter on the expiration of this lease, did you not? A. Expiration of the lease.

Q. And told him he could stay there as a tenant? A. Yes, I ran across him after we were there on the place.

Q. Some dispute arose at that conversation, did there not? A. Not that I remember, no dispute at all. We merely talked the matter over and I said, "Well, if you want to continue here, you are now paying the taxes, all right, we have got property enough that we are glad to have it," and that is all that I remember. He shrugged his shoulders and did not say yes or no, but he went right on with it, and I considered that silence gave consent and said nothing more.

Q. You said nothing about the mortgage then, did you? A. No, sir.

RE-DIRECT EXAMINATION by Mr. Hanson:

Q. There has been a dam referred to; do you recall that? A. Yes, sir.

Q. When was that put up? A. I cannot tell you when it was put up; it was an upper part there, the biggest part of the stream that this dam went across flooded our property, that is, the 21 acres, and it did not cover a half or a quarter of an acre along the other side. I put the dam up there for the boys and girls of Woodbridge who wanted to skate, at my own expense of putting it up there for the convenience of the people to skate. That spring is washed away, and

it has never been rebuilt. It was put up in the fall and washed away when the ice went out.

Q. Was it ever put back again? A. Not unless the boys filled it in some in the fall, but never in the summer time.

Q. You did not reconstruct it? A. I did not.

The Court: When was the dam built?

The Witness: I don't know; it was a good many years ago, quite a number. I say, quite a number of years ago, it was when the railroad there went through.

CHARLES H. GARDNER, heretofore sworn, recalled in rebuttal.

Direct-examination by Mr. Hanson:

Q. It has been testified to, Mr. Gardner, that Mr. Carpenter, prior to the execution of this $3,500 mortgage, loaned you $500; is that correct? A. It is not; no, sir.

Q. Did he give you a horse and wagon? A. Well, he sold me a horse and wagon, but I let him have my horse.

Q. Was that an exchange? A. Not in exchange, but he had sold me a horse. I never paid him for the horse and buggy. I remember now since you speak of it, I did owe him for the horse and buggy, but I gave him my horse to sell and he never rendered any accounting for that at all, and that is the fact.

Q. Did he give you money for taxes? A. No.

Discussion

The Court: Is there anything further?

Mr. Richardson: There is one case I would like to call the Court's attention to. I would like to submit this case on briefs. There is quite some interesting law in connection with it, and there is a question that I thought maybe the Vice Chancellor had in his mind as to our holding either under our mortgage after the expiration of the lease, and that is a case in 34 N. J. Law, 496. The Court said in that case:

> "Having been admitted into possession under the lease, a formal entry under the mortgage was not necessary to vest in him the possession under it." *Shields* v. *Lozear,* 34 N. J. Law, at page 501.

I thought I would merely cite that now because that seemed to be somewhat in question here. I would like the privilege of submitting this on brief. I think there is some very interesting law involved in it.

The Court: There is a question in my mind as to the right of the defendant to claim possession under either mortgage. In the first place, as to the $800 mortgage, the rights which he acquired there were merely the right of subrogation under the decree by reason of his having paid the mortgage. Now, undoubtedly he would have had the right to have proceeded with a sale and execution, but he did not do it.

Mr. Richardson: We have a case on that very point.

The Court: That is all right; I am merely indicating some of the points which I consider to be important.

Now, whether he could claim any rights of possession under the $800 mortgage is one question, but even if he could, he, I think, stated specifically that he did not, that the possession he claimed was under the $3,500 mortgage.

Now, as to the $3,500 mortgage, the finding of Judge Kirkpatrick, as I read it from his opinion, is merely to this effect, that Carpenter claims possession under the $3,500 mortgage and that that mortgage was open of record uncancelled, and so long as it was uncancelled he was obliged to assume that it was a valid mortgage and that therefore possession under it was a valid defense to the action of ejectment. I think he was entirely justified in that assumption, but if the mortgage is invalid in the first instance, if there was nothing due on the mortgage and never was anything due on the mortgage, then, of course, no possession could be claimed under it, could it?

Mr. Richardson: No, sir.

Mr. Lowenkopf: Before your Honor closes I would just like to read a short paragraph here that perhaps Mr. Richardson overlooked in citing that case of *Shields* v. *Lozear*:

> "But the mortgagee's act in taking possession must be unequivocal. Therefore if he enters as tenant or mortgagee that relation is presumed to continue unless repudiated."

The Court: I will not decide the case now. I will give you both an opportunity to submit briefs. I think I have a pretty firm conviction as to what I ought to do, but I will give you both a chance to argue it by brief as fully as you desire.

CONCLUSIONS.

(Filed July 14, 1930)

IN CHANCERY OF NEW JERSEY

Between DAVID A. BROWN and GEORGE H. BROWN, Complainants, and WILLIAM V. CARPENTER, Defendant.	On Bill. On Final Hearing. Conclusions. Not for Print in Any Report.

Bernard W. Vogel, Esq., and Leo S. Lowenkopf, Esq. (Mr. Thomas L. Hanson, of Counsel), for Complainants.

Frederick W. Richardson, Esq., for Defendant.

BERRY, V. C.:

This bill is filed to redeem a tract of land consisting of about forty acres in Middlesex County from the lien of certain mortgages and certificates of tax sale.

This property was conveyed to the complainants by Charles H. Gardiner and Mary G. Gardiner, his wife, by deed dated November 9, 1897, and duly recorded in the Middlesex County Clerk's Office in Book 297 of Deeds, page 210. On April 10, 1893, Gardiner executed a mortgage in the sum of $800 on this property in favor of Perth Amboy Savings Institution. That mortgage was assigned to one Robert A. Hirner on Oc-

tober 10, 1899. On December 19, 1894, Gardiner executed a further mortgage in the sum of $3500 on said property to the defendant William V. Carpenter. This mortgage was duly recorded on January 9, 1895. In January, 1898, the complainants in this suit filed a bill in this court against the defendant William V. Carpenter seeking the cancellation of the $3500 mortgage hereinbefore referred to on the ground that it was fraudulently obtained from Gardiner and that there was no consideration therefor. The defendant demurred to the bill of complaint and the demurrer was sustained in an opinion by the Chancellor on the ground that the bill of complaint was too indefinite in its charges to set out a cause of action. It was suggested in the opinion that the mortgage may have been given in fraud of creditors, but the decision was not based upon that ground.

On August 10, 1899, the lands were sold for taxes by the Collector of Taxes of the Township of Woodbridge and purchased by that municipality for a term of thirty years, and on February 8, 1906, the lands were again sold for taxes and purchased in fee by the municipality. The two certificates of tax sale evidencing these sales were assigned by the municipality to the defendant Carpenter on February 1, 1912, which assignments were recorded on January 22, 1915, in Book 15 of Releases for Middlesex County on pages 382 and 383, respectively. These assignments were recorded on April 14, 1928, in Book 915 of Deeds for Middlesex County, pages 75 and 77, respectively. On September 21, 1893, Gardiner

executed a lease for said premises to the defendant Carpenter for a term of ten years "for the yearly rent of one-half of the produce of said farmland less $1.50 for each load of manure delivered on said land by the party of the second part." It was also provided in said lease that the lessee should pay the taxes on the premises during the term of the lease.

In 1900 the $800 mortgage which had been assigned to Hirner was foreclosed and a final decree entered in that foreclosure suit on April 2, 1900. No execution was issued on that decree. On April 12, 1900, the defendant William V. Carpenter, who was also made a defendant in the foreclosure suit, filed a bill in this court to redeem the premises from the lien of the mortgage which had been foreclosed and the decree in said suit, and pursuant to an order of this court entered on April 12, 1900, paid into this court the sum of $1117.93 and on May 2, 1900, an order was entered in that cause directing the payment of said sum to Robert A. Hirner, the complainant in the foreclosure suit. That order contained this provision: "It is further ordered that upon payment being made as aforesaid the said Robert A. Hirner shall deliver to the complainant or his solicitor the bond and mortgage in said bill mentioned, uncancelled, together with the assignment thereof to said Hirner; and that thereupon the bill of complaint in said cause be dismissed." No further proceedings were had in either the foreclosure suit or the suit to redeem. The $800 mortgage and the assignment to Hirner were apparently delivered to Carpenter but

the final decree in the foreclosure suit was not assigned and no sale of the premises ever had pursuant to that decree.

After the conveyance by Gardiner to the Browns a dispute arose between the Browns and Carpenter with respect to Carpenter's rights under the lease and he was physically dispossessed, whereupon, in July, 1899, Carpenter brought an action in ejectment in the Supreme Court against the Browns for the recovery of possession of the premises and in that suit the lease was established and Carpenter restored to possession and he has continued in possession ever since. Two or three years ago the complainant in this suit brought an action in ejectment in the Middlesex County Circuit Court against the defendant Carpenter which was defended on the ground that Carpenter was rightfully in possession as mortgagee, under the $3500 mortgage which has been referred to. The cause was tried before the court without a jury and judgment was for the defendant on the ground that he was in possession under the $3500 mortgage; that the mortgage had not been declared invalid and that so long as that mortgage was in existence and possession claimed under it, the defendant was entitled to possession. The court, in its opinion, indicated that the validity of the mortgage was questionable but held that that court had no jurisdiction to determine that point. Immediately thereafter this bill was filed.

The defense to the bill is, first, adverse possession, the defendant claiming to have been in possession for a period of twenty years as mort-

gagee under both the $800 and the $3500 mortgages; second, that his right to possession has been established in the Middlesex County Circuit Court and that the issues are *res adjudicata* in that suit; third, that the issue as to the validity of the $3500 mortgage is *res adjudicata* because of the decree in the suit brought to cancel that mortgage. Other defenses are comprised within the defenses above stated.

The files in all of the Chancery suits and in the ejectment suit last referred to have all been introduced in evidence in this cause and an inspection of the file in the suit of Brown v. Carpenter, Docket 21, page 684, which was the suit in which cancellation of the $3500 mortgage was sought, indicates that the question of the validity of that mortgage was not *res adjudicata* in that suit at all. The question was not disposed of upon its merits. The defendant's right to possession as found in the Middlesex Circuit being based upon his possession as mortgagee under the $3500 mortgage, the validity of which was not determined, the judgment in that suit is not *res adjudicata* on the issues here presented. The defense resolves itself, therefore, into one of adverse possession and the possession claimed is possession as mortgagee, dating from the expiration of the lease in 1903 down to the present time. The defendant alleges that after the expiration of the lease he informed the complainants that thereafter he would hold the premises as mortgagee. His testimony is the only evidence supporting that claim. It is vigorously denied by both complainants, who allege that on the contrary, after the

expiration of the lease they told Carpenter that so long as he paid the taxes on the property he could remain in possession under the terms of the lease. It is conceded by the defendant that there was never any change in the character of his possession since he first entered into possession under the lease, and my own examination of the defendant when he was on the stand convinces me that his possession subsequent to the expiration of the lease was merely that of a holdover tenant. I find as a fact, therefore, that Carpenter was not in possession as mortgagee either under the $800 mortgage or the $3500 mortgage. So far as the $3500 mortgage is concerned, the evidence is convincing that the defendant has no rights thereunder. The mortgage was given in connection with the lease and it is said as security therefor, and also to secure the defendant Carpenter for loans to be made or liability to be incurred by him for the mortgagor. Carpenter claims that at the time the mortgage was given Gardiner owed him about $500 and that thereafter he loaned him certain sums for payment of taxes. This is denied by Gardiner and I believe Gardiner is speaking the truth. I was not at all impressed by the defendant's testimony and have no confidence in him as a witness. The record in the ejectment suit shows a sharp conflict with his testimony there and in this court, so that I feel I can place no reliance whatever upon what he says here. There is no corroborating evidence whatever supporting Carpenter's testimony with respect to what is due him on this mortgage. He cannot give any accurate

statement either of moneys which he claims Gardiner owed him at the time the mortgage was executed or advances made thereafter. Gardiner says that the understanding with Carpenter was that the mortgage was to be cancelled upon the expiration of the lease and that he informed the complainants of this fact at the time he conveyed the property to them. The complainants' testimony is to the same effect. No interest has ever been demanded by Carpenter from Gardiner or from the complainants on this mortgage, nor has any amount of principal ever been demanded by Carpenter of anyone. No statement of principal or interest claimed by Carpenter, if any, has ever been presented to either Gardiner or the complainants. My conclusion with reference to this mortgage is that Gardiner's explanation of it is the correct one; that it was to have been surrendered and cancelled by Carpenter upon the expiration of the lease; that no moneys were ever advanced thereon and that there is nothing due thereon to Carpenter. With respect to the $800 mortgage undoubtedly Carpenter has a right to subrogation by reason of his payment of the decree in the foreclosure suit, but while the answer alleges possession as mortgagee under that mortgage also, the defendant, while on the witness stand, expressly disclaimed possession except as mortgagee under the $3500 mortgage. But irrespective of the claim of possession under the $800 mortgage the evidence does not justify a finding of possession except as a holdover tenant.

Conclusions

I think the complainants are entitled to redeem and I will refer the matter to a master to state an account between the parties, indicating the amount which the complainant will be required to pay the defendant on redemption. The master will not consider, however, the $3500 mortgage in stating this account, as I find as a fact that there is not now and never was anything due on that mortgage. The defendant says that after the conveyance of the property to the complainant he never made any accounting to them for the crops, although he had accounted to Gardiner under the lease up to that time. The land here involved is farmland of very little value at the time of the conveyance by Gardiner to the complainants. It does not abut on any highway and lies in the rear of another tract of land owned by the complainants. Access to it is had only over complainants' other lands. All of the land has never been cultivated at any one time. It being the obligation of defendant as lessee to pay the taxes, he is not entitled to any credit either by reason of such payments or by reason of the assignments of the certificates of tax sale hereinabove referred to. It was his obligation to pay these taxes and his failure to do so, resulting in the tax sales, cannot inure to his benefit. He obtained no rights as against the complainants by reason of the assignments of these certificates of tax sale.

Notwithstanding the defendant has been in possession of the premises in question, the complainants have exercised some rights of ownership over it during the period since the expiration of the

lease. In 1919 they executed a paper writing to Gardiner giving him a right of passage over the land and in 1914 they executed a right of way agreement giving to the Tidewater Oil Company the right to lay a pipe line over the premises. This agreement was duly acknowledged and recorded in the Middlesex County Clerk's Office.

The account to be taken by the master should credit the defendant with the amount he paid in satisfaction of the decree in the foreclosure suit, with interest thereon, and should charge the defendant with one-half the value of all crops raised on the lands during the period of his possession.

It is contended by the defendants that upon the expiration of the lease it was not necessary for Carpenter to do anything to change the character of his possession from that of lessee to one as mortgagee. It is quite true that a re-entry is not necessary but there must be some act indicating a change of the character of possession and I have already held that there was no change in the character of possession. The act relied upon by the defendant was his alleged statement to the complainants that after the expiration of the lease he was holding under the mortgage. I do not accept his testimony on that point. There is no evidence of any act which could be construed as evidence of a change of the character of the possession from that of lessee to that of mortgagee. I will advise a decree in accordance with the foregoing conclusions.

The final hearing in this cause was had before me in Long Branch on May 15, 1930, and counsel

for the respective parties expressed a desire to submit briefs. This privilege was accorded them but up to this time no briefs have been received. The foregoing conclusions were written by me immediately after the final hearing in order to record my impressions while the matter was fresh in my mind. They have been withheld from the files pending the receipt of briefs. The matters in issue are, in my judgment, of sufficient importance to the parties to the suit to justify the filing of these conclusions without further delay. Neglect or inactivity of counsel should not withhold from their clients relief to which they are justly entitled. This is a fair example of the delays due primarily to neglect of counsel resulting in congestion in this court and unwarranted criticism of the court itself.

July 8, 1930.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY

74/427

Between DAVID A. BROWN and GEORGE H. BROWN, Complainants, and WILLIAM V. CARPENTER, Defendant.	On Bill &c.

This matter coming on to be heard in the presence of Bernard W. Vogel, Esq., solicitor of the complainants, and Thomas L. Hanson, Esq., and Leo S. Lowenkopf, Esq., of counsel with the complainants, and Frederick F. Richardson, Esq., solicitor of the defendant, and the court having examined the pleadings, and having taken proofs orally and in open court, and heard and considered the arguments of counsel thereon; and it appearing to the satisfaction of the court that the complainants are entitled to the relief prayed for by them in their bill of complaint filed herein, and that there is equitably due from the said complainants to the defendant the sum of Eleven Hundred Seventeen Dollars and Ninety-three ($1117.93) Cents, for principal on the mortgage dated April 10th, 1893, and recorded April 12th, 1893, in Book 123 of Mortgages for Middlesex County on page 33, and which said mortgage was subsequently, to wit: on the 10th day of October, 1899, assigned by the mortgagee, the Perth Amboy Savings Institution, to Robert Adolph Hirner, and which said assignment was recorded

New Jersey State Library

on the 12th day of October, 1899, in Book "T" of Assignments for Middlesex County, on page 617, and upon which said mortgage a final decree of foreclosure was entered on the 2nd day of April, 1900, and which said mortgage was redeemed by the defendant, William V. Carpenter, by the payment into this court of the sum of Eleven Hundred Seventeen Dollars and Ninety-three ($1117.93) Cents, on the 12th day of April, 1900, together with the sum of Two Thousand Thirty-one Dollars and Twenty-four ($2,031.24) Cents, for interest on said principal sum, at the rate of six (6%) per cent per annum from the 2nd day of May, 1900, to the 15th day of July, 1930, being the sum of Thirty-one Hundred Forty-nine Dollars and Seventeen ($3,149.17) Cents and making a total sum due for principal and interest of Thirty-one Hundred Forty-nine Dollars and Seventeen ($3,149.17) Cents;

It is, on this 15th day of July, nineteen hundred and thirty, ORDERED, ADJUDGED and DECREED that the said complainants, David A. Brown and George H. Brown, are entitled to redeem the mortgage mentioned and described in their bill of complaint, being a certain mortgage executed by one Charles H. Gardner and Mary Gardner, his wife, to the Perth Amboy Savings Institution, a corporation of the State of New Jersey, dated the 10th day of April, 1893, to secure the payment of a bond executed by the said Charles H. Gardner and Mary Gardner, his wife, to said Perth Amboy Savings Institution, on the said 10th day of April, 1893, to secure the sum of Eight Hundred ($800.00) Dollars, with interest at the rate of six (6%) per cent per annum, payable

half-yearly from said date of said bond, which said mortgage was recorded in the office of the Clerk of the County of Middlesex in Book 123 of Mortgages for said County on pages 33, &c., and which said mortgage was subsequently assigned by the said Perth Amboy Savings Institution to one Robert Adolph Hirner, and which said assignment was recorded on the 12th day of October, 1899, in the office of the Clerk of the County of Middlesex in Book "T" of Assignments for said county on pages 617, &c., and which mortgage conveys the lands and premises described as follows:

> ALL that certain tract, situate in the Township of Woodbridge, County of Middlesex and State of New Jersey, and consisting of forty-nine acres of land, more or less, and being bounded as follows: On the west by property of Albert D. Brown, Port Reading Railroad, and estate of Jonas Codington. On the north by lands of the estate of Jones Codington and lands of James Edgar. On the east by lands of James Edgar and property known as the Honor Estate property. On the south by lands of Mary G. Gardner and Albert D. Brown.

It is further ORDERED, ADJUDGED and DECREED that the said defendant, William V. Carpenter, surrender unto complainants, for cancellation, a properly executed instrument authorizing the Clerk of the County of Middlesex to cancel of record a certain mortgage executed by one, Charles H. Gardner and Mary Gardner, his wife, to the defendant, William V. Carpenter, dated the

19th day of December, 1894, to secure the payment of a bond executed by the said Charles H. Gardner and Mary Gardner, his wife, to the said defendant, William V. Carpenter, on the said 19th day of December, 1894, to secure the sum of Thirty-five Hundred ($3500.00) Dollars, with interest at the rate of six (6%) per cent per annum, which said mortgage was recorded in the office of the Clerk of the County of Middlesex on the 2nd day of January, 1895, in Book 130 of Mortgages, on page 239, &c., and which mortgage conveys the lands and premises hereinabove described.

It is further ORDERED, ADJUDGED and DECREED that the said defendant, William V. Carpenter, surrender unto the complainants, for cancellation, properly executed instruments authorizing the Clerk of the County of Middlesex to cancel of record two certain certificates of tax sale which were assigned by the Township of Woodbridge, in the County of Middlesex and State of New Jersey, unto the defendant, William V. Carpenter, and recorded in the office of the Clerk of the County of Middlesex on April 14th, 1928, in Book 915 of Deeds for said county on pages 75 and 77, respectively, and which certificates of tax sale convey the lands and premises hereinabove described.

It is further ORDERED, ADJUDGED and DECREED that upon the payment by the complainants unto the defendant of the sum of Thirty-one Hundred forty-nine Dollars and Seventeen ($3,149.17) Cents, that, as to all of the said lands and premises hereinabove mentioned, so far as relates to any claim thereon, by or on behalf of the said

defendant, William V. Carpenter, the title of the said complainants, David A. Brown and George H. Brown, in and to the same and every part thereof is hereby determined, advised, settled and declared to be good.

It is further ORDERED, ADJUDGED and DECREED that the said complainants serve a true but uncertified copy of this decree upon the defendant, William V. Carpenter, or his solicitor, within ten days of the date hereof, and that the said complainants pay to the said defendant, William V. Carpenter, or to his solicitor, on the 30th day of July, 1930, between the hours of one and four o'clock in the afternoon, at the offices of Frederick F. Richardson, Esq., solicitor of the defendant, at the National Bank of New Jersey Building, in the City of New Brunswick, N. J., the aforesaid sum of Thirty-one Hundred Forty-nine Dollars and Seventeen ($3,149.17) Cents, less the costs of this suit to be taxed, including a counsel fee of Five Hundred Dollars, which is hereby allowed to said complainants, and that upon the making of said payment the said defendant, William V. Carpenter, forthwith deliver to the said complainants the said bonds, mortgages and certificates of tax sale, after having first duly endorsed the said mortgages and certificates of tax sale for cancellation.

EDWIN ROBERT WALKER,
C.

Respectfully advised.
MAJA LEON BERRY,
V. C.

A true Copy
Leo S. Lowenkopf,
Of Counsel.

ORDER REFUSING RECONSIDERATION.

(Filed July 22, 1930)

IN CHANCERY OF NEW JERSEY

74/427

Between DAVID A. BROWN and GEORGE H. BROWN, Complainants, and WILLIAM V. CARPENTER, Defendant.	On Bill to Redeem, etc. Order.

This matter being opened to the court by Frederick F. Richardson, solicitor for the defendant and in the presence of Leo Lowenkopf, of counsel for the complainants, and it appearing that notice of this motion is waived and application having been made to the court by Frederiick F. Richardson, solicitor for the defendant, for a reconsideration of the conclusions filed in the above entitled action by this court on the ground that the transcript of evidence taken in the ejectment suit at law between these parties had not been considered by the court, and it appearing that the said transcript has not as yet been furnished by the stenographer although applied for promptly and a letter from said stenographer explaining the delay being exhibited, and it further appearing to the court that a consideration of this testimony is not, in said court's opinion

necessary to a decision in the case, it was thereupon on this fifteenth day of July, 1930, ORDERED that the said application to reconsider the conclusions be and the same is hereby denied.

E. R. WALKER,
C.

Respectfully advised,
MAJA LEON BERRY, V. C.

A true Copy,
Fred Garretson,
Clerk.

EXHIBIT C-1.

Newark, N. J., Nov. 14, 1919

We, D. A. Brown and G. H. Brown, being owners of a certain tract of land known as Van Sycle Place. Bounded on north by lands of Edgar, east by Honer Place, south by Freeman St., west by P. R. Road and D. A. Brown, do hereby give Charles Gardner full right to go on said property and take others on same.

D. A. BROWN
GEO. H. BROWN

EXHIBIT C-4.

(Deed Right of Way)

D. A. BROWN, *et al*

to

THE TIDE-WATER PIPE COMPANY, LIMITED

For and in consideration of One Dollar to us paid, the receipt whereof is hereby acknowledged, we do hereby grant to The Tide-Water Pipe Company, Limited, its heirs, successors and assigns, a right of way upon and through our lands lying in Woodbridge Township Middlesex County, State of New Jersey, and described below, for the purpose of constructing two or iron pipe for the transportation of petroleum, in such manner as said grantee may deem necessary, and with free ingress and egress, to construct, operate, repair, replace, maintain, and from time to time alter and remove the same in such manner as it may desire.

Provided, that said pipe or pipes shall be so laid as not to interfere with the usual cultivation of the premises nor with any buildings thereon, and that all actual damage done to crops, timber or other wise, by the construction or operation of said pipe lines shall be paid for in full by the said grantee.

And it is further provided, that if said damages are not mutually agreed upon, the same shall be appraised by three disinterested persons, one thereof to be appointed by the said The Tide-Water Pipe Company, Limited, its heirs, successors or assigns, one by D. A. and G. H. Brown, their heirs and assigns, and one by the two so appointed as aforesaid, and the award of such

Exhibit C-4

three persons made under oath shall be final and conclusive, and if such damages are not paid within thirty days after they shall have been determined as aforesaid, then this grant shall be null and void. And that the said grantors shall fully enjoy the said premises except for the purposes hereinbefore specified.

The said lands are described as follows: Bounded on the north by the Port Reading R. R. & D. A. Brown; on the east by J. P. Edgar; on the south by J. P. Edgar and A. D. Brown Est.; on the west by the A. D. Brown Est. Said lines to be laid within five feet of the Port Reading Right of Way with privilege of making an angle that is practical at an offset in the north line.

In Witness Whereof, we have hereunto set our hand and seal this 2″ day of October, A. D. 1914.

D. A. BROWN (L. S.)
GEO. H. BROWN (L. S.)

Signed, Sealed and Delivered
in the presence of
L. A. Hovis

State of New Jersey: ss
County of Middlesex:

Be It known, that on this fifth day of October, in the year one thousand nine hundred and fourteen, before me, the subscriber, a Commissioner of Deeds in and for said county personally came L. A. Hovis, subscribing witness to the within grant, who being duly sworn, according to law, deposes and says, that he saw the said grantors D. A. Brown and George H.

Exhibit C-4

Brown, sign seal and as their act and deed deliver the said instrument, that the same might be recorded as such.

L. A. HOVIS

Sworn and subscribed before me
the day and year above written.
John L. Dunn, (L. S.)
Commissioner of Deeds (aforesaid)
of New Jersey

Received and Recorded October 13, 1914, at 1:25 P. M.

BERNARD M. GANNON, Clerk

MIDDLESEX COUNTY CLERK'S OFFICE

State of New Jersey, }
County of Middlesex. } ss:

I, F. WILLIAM HILKER, Clerk of the County of Middlesex, do hereby certify that the foregoing is a true and correct copy of the record of a certain Deed made by D. A. Brown et al to The Tide-Water Pipe Co., Limited and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book 553 of Deeds for said County on Pages 360

In Testimony Whereof, I have hereunto set my hand and official seal this
(Seal) 26th day of February A. D. 1929

F. WM. HILKER
Clerk.

(Cover):

Certified Copy DEED
D. A. Brown, et al
to
The Tide-Water Pipe Company
Limited.

EXHIBIT 1 FOR DEFENDANT.

Woodbridge, N. J.
July 13th, /97

Friend Will

I have just received notice from Tax Collector in relation to my taxes that if not paid by July 15th they will be advertised which will increase the amount. did I understand you to say that you would see Bruce about them and settle them for me. I will enclose the notices of taxes and if you can do anything about them you will accomadate me very much. C. H. GARDNER.

P. S. I will be down to see you tomorrow night would like to have a talk with you.

C. H. G.

EXHIBIT D-2.

($3500 Mortgage)

CHARLES H. GARDERNER and MARY, his wife,	Mortgage
to	Dated Dec. 19, 1894
WILLIAM V. CARPENTER	For $3500.00/100

This Indenture made the nineteenth day of December in the year of our Lord one thousand eight hundred and ninety four Between Charles H. Garderner and Mary, his wife, of the township of Woodbridge in the County of Middlesex, and State of New Jersey party of the first part;

Exhibit D-2

and William V. Carpenter of the township County and State aforesaid, party of the second part.

. . . Whereas the said Charles H. Garderner is justly indebted to the said party of the second part in the sum of Three thousand five hundred dollars lawful money of the United States of America, secured to be paid by his certain bond or obligation bearing even date with these presents in the penal sum of Seven Thousand dollars, lawful money as aforesaid conditioned for the payment of the said first mentioned sum of Three thousand Five hundred dollars lawful money as aforesaid to the said party of the second part, his executors administrators or assigns, on the nineteenth day of December which will be in the year one thousand eight hundred and ninety nine and interest thereon to be computed from the nineteenth day of December Eighteen hundred and ninety four at and after the rate of six per cent per annum and to be paid semi annually. And it is thereby expressly agreed that should any default be made in the payment of the said interest or of any part thereof on any day whereon the same is made payable as above expressed, or should any tax, assessment water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage and become due and payable and should the said interest remain unpaid and in arrear for the space of sixty days or said tax assessment water rent or other municipal or governmental rate charge imposition or lien or day or either of them remain unpaid and in arrear for the space of ninety days

Exhibit D-2

then and from thenceforth that is to say after the lapse or expiration of either of the said periods as the case may be the aforesaid principal sum of Three thousand five hundred dollars with all arrearage of interest thereon shall at the option of the said party of the second part, or his legal representatives become and be due and payable immediately thereafter although the period above limited for the payment thereof may not then have expired anything hereinbefore contained to the contrary thereof in anywise notwithstanding as by the said bond or obligation and the condition thereof reference being thereunto had may more fully appear. . . . Now this Indenture Witnesseth, that the said party of the first part for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation with interest thereon according to the true intent and meaning thereof and also for and in consideration of the sum of one dollar to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part, and to his heirs and assigns, forever; All that tract or parcel of land and premises situate lying and being in the township of Woodbridge in the county of Middlesex and State of New Jersey described as follows: All that part of the property lying east of the land deeded to the Port Reading Railroad and North of the brook run-

ning through said property from East to West butted and bounded as follows: North by lands of James Edgar and Jotham Coddington; east by lands of James Edgar now T. B. Hinsdale south by the brook running from West to East and West by lands of the Port Reading Rail Road: Containing about forty acres of land more or less subject nevertheless to a right of way from the said premises to the aforesaid Highway granted to Lewis M. Van Sickle by the said Charles H. Gardener. . . . Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders rents issues and profits thereof; And also all the estate, right, title, interest, property possession claim and demand whatsoever as well in law as in equity of the said party of the first part, of in and to the same and every part and parcel thereof with the appurtenances. To have and to hold, the above granted and described premises with the appurtenances unto the said party of the second part, his heirs and assigns to his and their own proper use, benefit and behoof forever. Provided always and these presents are upon this express condition that if the said party of the first part their heirs executors or administrators shall well and truly pay unto the said party of the second part, his executors administrators or assigns, the said sum of money mentioned in the condition of the said bond or obligation and the interest thereon at the time and times and in the manner mentioned in the said condition according to the true intent and meaning thereof that then these

Exhibit D-2

presents and the estate hereby granted shall cease, determine and be void. And the said Charles H. Gardener for himself, his heirs executors and administrators doth covenant and agree to pay unto the said party of the second part, his executors administrators or assigns, the said sum of money and interest mentioned as above and expressed in the conditions of the said bond: And it is also agreed by and between the parties to these presents that the said party of the first part shall and will keep the buildings erected and to be erected upon the lands above conveyed insured against loss or damage by fire, by insurers and in an amount approved by the said party of the second part, his executors administrators or assigns and assign the policy and certificates thereof to the said party of the second part and in default thereof it shall be lawful for the said party of the second part to effect such insurance and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises added to the amount of the said bond or obligation and secured by these presents payable on demand with interest at the rate of six per cent per annum from the time of payment of such premium or premiums; And the said Charles H. Gardener the owner of the above described for himself, his heirs and assigns, doth further covenant and agree to and with the said party of the second part, his heirs executors administrators and assigns that he and they will not hereafter apply for any deduction by reason of any mortgage from the taxable value of the lands embraced in this mortgage; And it is further agreed that

in case the said owner or his heirs or assigns shall claim any deduction from the taxable value of the said lands in violation of this agreement then and in that case this mortgage shall become and be immediately due and payable and the amount of tax paid by the mortgagee shall be added to the principal of the debt secured hereby and recoverable therewith with interest thereon from the time of payment.

In Witness Whereof the said party of the first part have hereto set their hands and seals the day and year first above written.

CHAS. H. GARDENER (L. S.)
MARY GARDENER (L. S.)

Sealed and Delivered
in the presence of

State of New Jersey: Be it remembered that
ss on this seventh day of
County of Middlesex: January in the year of
our Lord One Thousand Eight hundred and ninety five before me, a Master of the Court of Chancery of the State of New Jersey, personally appeared Charles H. Gardener and Mary Gardener his wife, who I am satisfied are the grantors mentioned in the within Indenture and to whom I first made known the contents thereof and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed. And the said Mary Gardener wife of the said Charles H. Gardener being by me privately examined, separate and apart from her husband, acknowledged that she

signed, sealed and delivered the same as her voluntary act and deed Freely without any fear threats or compulsion of her said husband.

LESLIE LUPTON,
Master in Chancery of New Jersey
Received and Recorded Jan. 9, 1895 at 2.40 P. M.
JOHN H. CONGER, Clerk

MIDDLESEX COUNTY CLERK'S OFFICE

State of New Jersey, }
County of Middlesex. } ss.

I, F. WILLIAM HILKER, Clerk of the County of Middlesex, do hereby certify that the foregoing is a true and correct copy of the record of a certain Mortgage made by Charles H. Gardener and Mary, his wife, to William V. Carpenter and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book 130 of Mtges. for said County on Pages 239 and uncancelled of record.

In Testimony Whereof, I have hereunto set my hand and official seal this 25th day of Feb. A. D. 1929.

(Seal)

F. WM. HILKER
Clerk.

(Note: In pen and ink in the left margin are the initials M A B)

(Cover):

Certified Copy Mortgage

Charles H. Gardener and Mary his wife,

to

William V. Carpenter

EXHIBIT D-3.

(Tax Deed)

LEONARD M. CAMPBELL, Collector &c. to THE TOWNSHIP OF WOODBRIDGE	Mortgage Dated February 8, 1906 For $

To all to whom these presents shall come, GREETING:

I, Leonard M. Campbell, Collector of Taxes of the Township of Woodbridge, in the County of Middlesex, and State of New Jersey, do hereby certify, that at a public sale of lands and real estate, held at the Town Hall in said township on the thirtieth day of January nineteen hundred and six at the hour of two o'clock in the after noon, for the purpose of making certain taxes assessed on said lands and real estate in said township in the year 1903, the following parcels of land and real estate were struck off and sold to the Township of Woodbridge in the County of Middlesex in fee, for the amounts hereinafter mentioned, there being no other purchaser for the same that is to say:

ALL that parcel of land and real estate assessed to George H. Brown in the year 1903, and described as follows 40 acres adjoining Gardner, St. George's Avenue was struck off for the sum of fifty one 25/100 dollars which amount as made up of forty three 95/100 dollars the taxes on the said real estate in said year and of six 33/100 dollars the interest due thereon to the date of sale and of 97/100 dollars the costs and expenses of said sale.

Exhibit D-3

And I do further certify that I gave public notice of the time and place of the sale for said taxes, of the lands and real estate so sold as aforesaid namely the Thirtieth day of January 1906 at the hour and place aforesaid, stating the names of the delinquents and the description of each parcel of the lands and real estate to be sold and the amount of the delinquent taxes thereon by advertisement signed by me as such collector of taxes in the Woodbridge News, a newspaper published in said township once in each week, for at least four weeks successively, next preceding the day appointed for the said sale, and by cuasing copies of such notice to be set up in five of the most public places of said township, for the same period one of which was at or near each parcel of the said lands and real estate to be sold.

And I do further certify that the right of the owner or owners or any other person or persons to redeem the said lands will expire on the thirtieth day of January nineteen hundred and eight.

In Witness Whereof I have hereunto set my hand and seal this 8th day of February nineteen hundred and six.

LEONARD M. CAMPBELL (L. S.)
Collector.

Signed, sealed and delivered
in the presence of
Ephraim Cutter.

Exhibit D-3

State of New Jersey: ss County of Middlesex: BE IT REMEMBERED, that on this Eighth day of February nineteen hundred and six, before me a Master in Chancery of said State personally appeared Leonard M. Campbell Collector of taxes of the Township of Woodbridge in the County of Middlesex who, I am satisfied, is the Collector named in the foregoing certificate of sale and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed.

EPHRAIM CUTTER.
Master in Chancery of N. J.

Received and recorded February 21, 1906, at 10:50 A. M.

JOHN H. CONGER,
Clerk

MIDDLESEX COUNTY CLERK'S OFFICE

State of New Jersey, } ss.
County of Middlesex. }

I, F. WILLIAM HILKER, Clerk of the County of Middlesex, do hereby certify that the foregoing is a true and correct copy of the record of a certain Mortgage made by Leonard M. Campbell, Collector &c to The Twp. of Woodbridge and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my

Exhibit D-3

office in book 189 of Mortgages for said County on Pages 85

In Testimony Whereof, I have hereunto set my hand and official seal this 25th
(Seal) day of February A. D. 1929

F. WM. HILKER
Clerk.

(Cover):

Certified Copy Mortgage

Leonard M. Campbell
Collector

to

The Township of Woodbridge

EXHIBIT D-4.

(Tax Deed)

BRUCE L. DRUMMOND
Collector
to
THE INHABITANTS OF THE TOWNSHIP OF WOODBRIDGE IN THE COUNTY OF MIDDLESEX.

To all persons to whom these presents shall come. Greeting:

Whereas, on the tenth day of August in the year of our Lord one thousand eight hundred and ninety nine the Township Committee of the Township of Woodbridge in the County of Middlesex and State of New Jersey did issue their warrant, bearing date the day and year last aforesaid, under the Common Seal of said township signed, by the chairman of said township committee and attested by the Clerk of said township, directed to me, Bruce L. Drummond the collector of said township; therein and thereby commanding me to make certain taxes remaining unpaid and in arrears, assessed in said township in the year 1898, pursuant to the laws of this state for and on account of certain lands, tenements, hereditaments and real estate in the said Warrant, particularly described with the interest thereon and all costs fees, charges, and expenses by selling the said lands, tenements hereditaments and real estate or any part thereof, as will be sufficient for the purpose according to the provisions of the statute in such case made and provided which said Warrant having first been duly recorded by the Clerk of said township in the book of record of tax sales of said township was to me duly delivered. Now this is to certify that I, as collector as aforesaid in pursuance of the

See Release in Book 15 of Releases Page 382

command of said Warrant did given public notice of the sale on Saturday the twenty third day of September, eighteen hundred and ninety nine at the Town Committee Room, Lockup Building, in the said township at two o'clock in the afternoon of said day of the following described land and real estate situate lying and being in said township being the tract or parcel of land and premises assessed to Geo. H. Brown and in said warrant described as Forty acres and house formerly Gardner Road District #10 and more particularly described as follows to such person or persons as would agree to take the same for the shortest time not exceeding thirty years and pay the sum of thirty eight and 40/100 dollars with the interest due thereon and the costs fees, charges and expenses aforesaid being the taxes assessed in said township against the said lands and real estate in the year 1898 by advertisement signed by me as such collector as aforesaid, published in the Woodbridge News, a newspaper printed and published in said Township; one in each week for four weeks consecutively next before the time appointed for such sale and by causing copies of such advertisement to be set up in five of the most public places in said Township for the same period one of which was at or near the lands to be sold a copy of which notice was forthwith mailed to George H. Brown the owner of said lands directed to him at Woodbridge, N. J. last known post office address with full postage prepaid thereon and at the time and place so advertised did publicly adjoin the said sale until the seventh day of October eighteen hundred and ninety nine at the hour of two o'clock in the after-

noon of the said day at the place aforesaid and notice of which adjournment was published in said newspaper and at the time and place aforesaid I did expose the above described land and real estate assessed to George H. Brown as aforesaid for sale at public vendue in the manner advertised as aforesaid and Clarence M. Lidder Treasurer of the said Township Committee being thereunto duly authorized by said Committee then and there bidding on behalf of The Inhabitants of the Township of Woodbridge in the County of Middlesex to take the same for the term of thirty years and pay the taxes assessed against the same with the interest, costs fees charges and expenses aforesaid and there being no other bidder or bidders for the same, did strike of– and sell the same to the said The Inhabitants of the Township of Woodbridge in the County of Middlesex for the term of thirty years from the—— day of————————eighteen hundred and *eighty* ninety nine for the sum of Forty five & 91/100 dollars, being the amount of Thirty eight and 40/100 dollars the taxes assessed against the said lands as aforesaid. Three & 46/100 dollars the interest thereon from the twentieth day of December 1898 and four & 5/100 dollars the cost fees, charges and expenses aforesaid.

In Witness Whereof, I Bruce L. Drummond, Collector as aforesaid, have hereunto set my hand and seal this sixteenth day of October in the year of our Lord one thousand eight hundred and ninety nine.

BRUCE L. DRUMMOND,
Collector

Signed, sealed and delivered
in the presence of
Albion R. Berry

Exhibit D-4

State of New Jersey: Be it remembered that on
ss this sixteenth day of Oc-
Middlesex County: tober in the year of our
Lord one thousand eight
hundred and ninety nine
before me a Commissioner of Deeds personally appeared Bruce L. Drummond, who I am satisfied, is the collector in the above certificate named, and I having first made known to him the contents hereof, he did thereupon acknowledge that he signed sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

ALBION R. BERRY,
Commissioner of Deeds

Received and Recorded Oct. 17, 1899 at 11.25 A. M.

JOHN H. CONGER, Clerk

MIDDLESEX COUNTY CLERK'S OFFICE

State of New Jersey, }
County of Middlesex. } ss.

I, F. WILLIAM HILKER, Clerk of the County of Middlesex, do hereby certify that the foregoing is a true and correct copy of the record of a certain Deed made by Bruce L. Drummond to The Inhabitants of the Twp. of Woodbridge in the County of Middlesex and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book 309 of Deeds for said County on Pages 569

In Testimony Whereof, I have hereunto
set my hand and official seal this 25th
(Seal) day of February A. D. 1929

F. WM. HILKER
Clerk.

Exhibit D-5

(Cover):

Certified Copy Deed

Bruce L. Drummond,
Collector,
to
The Inhabitants of the Township of Woodbridge in the County of Middlesex.

EXHIBIT D-5.

(Assignment Tax Deed)

Know all men by these presents that The Township of Woodbridge in the County of Middlesex, party of the first part, in consideration of the sum of sixty seven dollars and fifty four cents, lawful money of the United States of America, to it in hand paid by William V. Carpenter of the township of Woodbridge in the County of Middlesex, and State of New Jersey, party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, transferred and set over, unto the said party of the second part, his heirs and assigns forever, its right, title and interest, in and to a certain tax sale certificate, bearing date the eighth day of February, 1906, and recorded in the office of the Clerk of the County of Middlesex, on the twenty first day of February, 1906, in

Exhibit D-5

Book 189 of Mortgages, at page 85, for lands sold for the taxes of the year 1903, and made by Leonard M. Campbell, Collector of the said township, to said party of the second part, so far as property assessed to George H. Brown and described as 40 acres adjoining Gardner, is concerned, being one of the properties mentioned in the said certificate as having been sold on the thirtieth day of January, 1906, to the said party of the second part, together with all its interest in the said lands under and by virtue of the said certificate; to have and to hold the same unto the said party of the second part, his heirs and assigns, for his and their use, benefit and behoof, forever; subject only to the conditions in the said tax sale certificate contained.

In witness whereof the township committee of said township has caused this deed of assignment to be signed by the chairman of said committee, and attested by the township clerk of said township, and the corporate seal of said township to be hereunto affixed, the first day of February, nineteen hundred and twelve.

JOHN S. DOOLEY,
Chairman of Township Committee.

Sealed and delivered
in the presence of (Seal)
Andrew Keyes,
Township Clerk.

Exhibit D-5

State of New Jersey
County of Middlesex Be it Remembered that on this first day of February, nineteen hundred and twelve, before me personally appeared Andrew Keyes, Township Clerk of the township of Woodbridge in the County of Middlesex, who being duly sworn according to law, on his oath says, that he subscribed his name to the above deed as a subscribing witness, on the day the same bears date, and being well acquainted with the corporate seal of the township of Woodbridge in the County of Middlesex, knows that the same was and is thereto set; and that John S. Dooley, the Chairman of the township committee of the said township, did by order of said township committee, sign, seal deliver the said deed as the voluntary act and deed of said corporation in the presence of deponent, for the uses and purposes therein expressed.

ANDREW KEYES

Sworn and subscribed before me
the day and year above written.
Ephraim Cutter,
Master in Chancery of N. J.

(Cover):

Compared by GG KK
Recorded Middlesex County Clerks Office
Apr 14 11 26 AM 1928
New Brunswick, N. J.
F. Wm. Hilker, Clerk

Received in the Clerk's Office of the County of Middlesex, on the 14th day of April A. D. 1928, at 11.26 in the fore noon and Recorded in Book 915 of Deeds for said County on pages 75

F. WM. HILKER

Exhibit D-6

Deed 2678

Re Recorded as a Deed
75 pg 383

355

The Township of Woodbridge

To

William V. Carpenter.

Dated Feb. 1, 1912

Received in the Clerk's Office of the County of Middlesex, on the 22 day of January A. D. 1915 at 12.50 o'clock in the after noon and Recorded in Book 15 of Releases for said County on pages 383 &c

BERNARD M. GANNAN,
Clerk.

150 Pd

Jan 22 1915
12 50 O'Clock P. M. Pd.

EXHIBIT D-6.

(Assgmt Tax Deed)

Know all men by these presents that The Township of Woodbridge in the County of Middlesex, party of the first part, in consideration of the sum of eighty dollars and seventy eight cents, lawful money of the United States of America,

to it in hand paid by William V. Carpenter of the township of Woodbridge in the County of Middlesex, and State of New Jersey, party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, transferred and set over, unto the said party of the second part, his heirs and assigns forever, its right, title and interest in and to a certain tax sale certificate bearing date the sixteenth day of October, 1899, and recorded in the office of the Clerk of the County of Middlesex, on the seventeenth day of October, 1899, in Book 309 of Deeds, at page 569, for lands sold for the taxes of the year 1898, and made by Bruce L. Drummond, Collector of the said township, to the said party of the second part, so far as property assessed to George H. Brown and described as 40 acres adjoining Gardner, is concerned, being one of the properties mentioned in the said certificate as having been sold on the seventh day of October, 1899, to the said party of the second part, together with all its interest in the said lands under and by virtue of the said certificate; to have and to hold the same unto the said party of the second part, his heirs and assigns, for his and their use, benefit, and behoof forever; subject only to the conditions in the said tax sale certificate contained.

In witness whereof the said township committee of said township has caused this deed of assignment to be signed by the chairman of said committee, and attested by the township clerk of said township, and the corporate seal of said

township to be hereunto affixed, the first day of February, nineteen hundred and twelve.

JOHN S. DOOLEY
Chairman of Township Committee.

Sealed and delivered in
the presence of
Andrew Keyes
Township Clerk

(Seal)

State of New Jersey
County of Middlesex ss: Be it Remembered that on this first day of February, nineteen hundred and twelve, before me personally appeared Andrew Keyes, Township Clerk of the township of Woodbridge in the County of Middlesex, who being duly sworn according to law, on his oath says, that he subscribed his name to the above deed as a subscribing witness, on the day the same bears date, and being well acquainted with the corporate seal of the township of Woodbridge in the County of Middlesex, knows that the same was and is, thereto set; and that John S. Dooley, the Chairman of the township Committee of the said township, did by order of said township Committee, sign, seal and deliver the said deed, as the voluntary act and deed of said corporation, in the presence of deponent, for the uses and purposes therein expressed.

ANDREW KEYES

Sworn and subscribed before me
the day and year above written.
Ephraim Cutter,
Master in Chancery of N. J.

Exhibit D-6

(Cover):

Compared by GG KK
(30 yrs)
Recorded Middlesex County Clerks Office
Apr 14 11 26 AM 1928
New Brunswick, N. J.
F. Wm. Hilker, Clerk

Received in the Clerk's Office of the County of Middlesex, on the 14 day of April A. D. 1928, at 11.26 o'clock in the fore noon and Recorded in Book 915 of Deeds for said County on pages 77

F. WM. HILKER

77 ab
Deed 2679
30 yrs
Record as a deed 354

The Township of Woodbridge

To

William V. Carpenter.

Dated Feb. 1, 1912.

Received in the Clerk's Office of the County of Middlesex, on the 22 day of January A. D. 1915 at 12.50 o'clock in the after noon and Recorded in Book 15 of Releases for said County on pages 382

BERNARD M. GANNON
Clerk.

150 Pd

Jan 22 1915
12.50 O'Clock, P M.

EXHIBIT D-7.

(Mortgage $800)

Charles H. Gardner and Mary G., his wife, To The Perth Amboy Savings Institution	Mortgage Dated April 10, 1893 For $800.00

This Indenture &c., Witnesseth &c. have granted &c All that tract or parcel of land and premises hereinafter particularly described situate lying and being in the Township of Woodbridge in the County of Middlesex and State of New Jersey to wit All that part of the property lying east of the land deeded to the Port Reading Rail Road and north of the brook running through said property from west to east, butted and bounded as follows North by land of James Edgar and Jotham Coddington east by lands of James Edgar and L. B. Hinsdale south by brook running west to east and west by lands of Port Reading Railroad. Containing about forty acres of land more or less. It being understood and agreed that the party of the second part is to have a right of way from the land herein granted to the highway without let or hindrance, and being the same land and premises that were conveyed to the said Charles H. Gardner from Lewis M. Van Sickle by deed bearing date July 15, 1892 and recorded in the office of the Clerk of the said County of Middlesex in Book 257 of Deeds page 545 &c.

Together &c. Have & Hold &c. Provided that if the said Charles H. Gardner his heirs &c do

Exhibit D-7

pay to the party of the second part or to its attorney, successors or assigns the sum of eight hundred dollars in one year from the date hereof with interest from the date hereof at the rate of six per cent per cent per annum payable semi annually.

CHARLES H. GARDNER (L. S.)
MARY G. GARDNER (L. S.)

Received and registered April 12, 1893, at 10 A. M.

P. CONVERY Clerk

MIDDLESEX COUNTY CLERK'S OFFICE

State of New Jersey, } ss.
County of Middlesex. }

I, F. WILLIAM HILKER, Clerk of the County of Middlesex, do hereby certify that the foregoing is a true and correct copy of the record of a certain mortgage made by Charles H. Gardner and Mary G., his wife, to The Perth Amboy Savings Institution (and uncancelled of record) as the same may be found registered in my office in book 123 of Mortgages for said County on Pages 33 &c

In Testimony Whereof, I have hereunto set my hand and official seal this 20 day of June A. D. 1928

(Seal)

F. WM. HILKER,
Clerk.

Exhibit D-7

(Cover):

Certified Copy of Mortgage

Charles H. Gardner and Mary G. Gardner, his Wife,

To

The Perth Amboy Savings Institution

(Assignment of $800 Mortgage)

The Perth Amboy Savings Institution

To

Robert Adolph Hiner

Know all Men by these Presents That The Perth Amboy Savings Institution a corporation of the City of Perth Amboy Middlesex County New Jersey party of the first part in consideration of the sum of eight hundred and eighty five dollars and thirty three cents lawful money of the United States of America to it in hand paid by Robert Adolph Hiner of Woodbridge in said County and State party of the second part at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged have granted bargained sold assigned transferred and set over and by these presents does grant bargain sell assign transfer and set over unto the said party of the second part a certain indenture of mortgage bearing date the tenth day of April one thousand eight hundred and ninety three made by Charles H. Gardner and Mary G. his wife on lands in the said Township of Woodbridge to secure the payment of the sum of eight hundred dollars which mort-

gage is registered in the Clerks office of the County of Middlesex in Book 123 of Mortgages page 33. Together with the bond or obligation therein described and the money due and to grow due thereon with the interest. To have and to hold the same unto the said party of the second part his heirs executors administrators or assigns forever subject only to the proviso in the said indenture of mortgage mentioned; and it does hereby make constitute and appoint the said party of the second part its true lawful attorney irrevocable in its name or otherwise but at his proper costs and charges. To have use and take all lawful ways and means for the recovery of all the said money and interest and in case of payment to discharge the same as fully as it might or could do if these presents were not made and it does hereby covenant promise and agree to and with the said party of the second part that there is now due and owing upon the said bond and mortgage the sum of eight hundred dollars principal and eighty five dollars and thirty three cents interest.

In Witness Whereof the party of the first part has caused these presents to be signed by its President and attested by its Secretary and its corporate seal to be hereto annexed the tenth day of October in the year of our Lord one thousand eight hundred and ninety-nine.

ADRIAN LYON
President

Signed, sealed and delivered
in the presence of (Seal)
Attest: John L. Boggs, Secretary

Exhibit D-7

State of New Jersey
County of Middlesex

Be it remembered that on this tenth day of October in the year of our Lord one thousand eight hundred and ninety nine before me personally appeared John L. Boggs who being by me duly sworn doth depose and make proof to my satisfaction that he well knows the corporate seal of the Perth Amboy Savings Institution the assignor named in the foregoing deed of assignment that the seal thereto affixed is the proper corporate seal of the said institution that the same was so affixed thereto and the said deed signed and delivered by Adrian Lyon who was at the date and execution thereof the president of said institution in the presence of the said deponent as the voluntary act and deed of the said institution and that the said deponent thereupon signed the same as subscribing witness.

JOHN L. BOGGS

Sworn and subscribed before me at Perth Amboy the date aforesaid. 7th line "Robert Adolph Hiner" written over an erasure before execution.

C. C. Hommann
M. C. C.

Received and recorded Oct. 12, 1899, at 10:30 A. M.

JOHN H. CONGER—Clerk

Exhibit D-7

MIDDLESEX COUNTY CLERK'S OFFICE

State of New Jersey,
County of Middlesex. } ss.

I. F. William Hilker, Clerk of the County of Middlesex, do hereby certify that the foregoing is a true and correct copy of the record of a certain assignment of mortgage made by The Perth Amboy Savings Institution to Robert Adolph Hiner and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book T of Assignment of Mortgages for said County on Pages 617 &c

In Testimony Whereof, I have hereunto set my hand and official seal this 20 day of June A. D. 1928

(Seal)

F. WM. HILKER,
Clerk.

(Cover):

Certified Copy of Assignment of Mortgage
The Perth Amboy Savings Institution

To

Robert Adolph Hiner

EXHIBIT D-8.

(Deed)

CHARLES H. GARDNER et ux
To
DAVID A. BROWN and
GEORGE H. BROWN

This Indenture made the Ninth day of November in the year of our Lord one thousand eight hundred and ninety seven, Between Charles H. Gardner and Mary G. Gardner his wife, of the Township of Woodbridge in the County of Middlesex and State of New Jersey of the First Part; And David A. Brown and George H. Brown of the Township of Woodbridge in the county of Middlesex and State of New Jersey of the Second Part: . . . Witnesseth That the said party of the first part, for and in consideration of Four Hundred Dollars lawful money of the United States of America, to————in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part, therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party of the second part, and to them their heirs and assigns forever. All of a certain tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the Township of Woodbridge in the County of Middlesex and State of New Jersey, Being bounded as follows: On the West by property of Albert D. Brown, Port Reading Railroad

Exhibit D-8

and Estate of Jonas Codington. One the north by lands of the estate of Jonas Codington and lands of James Edgar on the east by lands of James Edgar and property known as the Home Estpety One the south by lands of Mary G. Gardner and Albert D. Brown. Being the same lands conveyed to Charles H. Gardner by Louis Vansycle (deed) the same being subject to a mortgage of Eight hundred Dollars, held by the Perth Amboy Savings Bank of Perth Amboy N. J. Together with all and singular, the houses, buildings, trees, ways, waters, profits, privileges and advantages with the appurtenances to the same belonging or in anywise appertaining. Also all the estate right, title, interest, property claim and demand whatsoever, of the said party of the first part, of in and to the same, and of in and to every part and parcel thereof. To Have and to Hold all and singular the above described land and premises with the appurtenances unto the said party of the second part, their heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, their heirs and assigns forever. And the said Charles H. Gardner, doe for himself, his heirs executors and administrators covenant and grant to and with the said party of the second part, their heirs and assigns, that he the said Charles H. Gardner the true, lawful and righr owner of all and singular the above described land and premises and of every part and parcel thereof with the appurtenances thereunto belonging. And that the said land and premises or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any Mortgage, judg-

ment or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made for the above described land and premises can or may be changed, charged, altered or defeated in any way whatsoever. And Also that the said party of the first part, now has good right full power and lawful authority to grant, bargain, sell and convey the said land and premises in manner aforesaid. And Also that Charles H. Gardner Will Warrant, secure and forever defend the said land and premises unto the said David A. Brown and George H. Brown, heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrances Whatsoever.

In Witness Whereof, the said party of the first part, have hereunto set their hands and seals the day and year first above written.

CHAS. H. GARDNER (L. S.)
MARY G. GARDNER (L. S.)

Signed, Sealed and Delivered
in the presence of
Mary G. Gardner and Perth Amboy
Savings Bank. (actne before signing)
W. M. Brown

State of New Jersey: ss
County of Middlesex:

Be it Remembered, that on this Ninth day of November in the year of our Lord one thousand eight hundred and Ninety Seven before me A Master in Chancery of New Jersey personally

appeared Chas. H. Gardner and Mary G. Gardner who I am satisfied are the grantors in the within Deed of Conveyance named, And I having first made known to them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed. And the said Mary G. Gardner being by me privately examined, separate and apart from her said husband, did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, Freely, without any fear, threats or compulsion of her said husband.

WM. M. BROWN,
Master in Chancery of New Jersey

Rec'd. and Recorded Nov. 10, 1897 at 10:20 A. M.

JOHN H. CONGER, Clerk

MIDDLESEX COUNTY CLERK'S OFFICE

State of New Jersey, }
County of Middlesex. } ss.

I, F. WILLIAM HILKER, Clerk of the County of Middlesex, do hereby certify that the foregoing is a true and correct copy of the record of a certain Deed made by Charles H. Gardner et ux to David A. Brown and George H. Brown and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my

Exhibit D-8

office in book 296 of Deeds for said County on Pages 210

In Testimony Whereof, I have hereunto set my hand and official seal this
(Seal) 26th day of February A. D. 1929

F. WM. HILKER
Clerk.

(Cover):

Certified Copy Deed

Charles H. Gardner et ux

to

David A. Brown and George H. Brown

EXHIBIT D-9.

Conclusions of Kirkpatrick, J.

(Filed July 31, 1929)

MIDDLESEX COUNTY CIRCUIT COURT

DAVID A. BROWN and GEORGE R. BROWN, Plaintiffs, vs. WILLIAM V. CARPENTER, Defendant.	In Ejectment Conclusions

KIRKPATRICK, J.:

This case was tried before the Court without a jury by agreement of the parties.

The defendant entered into possession of the premises in question under a written lease from the owner Charles H. Gardner, sometime in the year 1893. The lease was for the period of ten years.

In 1897 Charles H. Gardner and wife conveyed the premises in question to the present plaintiffs.

In 1894 Gardner being financially involved, made a mortgage to the present defendant purporting to secure the sum of Thirty-five Hundred dollars ($3500.00) and covering the premises in question. This mortgage became due and remained unpaid and is still open of record and has never been paid. The circumstances surrounding the making of this mortgage are such

as to raise a strong suspicion of fraud and Mr. Gardner made an attempt to have the Court of Chancery declare it void. This the Court refused to do and left the parties to any remedy they might have at law.

Thus it will appear the mortgage in question is not a very substantial foundation upon which to base a claim of title. Nevertheless, whether strong or weak, it is the foundation upon which Carpenter claims to be entitled to possession. In this action, in this Court, he is entitled to and is in possession as mortgagee under his mortgage. Gardner could not dispute his right, without satisfying the mortgage, and the present plaintiffs taking with notice have no rights superior to those of their grantor.

He also claims by virtue of having redeemed another mortgage and purchased certain certificates of tax sales. These claims it is not necessary to consider because if he is rightfully in possession under the mortgage, that possession is sufficient to defeat the plaintiffs in this proceeding. There may be equitable questions presented by the bizarre facts developed in this litigation, but I am convinced a law court is limited to the finding here expressed.

Judge.

(Cover):

Filed
Middlesex County
Jul 31 3:54 PM 1929
New Brunswick N. J.
F. Wm. Hilker, Clerk

Exhibit D-9

MIDDLESEX COUNTY CIRCUIT COURT

David A. Brown and George M. Brown
Plaintiffs,
vs.
William V. Carpenter
Defendant

In Ejectment

CONCLUSIONS

Kirkpatrick Judge
John P. Kirkpatrick
Counsellor at Law
New Brunswick N. J.

NOTE:

The following are the records of the Court of Chancery offered in evidence on behalf of both parties as appears by the record but not marked as exhibits.

BILL OF COMPLAINT.

(Filed Jan. 16, 1900)

To the Honorable Alexander T. McGill,
Chancellor of the State of New Jersey:

Humbly complaining, shows unto your Honor your orator, Robert Adolph Hirner, of the Township of Woodbridge in the County of Middlesex and State of New Jersey, that on or about the tenth day of April in the year eighteen hundred and ninety three, one Charles H. Gardner of the Township, County and State aforesaid, became and was justly indebted unto The Perth Amboy Savings Institution of the City of Perth Amboy, County and State aforesaid, in the sum of Eight Hundred Dollars, and being so indebted, the said Charles H. Gardner, in order to secure the payment of the said sum of money, with interest, did make and execute, under his hand and seal, and deliver unto the said The Perth Amboy Savings Institution, his certain bond or obligation bearing date the same day and year last aforesaid in the penal sum of Sixteen hundred Dollars, lawful money of the United States of America, to be paid to the said The Perth Amboy Savings Institution or to its certain attorney, Successors or Assigns, with a condition thereunder written, that if the said Charles H. Gardner, his heirs, executors, administrators or any of them should and would well and truly pay or cause to be paid unto the said The Perth Amboy Savings Institution, or its certain attorney, successors or assigns, the just and full sum of Eight Hundred Dollars, lawful money aforesaid, in one year from the date thereof, with interest for the same at the rate of

six per cent. per annum, payable semi annually, without fraud or other delay, then the said obligation should be void, or else to be and remain in full force and virtue; as in and by the said bond or obligation and the condition thereof, reference being thereunto had, will more fully and at large appear.

And your orator further shows, that the said Charles H. Gardner and Mary G. Gardner, his wife, in order to secure the payment of the said sum of money above mentioned, together with the interest which should accrue or become due thereon, executed and delivered unto the Perth Amboy Savings Institution aforesaid, a certain Indenture of Mortgage, bearing date the same day and year last aforesaid, made by the said Charles H. Gardner and Mary G. Gardner, his wife, of the first part, and the said The Perth Amboy Savings Institution of the second part, in and by which said indenture of mortgage the said parties of the first part did give, grant, bargain, sell, alien, enfeoff, convey and confirm unto the said The Perth Amboy Savings Institution, as party of the second part, and to its successors and assigns forever,

All that tract or parcel of land and premises, thereinafter particularly described, situate, lying and being in the township of Woodbridge in the County of Middlesex and State of New Jersey, to wit: All that part of the property lying East of the land deeded to the Port Reading Railroad and North of the Brook running through said property from West to East—Butted and bounded as follows, North by land of James Edgar and

Jotham Coddington; East by lands of James Edgar and S. B. Hinsdale; South by brook running West to East and West by lands of Port Reading Railroad, Containing about forty acres of land more or less. It being understood and agreed that the party of the second part is to have a right of way from the land herein granted to #3 # the highway without let or hindrance; and being the same lands and premises that were conveyed to the said Charles H. Gardner from Lewis M. Van Sickle by deed bearing date July 15th, 1892, and recorded in the office of the Clerk of the said County of Middlesex in Book 251 of Deeds, page 545 &c.

Together with all and singular the profits, privileges, and advantages, with the appurtenances, to the same belonging or in anywise appertaining; Also all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof: To Have and to Hold, all and singular the therein above granted and described tract or lot of land and premises, with the appurtenances, unto the said The Perth Amboy Savings Institution as the said party of the second part, and to its successors and assigns, to its and their own proper use, benefit and behoof forever: Provided always, and the said indenture of mortgage was therein declared to be upon this express condition, that if the said Charles H. Gardner, his heirs, executors or administrators should and would well and truly pay or cause to be paid unto

the said The Perth Amboy Savings Institution, as party of the second part, or to its certain attorney or attorneys, successors or assigns, the said sum of eight hundred dollars, lawful money as therein aforesaid in one year from the date thereof, together with the interest thereon from the date thereof at the rate of six per centum per annum, payable semi annually, according to the conditions of a certain bond or obligation bearing even date therewith, being the bond or obligation aforesaid, without any deduction or defalcation for taxes, assessments, or any other imposition whatsoever; then and from thenceforth the said bond or obligation, and the said indenture of mortgage, and everything therein contained, should cease, determine and be null and void, anything therein contained to the contrary in anywise notwithstanding.

And your orator further shows that after the execution of the said indenture of mortgage, the same was in due form of law acknowledged by the said Charles H. Gardner, and Mary G. Gardner, his wife, before John W. Beekman, a Master in Chancery of New Jersey, and was thereafter duly registered in the office of the Clerk of the County of Middlesex in Book 123 of Mortgages for said County, on pages 33, on the twelfth day of April in the year eighteen hundred and ninety three; as by the certificate of the Clerk of the said County, endorsed on the said indenture of mortgage more fully appears, and to which your orator, for greater certainty, begs leave to refer, if it is necessary so to do.

And your orator further shows that afterwards, and on or about the tenth day of October, eighteen hundred and ninety nine, the said sum of money being still unpaid, and the said bond or obligation and indenture of mortgage executed to secure the same being still unsatisfied, and the said The Perth Amboy Savings Institution being still the holder and owner of the same, the said The Perth Amboy Savings Institution, by a certain deed of assignment, bearing date the day and year last aforesaid, for and in consideration of the sum of Eight Hundred and Eighty Five Dollars and Thirty Three Cents, lawful money of the United States of America, to it in hand paid by your orator, did grant, bargain, sell, assign, transfer and set over unto your orator as party thereto of the second part, the aforesaid indenture of mortgage, bearing date on the said tenth day of April, eighteen hundred and ninety three, made by the said Charles H. Gardner and Mary G. Gardner, his wife, on lands in the said Township of Woodbridge, to secure the payment of the aforesaid sum of Eight Hundred Dollars, which said mortgage was therein stated to be Registered in the Clerk's Office of the County of Middlesex in Book 123 of Mortgages, page 33: Together with the said bond or obligation therein described, and the money due and to grow due thereon, with the interest: To have and to hold the same unto your orator as party of the second part, his heirs, executors, administrators or assigns forever, subject only to the proviso in the said Indenture of Mortgage mentioned: And the

#5 #

said The Perth Amboy Savings Institution, as party thereto of the first part, in and by said deed of assignment did make, constitute and appoint your orator, as party thereto of the second part, the true and lawful attorney, irrevocable, of the said The Perth Amboy Savings Institution, in its name, or otherwise, but at your orator's proper costs and charges, to have, use and take all lawful ways and means for the recovery of all the said money and interest; and in case of payment, to discharge the same as fully as the said The Perth Amboy Savings Institution might or could have done if the said deed of assignment had not been made; by virtue of which said deed of assignment all the estate, right, title, interest and demand whatsoever of the said The Perth Amboy Savings Institution in or to the said bond or obligation, and the property covered by the said mortgage, and the said debt secured to be paid thereby, became and was vested in your orator, and it then and there became and was the duty of the said Charles H. Gardner to pay unto your orator the said sum of money secured to be paid by the said bond or obligation, and by the said indenture of mortgage, together with all interest remaining unpaid or to grow due thereon, and all other sums of money chargeable thereto.

#6 #

And your orator further shows that after the execution of the said deed of assignment, the same was in due form of law, proved before C. C. Hommann, a Master in Chancery of New Jersey, and was thereafter duly recorded in the Office of the Clerk of the County of Middlesex in Book T of

Assignments of Mortgages for said County, on pages 617 &c., on the twelfth day of October, eighteen hundred and ninety nine, as by the certificate of the Clerk of the said County, endorsed on the said deed of assignment, reference being thereunto had, will more fully and at large appear.

And your orator further shows that after the execution of the said indenture of mortgage, to wit, on or about the nineteenth day of December, eighteen hundred and ninety four, the said Charles H. Gardner and Mary Gardner, his wife, executed a mortgage covering the same premises to one William V. Carpenter, bearing date the day and year last aforesaid, and purporting to secure the sum of thirty five hundred dollars, or some other sum, which last mentioned mortgage was recorded in the office of the Clerk of Middlesex County on the ninth day of January, eighteen hundred and ninety five in Book 130 of Mortgages at page 239, to which record your orator for greater certainty begs leave to refer, if it be nec-

#7 #

essary so to do; by virtue of which last mentioned mortgage the said William V. Carpenter claims to have some lien upon the said premises, but your orator charges that the said last mentioned pretended mortgage was executed and recorded subsequent to your orator's said mortgage, and with full notice thereof, and if an encumbrance at all upon said premises is subsequent to the mortgage of your orator.

And your orator further shows that afterwards, and on or about the ninth day of November, eigh-

teen hundred and ninety seven, the said Charles H. Gardner and Mary G. Gardner, his wife, conveyed to David A. Brown and George H. Brown, the same property covered by your orator's said mortgage, by deed bearing date the day and year last aforesaid and reciting that the said lands were conveyed subject to a mortgage of Eight Hundred Dollars, held by the Perth Amboy Savings Bank of Perth Amboy, N. J., being the same mortgage first above mentioned and now held by your orator, as above set forth, which deed was afterwards recorded in the office of the Clerk of the County of Middlesex on the tenth day of November, eighteen hundred and ninety seven in Book 296 of Deeds for said County, pages 210 &c., to which record your orator for greater certainty begs leave to refer if it be necessary so to do; by virtue of which said conveyance the said David A. Brown, George H. Brown and Elizabeth H. Brown, his wife, claim to have some interest in the said premises, but your orator charges that the said conveyance was executed and recorded subsequent to your orator's said mortgage, and with full and express notice thereof, and that the interest, if any, of the said David A. Brown, George H. Brown and Elizabeth H. Brown, his wife, in the said premises is subsequent to the lien of your orator's said mortgage, and subject to the encumbrance thereof.

And your orator further shows that on or about the twenty first day of September, eighteen hundred and ninety three, the said Charles H. Gardner executed and delivered unto the said William

V. Carpenter, his certain indenture of lease, bearing date the day and year last aforesaid, in and by which said indenture of lease the said Charles H. Gardner did demise and lease unto the said William V. Carpenter, the premises in question for the term of ten years from the said twenty first day of September, eighteen hundred and ninety three, as in and by the said indenture of lease, reference being thereunto had, will more fully and at large appear; by virtue of which said lease the said William V. Carpenter entered into the possession of the said premises, and now claims to have some right or title thereto; but your orator charges that the said indenture of lease was executed and delivered subsequent to the execution and registry of your orator's said mortgage, and with full notice thereof, and if effectual to create an interest in or charge upon the said premises, is subsequent to your orator's said mortgage, and subject to the encumbrance thereof.

And your orator further shows that on or about the eighth day of November, eighteen hundred and ninety nine, the said William V. Carpenter recovered a judgment in the Supreme Court of the State of New Jersey, against the said David A. Brown and George H. Brown in an action of ejectment brought upon the said lease, by virtue whereof the said William V. Carpenter claims to have a lien upon the said premises for the

#9 #

costs of said action to be taxed; but your orator charges that the said judgment was recovered subsequent to the execution and registry of your

orator's said mortgage, and is subject to the encumbrance thereof.

And your orator further shows that the said Charles H. Gardner and Mary G. Gardner, his wife, David A. Brown, George H. Brown and Elizabeth H. Brown, his wife, and William V. Carpenter, have not, nor have either of them, paid the taxes levied on the said mortgaged premises for the years eighteen hundred and ninety eight and eighteen hundred and ninety nine, and that the said premises were sold on the tenth day of October, eighteen hundred and ninety nine, to the Inhabitants of the Township of Woodbridge in the County of Middlesex, to satisfy the said taxes levied for the year eighteen hundred and ninety eight, and that the certificate of such sale was recorded in the Office of the Clerk of the County of Middlesex in Book 309 of Deeds for said County on pages 569 &c., on the seventeenth day of October, eighteen hundred and ninety nine, as by the said certificate or the record thereof, reference being thereunto had, will more fully and at large appear.

And your orator further shows that the said sale constituted an encumbrance on the said premises superior to the lien of your orator's said mortgage, and endangered the security of the same; and that in order to prevent the loss of your orator's said mortgage, and to maintain the lien of the same, your orator was compelled to redeem the said premises from the said taxes at great expense; and that your orator was obliged to expend, and on the eleventh day of January,

nineteen hundred, did expend in satisfying the said taxed, and in redeeming the said premises
#10 #
from the lien thereof, and in obtaining from the Township Committee of the said Township a certificate of the redemption of the said premises from the said taxes, the sum of forty eight dollars and twenty nine cents, as in and by the said certificate of redemption, reference being thereunto had, will more fully and at large appear; by virtue whereof, and by the force of the statute in such case made and provided, your orator is entitled to be reimbursed his said outlay and expenditure out of the said premises, and to have a lien upon the said premises for the said sum of forty eight dollars and twenty nine cents, with interest at the rate of twelve per centum upon the said sum from the said eleventh day of January, nineteen hundred.

And your orator further shows that the taxes for the year eighteen hundred and ninety nine are now due and payable, and are unpaid, and are a lien upon the said premises superior to the lien of your orator's said mortgage, and that if the said taxes are not paid the said premises will be returned as subject to the lien of said taxes, and the interest of your orator in said premises will be impaired and destroyed, and your orator will lose the benefit and security of his said mortgage.

And your orator further shows that the whole of the principal money shown in the said bond or obligation, and secured thereby and by the said

indenture of mortgage, with large arrears of interest, still remains due and owing to your orator, no part thereof having been paid to the said The Perth Amboy Savings Institution before the assignment of the said mortgage to your orator as aforesaid, or to your orator or to the said The Perth Amboy Savings Institution since the execution of the said deed of assignment as aforesaid, so that your orator is greatly delayed and

#11 #

disappointed in the receipt of the said money, by means of which said several premises the said indenture of mortgage, and the estates thereby mortgaged as aforesaid, have become absolute in your orator and his heirs and assigns forever.

And your orator further shows that the said Charles H. Gardner and Mary G. Gardner, his wife, David A. Brown, George H. Brown and Elizabeth H. Brown, his wife, and William V. Carpenter, since the execution of your orator's said mortgage, have possessed and enjoyed, and that they or some of them still do possess and enjoy the said mortgaged premises, with the appurtenances, and that they have always received, and still do receive, the rents, issues and profits thereof.

And your orator further shows and expressly charges that the said mortgaged premises are a slender and scanty security for the payment of the said several sums of money so due to your orator as aforesaid, and that your orator or some other person or persons for him have frequently and in a friendly manner applied to the said

Charles H. Gardner and Mary G. Gardner, his wife, David A. Brown, George H. Brown and Elizabeth H. Brown, his wife, and William V. Carpenter, or some or one of them, and requested them or one of them to pay and discharge the said principal and interest, and the said taxes and other sums, so due to your orator on the said bond or obligation and indenture of mortgage hereinbefore mentioned and set forth; and your orator well hoped that they or one of them would have complied with such reasonable requests of your orator, and would have paid to him the said several sums of money so as aforesaid due to your orator on the said bond or obligation and indenture of mortgage, as in equity and good #12 # conscience they ought to have done.

In tender consideration whereof, and for as much as your orator has not a complete and safe remedy in the premises of and by the strict rules of the common law nor can foreclose the equity of redemption of the said mortgaged premises, or safely sell the same for the payment and satisfaction of the said several sums of money so as aforesaid due to your orator on said bond or obligation and deed of mortgage without the aid and decree of this Honorable Court,

To the end therefore, that the said Charles H. Gardner and Mary G. Gardner, his wife, David A. Brown, George H. Brown and Elizabeth H. Brown, his wife, and William V. Carpenter, may, but without oath, true, full and perfect answer make to all and singular the premises, as fully

and particularly as if the same were here again repeated, and they and each of them thereto particularly interrogated, according to the best of their respective knowledge, information, remembrance and belief; And that the said defendants or some or one of them may be decreed to pay unto your orator the said principal sums so due to him on the said bond or obligation and deed of mortgage hereinbefore mentioned and set forth, and all the interest money now due and to grow due thereon, together with the sums now paid or hereafter to be paid by your orator for the taxes assessed or to be assessed upon the said premises with the interest thereon, together with all your orator's costs and charges in this behalf sustained, by a short day to be appointed by this honorable Court; and in default thereof that the said defendants, and each of them, and all persons claiming or to claim under them, or any or either of them, may be foreclosed of and

#13 #

from all equity of redemption or claim of, in and to the said mortgaged premises, and every part and parcel thereto, with the appurtenances, and may deliver over unto your orator all deeds, demises and writings whatsoever relating to or concerning the same; or that all and singular the said mortgaged premises, with the appurtenances, may, by the order and decree of this honorable Court, be sold, and out of the moneys arising out of the sale thereof, your orator may be paid the said several sums of principal, interest and taxes so due to your orator on the said bond or obligation and deed of mortgage as aforesaid, or to

grow due thereon, together with all your orator's costs and charges in this behalf sustained;

And that your orator may have such further and other relief in the premises as to your Honor may seem meet and shall be agreeable to equity and good conscience; may it please your Honor, the premises considered, to grant unto your orator a writ or writs of subpoena, issuing out, and under the seal of this honorable Court, to be directed to the said Charles H. Gardner and Mary G. Gardner, his wife, David A. Brown, George H. Brown and Elizabeth H. Brown, his wife, and William V. Carpenter, therein and thereby commanding them and each of them, on a certain day and under a certain penalty therein to be inserted and expressed, to be and appear before your Honor and this honorable Court, then and there to answer all and singular the premises, and to stand to, abide by, and perform, such order and decree therein as to your Honor shall seem meet and shall be agreeable to equity and good conscience.

And your orator, as in duty bound, will ever pray, etc.

J. H. THAYER MARTIN, JR.,
Solicitor for Complainant.

SHERRERD DEPUE
Of Counsel.

A True Copy
Ferd Garretson
Clerk

ANSWER OF MAR. 21, 1900.

IN CHANCERY OF NEW JERSEY

Between ROBERT ADOLPH HIRNER, Complainant, and CHARLES H. GARDNER, *et als.*, Defendants.	On Bill etc.

The joint and several answer of the defendants David A. Brown, George H. Brown, and Elizabeth H. Brown, his wife, to the bill of complaint of Robert Adolph Hirner.

These defendants answering admit that the said Charles H. Gardner and Mary G. Gardner, his wife, in the complainant's bill named did make and execute an indenture of mortgage of such date, purport and effect as in the complainant's said bill is mentioned and described; and that the said indenture of mortgage was thereafter assigned to the said complainant, as in said bill the same is set forth.

These defendants further answering admit that there is due to the said complainant the principal money in the bond or obligation and indenture of mortgage mentioned and expressed, and set forth in the said bill of complaint, together with arrearages of interest and sums paid for taxes, to these defendants unknown; but for greater certainty they pray that reference may be had to the same, and the amount distinctly ascertained.

Answer of Mar. 21, 1900

These defendants further answering say that the said Charles H. Gardner and Mary G. Gardner, his wife, by deed bearing date the ninth day of November, eighteen hundred and ninety-seven, and recorded in the office of the Clerk of the County of Middlesex on the tenth day of November, eighteen hundred and ninety-seven, in Book 296 of Deeds for said county, pages 210 etc., conveyed to these defendants David A. Brown and George H. Brown the same property covered by the said complainant's mortgage as set out in the said bill of complaint, by virtue whereof the whole interest in the said premises, subject only to the complainant's said mortgage, is now vested in these defendants.

And these defendants further answering say that the said defendants David A. Brown and George H. Brown have fully paid and satisfied the said judgment recovered against them by the said William V. Carpenter and set out in the bill of complaint herein.

And these defendants further answering admit that the said Charles H. Gardner and Mary G. Gardner, his wife, signed and delivered to the said William V. Carpenter a certain pretended indenture of mortgage as in said bill set forth. But these defendants say that the said pretended mortgage was given without consideration, and is wholly void, and that no sum of money was ever advanced upon said mortgage, and that the said pretended mortgage never did, and does not now represent or secure the payment of any sum of money or the performance of any act what-

soever, and that the same is of no force and validity whatever as against these defendants.

And these defendants further answering say that the said Charles H. Gardner and Mary G. Gardner, his wife, signed and delivered the said indenture of mortgage to the said William V. Carpenter in pursuance of an agreement whereby the said William V. Carpenter was to advance certain sums of money to the said Charles H. Gardner when requested by the said Gardner, and was to hold the said mortgage as security for the repayment of such advances as should be made; and in the event of said advances not being required, or upon the repayment of the same if made, the said William V. Carpenter was to deliver up the said mortgage to be cancelled. But these defendants charge that the said proposed advances were never called for by the said Charles H. Gardner and were never made by the said William V. Carpenter, and that no consideration whatever was ever given for the said pretended mortgage; yet the said William V. Carpenter when requested, refused to surrender up the said mortgage in accordance with his said agreement, but still fraudulently retains the same; by reason of all which these defendants charge that the said pretended mortgage is fraudulent and void, and of no force and validity whatsoever as against them.

These defendants further answering admit that the said Charles H. Gardner leased the said premises to the said William V. Carpenter under certain terms and conditions to these defendants

unknown, but these defendants are informed and believe that the said William V. Carpenter has failed to perform the terms and conditions of the said lease, and that the same is now forfeited and void.

All which matters and things these defendants are ready to aver, maintain and prove, as this honorable Court shall direct, and they consent that a decree be made by this Honorable Court for the sale of the said lands and premises mentioned and described in the complainant's said indenture of mortgage, and set forth in his said bill of complaint, and that out of the moneys arising from such sale the complainant may be paid the amount of moneys found to be due him for principal, interest and taxes, and his reasonable costs and charges in the prosecution of this suit sustained, and that the surplus remaining, if any, be paid to these defendants, or be paid into this Court, to be paid out as this honorable Court shall direct.

WILLIAM M. BROWN,
Solicitor of Defendants David A. Brown, George H. Brown, and Elizabeth H. Brown.

A true copy.
Ferd Garretson,
Clerk.

DECREE PRO CONFESSO OF MAR. 14, 1900.

IN CHANCERY OF NEW JERSEY

Between ROBERT ADOLPH HIRNER, Complainant, and CHARLES H. GARDNER, *et als.*, Defendants.	On Bill etc. Decree Pro Confesso

This cause being opened to the Court by Sherrerd Depue, Esquire, of Counsel with the Complainant, and it appearing that process of subpoena for the appearance of the Defendants hath been duly issued and returned served by the Sheriff of the County of Middlesex upon Charles H. Gardner and Mary G. Gardner, his wife, David A. Brown, George H. Brown and Elizabeth H. Brown, his wife, and William V. Carpenter, being all of the defendants, and that the said Defendants Charles H. Gardner, Mary G. Gardner and William V. Carpenter have not filed any plea, demurrer or answer to said bill, within the time limited by law, but have wholly failed and neglected so to do:

IT IS THEREUPON, on this fourteenth day of March in the year of Our Lord One Thousand Nine Hundred, ordered, adjudged and decreed, that the said bill be taken as confessed as against the said Charles H. Gardner, Mary G. Gardner and William V. Carpenter, to the end that such

decree may be made against them as the Chancellor shall think equitable and just.

By the Statute

H. C. PITNEY,
Master.

A true copy.
Ferd Garretson.
Clerk.

ORDER OF REFERENCE.

(Filed March 21, 1900)

IN CHANCERY OF NEW JERSEY

Between ROBERT ADOLPH HIRNER, Complainant, and CHARLES H. GARDNER, *et als.*, Defendants.	On Bill etc. Order of Reference

This matter being opened to the Court by Sherrerd Depue, of counsel with the complainant, in the above entitled cause, and it appearing that the bill of complaint in the said cause has heretofore been taken as confessed against the defendants Charles H. Gardner, Mary G. Gardner, his wife, and William V. Carpenter, and it further appear-

ing that process of subpoena for the appearance of the defendants David A. Brown, George H. Brown, and Elizabeth H. Brown, his wife, has been duly issued and service thereof duly made upon the said last named defendants by the Sheriff of the County of Middlesex, and that they have filed their answer in the said cause, in which they do not deny the matters and things set forth in the bill of complaint filed in the said cause, but have prayed that the complainant therein might make proof of the amount due to him upon the mortgage sought to be foreclosed by his said bill of complaint; and it further appearing that the said matter should be referred to one of the Masters of this Court for the purpose of determining what is due to the complainant as aforesaid, and William M. Brown, solicitor for the said defendants David A. Brown, George H. Brown and Elizabeth H. Brown, his wife, consenting hereto,

It is, on motion of Sherrerd Depue, of counsel with the complainant, on this twenty-first day of March, nineteen hundred, ordered that the said cause be referred to Nicholas W. Bindseil, one of the Masters of this Court, to ascertain and report the amount due to the said complainant for principal, interest and taxes upon the mortgage held by him upon the premises mentioned and described in the said bill of complaint, and also to ascertain and report whether the said mortgage is a lien upon the said premises, and whether the said premises should be sold together or in parcels, and if in parcels, in what order, and that the said Master do make his report with all con-

venient speed, and all further equity is reserved until the coming in of the said Master's report.

By the Statute

Master.

I consent to the making of the above order.

WILLIAM M. BROWN,
Solicitor of Defendants David A. Brown, George H. Brown and Elizabeth H. Brown.

A true copy.
Ferd Garretson,
Clerk.

MASTER'S SUMMONS IN CHANCERY.

IN CHANCERY OF NEW JERSEY

Between ROBERT ADOLPH HIRNER, Complainant, and CHARLES H. GARDNER, *et als.*, Defendants.	On Bill, etc.

To David H. Brown, George H. Brown and Elizabeth H. Brown, three of the defendants in the above stated cause:

Sir:

BY VIRTUE OF AN ORDER OF REFERENCE, made in the above cause, you are hereby summoned to be

and appear before me, at my office Room 735, Prudential Building, Newark, New Jersey, on Thursday, the Twenty-ninth day of March, next, at ten o'clock in the forenoon, at which time I shall proceed to ascertain the truth of the allegations of the Complainants bill in said cause, and to take an account of what is due to the Complainant for principal and interest upon mortgage in the Bill of Complaint mentioned, and also, what is due upon the other encumbrances, and proceed to report upon the same, and the other matters referred to me.

Dated March 24th, 1900.

NICHOLAS W. BINDSEIL,
Master in Chancery.

MASTER'S REPORT.

IN CHANCERY OF NEW JERSEY

Between ROBERT ADOLPH HIRNER, Complainant, and CHARLES H. GARDNER, *et als.*, Defendants.	On Bill etc. Master's Report.

In pursuance of an order made in this cause, bearing date the twenty-first day of March, Nine-

teen hundred, whereby it was referred to the subscriber, one of the Masters of this Court, to ascertain and report the amount due to the said complainant for principal, interest and taxes upon the mortgage held by him upon the premises mentioned and described in the said bill of complaint, and also to ascertain and report whether the said mortgage is a lien upon the said premises, and whether the said premises should be sold, together, or in parcels, and if in parcels, in what order; I do hereby report that I have been attended by J. H. Thayer Martin, Jr., solicitor of the complainant, and by William M. Brown, solicitor of the defendants David A. Brown, George H. Brown and Elizabeth H. Brown, who were duly summoned, as by due acknowledgment of summons hereto annexed, appears; and in the presence of the parties attending me, I have considered the matters referred to me, and the solicitor of the complainant produced before me the mortgage in his bill mentioned, bearing date the tenth day of April, eighteen hundred and ninety-three, made and executed by Charles H. Gardner and wife, to the Perth Amboy Savings Institution, and which said mortgage was duly

#2 #

acknowledged according to law by the said Charles H. Gardner, and wife, and recorded as in the bill mentioned, as appears by endorsements thereon; and the said solicitor also produced before me the bond intended to be secured by the said mortgage, which bond and mortgage are marked Exhibit 1 and 2 on the part of the complainant.

And the said complainant's solicitor also produced before me, the assignment of mortgage mentioned in said bill of complaint, from the Perth Amboy Savings Institution, to Robert Adolph Hirner, the complainant herein, which said assignment of mortgage were duly acknowledged according to law, and recorded as in the bill mentioned, as appears by endorsement thereon; which said assignment of mortgage is marked Exhibit 3 for the complainant.

And I further report that the solicitor of the complainant produced before me a release of Land Sold for Taxes from the Inhabitants of the Township of Woodbridge, New Jersey, to Robert Adolph Hirner, dated the eleventh day of January, nineteen hundred, by which it appears that the said complainant has paid the sum of forty-eight dollars and twenty-nine cents, for arrears of taxes for the year eighteen hundred and ninety-eight; which said release is marked Exhibit 4 for the complainant.

And I further report that the solicitor of the complainant produced before me a Discharge of Lien, from the Collector of the Township of Woodbridge, New Jersey, by which it appears that the said complainant has paid the sum of forty-four dollars and seventy-eight cents, for the taxes for the year eighteen hundred and ninety-

#3 #

nine, which said Discharge of Tax Lien is marked Exhibit 5 for the complainant.

And I find that there is due to the complainant on his mortgage, for principal, interest and taxes,

on this day, the sum of One thousand and one dollars and fifty-seven cents, as appears by said bond, mortgage and affidavit of the complainant, hereto annexed and making part of this my report.

And I further certify and report that the schedule hereto annexed, marked Schedule No. 1, and making part of this my report, contains a statement and account of the principal, interest and taxes due to the complainant on his said mortgage, to which for greater certainty I refer.

And I further certify that the defendants David A. Brown, George H. Brown and Elizabeth H. Brown, having appeared by William H. Brown, their solicitor, and not disputing the amount due the said complainant, filed with me an affidavit made by David A. Brown, which affidavit is hereto annexed.

And I further certify and report that it is necessary and advisable that the whole of the mortgaged premises should be sold to raise and pay the money so due to the complainant, together with the costs of this suit.

And I further certify that the complainant is entitled for fees paid and expenses incurred in obtaining certificates of search in the office of the Clerk of the County of Middlesex and New Jersey Supreme Court, to the sum of twenty-seven dollars and fifty-one cents, the persons having made such searches having endorsed thereon the

#4 # amount of such fees paid and expenses incurred;

and I certify further, that in my opinion said certificates of search were necessary for the proper foreclosure of the said mortgage; said search is marked Exhibit 6 for complainant.

All of which is respectfully submitted, this twenty-ninth day of March, Nineteen Hundred.

NICHOLAS W. BINDSEIL,
Master in Chancery of New Jersey.

SCHEDULE No. 1.

Bond bearing date the tenth day of April, eighteen hundred and ninety-three, in the penal sum of Sixteen hundred dollars, conditioned for the payment of eight hundred dollars, at the rate of six per centum per annum, secured by the mortgage in the complainant's bill mentioned		$800.
Interest from January 1, 1898, to March 29, 1900, 2 years, 2 months and 29 days		107.87
Taxes for 1898, paid January 11, 1900	48.29	
Interest to March 29, 1900, 2 months, 18 days	.63	48.92
Taxes for 1899 to March 27, 1900		44.78
		$1001.57

NICHOLAS W. BINDSEIL,
Master in Chancery of New Jersey.

Master's Report—Affidavit of Robert Adolph Hirner

IN CHANCERY OF NEW JERSEY

Between ROBERT ADOLPH HIRNER, Complainant, and CHARLES H. GARDNER, *et als.*, Defendants.	On Bill etc. Affidavit

Robert Adolph Hirner, of full age, being duly sworn, on his oath says, that he is the complainant in the above entitled cause. That there is due on the bond, and secured by the mortgage of deponent set out in the bill of complaint therein, the sum of eight hundred dollars principal, together with interest thereon from the first day of January, eighteen hundred and ninety-eight, amounting to one hundred and seven dollars and eighty-seven cents. That on the eleventh day of January, nineteen hundred, he paid the taxes assessed upon the property covered by his said mortgage for the year eighteen hundred and ninety eight, amounting to forty eight dollars and twenty nine cents, no part of which sum has been repaid him, and the whole of which, with interest thereon from said date, amounting to sixty three cents, is now due him and secured by his said mortgage; and that on the twenty seventh day of March, nineteen hundred, he paid the taxes assessed against the said property for the year eighteen hundred and ninety-nine, amounting to

forty-four dollars and seventy-eight cents, no part of which sum has been repaid him, and the whole amount of which is now due him and secured by his said mortgage.

And this deponent further says that the whole of said amounts so due him for principal, interest and taxes, and secured by his said mortgage, is the sum of one thousand and one dollars and fifty-seven cents.

R. A. HIRNER.

Sworn and subscribed before me this
29th day of March, 1900.
Marcus A. Brown,
Notary Public of N. J.

IN CHANCERY OF NEW JERSEY

Between ROBERT A. HIRNER, Complainant, and CHARLES H. GARDNER, *et als.*, Defendants.	On Bill, &c.

State of New Jersey,
County of Middlesex. } ss:

David A. Brown, of full age, being duly sworn, on his oath says:

I am one of the defendants in the above entitled cause, and am the owner of a one half interest in

the property covered by the mortgage of the complainant therein. I hold title by virtue of a deed dated November 9, 1897, executed by Charles H. Gardner and wife.

Prior to the last mentioned date the said Charles H. Gardner and wife executed a mortgage to one William V. Carpenter, bearing date December 19, 1894, acknowledged January 9, 1895, and recorded January 9, 1895, in the office of the Clerk of Middlesex County in Book 130 of Mortgages, page 239. This last mentioned mortgage was given without consideration, under an oral agreement whereby the said William V. Carpenter agreed to make certain advances if called for, and the said Charles H. Gardner and wife agreed that the mortgage should stand as security for such advances if made.

I have been informed and believe that no advances ever were made, and that under the terms of the agreement, the said William V. Carpenter should deliver his said mortgage up to be cancelled, but that he improperly retains the same and makes claim to the land under it.

The said William V. Carpenter heretofore began a proceeding in the Court of Chancery of New Jersey to foreclose his said pretended mortgage, in which suit an answer setting up the facts above stated was out in by myself and my co-owner, who were made defendants in said cause. The cause was set down for hearing on bill and answer, and it was agreed by counsel that the same should be submitted on briefs, but although a year or thereabouts has since elapsed, no brief

has ever been submitted by counsel for the said William V. Carpenter, nor have any further steps been taken by or for him.

And further that the said William V. Carpenter claims to have and hold a certain lease on the property above mentioned but the deponent saith that the said William V. Carpenter has not complied with the terms and conditions therein contained and this deponent verily believes the said lease has been by the said William V. Carpenter broken.

D. A. BROWN.

Sworn and subscribed before me
the 29th day of March, A. D. 1900.
Frederick W. Coward,
Master in Chancery of
New Jersey.

A true copy.
Ferd Garretson,
Clerk.

(Endorsed on back):

J. H. Thayer Martin, Jr. for Complainant.

	Master's fees	
	Attendance fee	4.00
1	Master's Summons	.80
	Drawing Report	4.00
1	Schedule	.30
	7 fols. depositions @ 20¢	1.40
	9 " Report @ 30¢	2.70
	6 Exhibits @ 10¢	.60
		$13.80

FINAL DECREE.

(Filed April 2, 1900)

IN CHANCERY OF NEW JERSEY

Between ROBERT ADOLPH HIRNER, Complainant, and CHARLES H. GARDNER, *et als.*, Defendants.	On Bill etc. Final Decree.

This cause having been referred to Nicholas W. Bindseil, Esquire, one of the Masters of this Court to ascertain and report the amount due to the said complainant for principal, interest and taxes, upon the mortgage held by him upon the premises mentioned and described in the bill of complaint in this cause, and whether the same is a lien upon the said premises, and whether said premises should be sold together or in parcels, and if in parcels in what order; and now coming on to be heard in the presence of J. H. Thayer Martin, Jr., solicitor, and Sherrerd Depue, of counsel, for the complainant, and William M. Brown, solicitor for and of counsel with the defendants David A. Brown, George H. Brown, and Elizabeth H. Brown, and the bill of complaint having been heretofore taken as confessed against the defendants Charles H. Gardner, Mary G. Gardner, and William V. Carpenter, and it appearing by the report of the said Nicholas W. Bindseil, bearing date on the twenty-ninth day of

March, nineteen hundred, that there was due to the complainant on the day of the making of the said report, on his said mortgage, for principal, interest and taxes, the sum of One Thousand and One Dollars and fifty-seven Cents; that the said mortgaged premises are subject to the lien of the same, and that it is necessary and advisable that the whole of the said mortgaged premises should be sold to raise and pay the money so due as aforesaid to the said complainant, together with the costs of this suit; and no cause being shown or appearing against the confirming of the said report;

It is thereupon, on this Second day of April, nineteen hundred, by Alexander T. McGill, 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 taking of the said bill as confessed, and the said report and all the matters and things therein contained do stand ratified and confirmed, and that the said mortgaged premises be sold to raise and satisfy the said sum of money due to the said complainant, that is to say, the sum of One Thousand and One Dollars and Fifty Seven Cents, together with lawful interest thereon to be computed from the twenty-ninth day of March, nineteen hundred, being the date of the said Master's report, with costs to be taxed; and that writ of *fieri facias* do issue for that purpose out of this Court directed to the Sheriff of the County of Middlesex, commanding him to make sale according to law of the said mortgaged premises, and

that out of the money arising from such sale he pay to the said complainant or his solicitor, said debt, interest and costs in manner aforesaid; and in case more money shall be raised by the said sale than shall be sufficient to answer such several sums, that such surplus be brought into this Court to abide the further order of the Court, unless otherwise previously disposed of by the order of this Court, and that the said Sheriff do make return without delay of his said proceedings by virtue of the said writ.

And it is further ordered, adjudged and decreed that the said defendants, Charles H. Gardner, Mary G. Gardner, David A. Brown, George H. Brown, Elizabeth H. Brown and William V. Carpenter, 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 Ten 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 said bill.

By the Statute

H. C. PITNEY,
Master.

A true copy.
Ferd Garretson,
Clerk.

BILL TO REDEEM.

(Filed April 12, 1900)

IN CHANCERY OF NEW JERSEY

To the Honorable Alexander T. McGill, Chancellor of the State of New Jersey:

Humbly Complaining showeth unto your Honor your orator William V. Carpenter, of the township of Woodbridge, County of Middlesex and State of New Jersey, that on or about the tenth day of April in the year eighteen hundred and ninety-three, one Charles H. Gardner, then being the owner in fee simple of the premises hereinafter described, did together with Mary Gardner his wife, party of the first part, make, execute, acknowledge and deliver to the Perth Amboy Savings Institution party of the second part, a certain indenture of mortgage bearing date the day and year aforesaid and whereby the said party of the first part did grant, bargain, sell and convey unto said party of the second part its successors and assigns forever a certain tract of land and premises in the township of Woodbridge aforesaid therein described as follows: All that part of the property lying East of the land deeded to the Port Reading Rail Road and North of the brook running through said property from West to East. Bounded North by land of James Edgar & Jotham Coddington, East by lands of James Edgar and S. B. Hinsdale, South by the brook running from West to East and West by lands of the Port Reading Rail Road. Containing about forty acres more or less. Being the same lands conveyed to said Gardner by Lewis M. VanSickle by Deed

dated July 15, 1892, recorded in Middlesex County Clerk's Office in book 251 of deeds at page 545. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof: And also all the estate, right, title, interest, use, property, possession, claim and demand whatsoever, as well

#2 #

in law as in equity, of the party of the first part to the said indenture of mortgage, and every part and parcel thereof, with the appurtenances; To have and To Hold the therein above granted and described premises, with the appurtenances unto the said party of the second part its successors and assigns to their own proper use, benefit and behoof forever; Provided Always, and the said indenture of mortgage was therein declared to be upon this express condition, that if the said party of the first part to the said indenture of mortgage their heirs executors or administrators should well and truly pay, or cause to be paid, unto said party of the second part its successors or assigns the sum of eight hundred dollars with interest thereon at the rate of six per cent per annum as provided in the condition of a certain bond in the penal sum of sixteen hundred dollars bearing even date with said mortgage and given by said Charles H. Gardner to said Savings Institution, according to the true intent and meaning thereof, then the said indenture of mortgage, and the estate thereby granted, should cease, determine, and from thenceforth be null and void. And your

orator further shows that after the execution of the said indenture of mortgage, the same was in due form of law acknowledged by the said Charles H. Gardner and wife before an officer authorized to take acknowledgments of such instruments under the laws of this State and duly registered in the office of the Clerk in and for the said County of Middlesex in Book 123 of Mortgages, page 33 on the twelfth day of April in the year One Thousand Eight Hundred and Ninety-Three.

And your orator further shows that afterward on or about the tenth day of October in the year eighteeen hundred and ninety-nine the said The Perth Amboy Savings Institution by deed of assignment bearing date the day and year last mentioned did assign transfer and set over the said indenture of mortgage and bond accompany-

#3 #

ing the same and all moneys due or to become due thereon to one Robert Adolph Hirner absolutely which deed of assignment was duly proven by the oath of the subscribing witness before an officer authorized under the laws of this State to take such proof, and thereupon duly recorded in the office of the Clerk of said County of Middlesex on the twelfth day of October in said last mentioned year in Book "T" of assignments of mortgages at page 617.

#4

And your orator further shows that on or about the twenty-first day of September in the year eighteen hundred and ninety-three, the said Charles H. Gardner by indenture of lease bearing date the day and year last mentioned between the

said Charles H. Gardner of the first part and your Orator of the second part did demise and lease unto your orator all the lands above described (the party of the first part reserving the right and privilege of mining clay from a continuation of the excavations made for that purpose) with the appurtenances and the sole and uninterrupted use and occupation thereof for the term of ten (10) years from the date of lease for the yearly rent of one half the products of said farm land less one dollar and fifty cents for each load of manure delivered on said land by party of the second part. And the party of the second part did agree to pay to said party of the first part or his assigns the said yearly rent of one half of the products and further did agree not to relet or underlet the whole or any part of said premises nor assign said lease, nor use or permit any part thereof to be used for any other purpose than farm use; and at the expiration of said term to yeild up the peaceable possession thereof to said party of the first part or his assigns; all of which will more fully and particularly appear by reference to said lease executed in duplicate by the said parties, one of which duplicate is in the hands of your orator ready to be produced and proven as this Court may direct.

#4 #

And your orator further shows that afterward on or about the nineteenth day of December in the year eighteen hundred and ninety-four, the said Charles H. Gardner made and executed under his hand and seal and delivered unto your orator, his

certain bond or obligation bearing date the day and year last aforesaid, whereby he the said Charles H. Gardner did acknowledge himself to be held and firmly bound unto your orator in the penal sum of seven thousand dollars to be paid to your orator, to which payment the said Charles H. Gardner did bind himself his heirs, executors and administrators firmly by said obligation sealed with his seal and dated as aforesaid, subject nevertheless to the condition thereunder written that if said Charles H. Gardner his heirs executors or administrators should well and truly pay, or cause to be paid, unto your orator his executors administrators or assigns the just and full sum of three thousand and five hundred dollars on the nineteenth day of December in the year eighteen hundred and ninety-nine with interest at the rate of six per centum per annum payable semi-annually without fraud or delay, then said obligation should be void.

And it was further thereby expressly agreed that should any default be made in the payment of said interest or any part thereof on any day whereon the same was made payable as above expressed, or should any tax, assessment, water-rent or other municipal or governmental rate, charge, imposition or lien be thereafter imposed or acquired upon the premises described in the mortgage accompanying said bond, become due and payable and remain unpaid and in arrear, the said interest for sixty-or said tax, assessment, water-rent or other rate charge, imposition or lien for ninety days, then after the lapse of said per-

iods as the case might be the said principal sum with all arrearage of interest should at the option of your orator or his legal representatives become

#5 # due and payable, although the period first limited for the payment thereof might not then have expired.

And your orator further shows that the said Charles H. Gardner together with said Mary Gardner, his wife, in order to secure payment of the said sum of thirty-five hundred dollars and interest thereon as provided in the condition of said obligation as last above set forth, executed and delivered to your orator an indenture of mortgage bearing an even date with the said obligation and made by the said Charles H. Gardner and wife of the first part and your orator of the second part, whereby, the said party of the first part did grant, bargain sell and convey unto your orator of the second part all the said lands and premises above mentioned and described and previously by them mortgaged as aforesaid to said The Perth Amboy Savings Institution; Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents issues and profits thereof; And also all the estate, right, title, interest, use, property, possession, claim and demand whatsoever, as well in law as in equity, of the party of the first part to the said indenture of mortgage, and every part and parcel thereof, with the appurtenances; To have and to Hold, the therein above granted and described premises,

with the appurtenances unto your orator, the said party of the second part his heirs and assigns to his and their own proper use, benefit and behoof forever; Provided always, and the said indenture of mortgage was therein declared to be upon this express condition, that if the said party of the first part to the said indenture of mortgage their heirs, executors, or administrators should well and truly pay, or cause to be paid, unto said party of the second part (your orator) his certain attorney or attorneys, executors, administrators or assigns, the said sum of money mentioned in the

#6 #

condition of the aforesaid bond or obligation, with the interest thereof, at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof, then the said indenture of mortgage, and the estate thereby granted, should cease, determine and from thenceforth be null and void. And your orator further shows that after the execution of the said indenture of mortgage, the same was in due form of law acknowledged by the said Charles H. Gardner and wife before Leslie Lupton, Esquire, a Master in this Honorable Court, and thereupon duly recorded in the office of the Clerk in and for the said County of Middlesex in Book 130 of Mortgages page 239 on the ninth day of January in the year One thousand eight hundred and ninety-five; as by the certificate of the Clerk of the said County, endorsed on the said indenture of mortgage, more fully appears, and to which your orator for greater certainty, begs leave to refer, if it be necessary so to do, as also to said indenture of mortgage.

#7

And your orator further shows that afterward on or about the ninth day of November in the year eighteen hundred and ninety-seven, the said Charles H. Gardner and Mary his wife by their deed bearing the date last mentioned, did grant, bargain, sell and convey all of the said mortgaged premises or all their right title and interest therein (the same being subject to the mortgage and lease so as aforesaid made by said Gardner to your orator) to David A. Brown and George H. Brown and their heirs and assigns forever, which deed of conveyance was on the tenth day of November in said last mentioned year recorded in the office of the Clerk of said County of Middlesex in Book 296 of Deeds at page 210.

And your orator further shows that your orator upon receiving the lease so as aforesaid made to him by the said Gardner soon after the date thereof, entered upon said demised and mortgaged premises under said lease and proceeded to farm and cultivate and mow and gather hay

#7 #

thereon, and continued so to occupy, possess and enjoy the same for farming purposes under and by virtue of said lease and the estate thereby granted from thenceforth until after the said conveyance of said premises by said Gardner and wife to said David A. Brown and George H. Brown, but that the said David A. Brown and George H. Brown having obtained said conveyance with actual knowledge and full notice of the said lease and of said mortgage and of all your orator's rights thereunder, nevertheless thereafter wrongfully entered upon said premises and

ejected and dispossessed your orator therefrom, and kept and withheld the possession thereof against your orator disputing and denying his rights thereto under said lease and under said mortgage, so that your orator was compelled to and in fact did bring an action of ejectment in the Supreme Court of this State against the said David A. Brown and George M. Brown for the recovery of the possession of said premises, and that your orator caused summons to be issued out of said Court in said action of ejectment on the fifteenth day of July in the year eighteen hundred and ninety-nine returnable the first day of August then next which was duly served upon the said David A. Brown and George H. Brown defendants in said action, whereby your orator demanded of them the said defendants the possession of all of the said demised and mortgaged premises; and that the said defendants duly pleaded to said action in the form prescribed for that purpose by the statute of this State concerning the action of ejectment, that they were not guilty of the injury whereof your orator as such plaintiff had complained in his said declaration nor of any part thereof, and that issue was thereupon joined in said action and the same came on to be tried at the September term of the Middlesex County Circuit of said Supreme Court before the Honorable Gilbert Collins, one of the Justices of said Court and was duly tried before the said Justice by consent, a jury being waived by said parties, and

#8 #

upon said trial your orator as plaintiff offered in evidence and relied upon the said lease from said

Charles H. Gardner to your orator above set forth and offered no other evidence in support of said action, and the said Justice thereupon found and decided that the said lease was valid and effectual and in full force according to the terms thereof, and that your orator by virtue thereof was then entitled to a lease-hold estate and unexpired term of years in said premises, and to the possession of said premises as against said David A. Brown and George H. Brown; and postea having been accordingly signed by said Justice and duly filed that the said defendants were guilty of the injury in said declaration alleged against them, judgment thereon was duly entered in favor of the plaintiff and against the defendants on the eighth day of November in the year eighteen hundred and ninety-nine, that the plaintiff (your orator) recover his unexpired term in the said premises against the said David A. Brown and George H. Brown together with his costs of suit, which said judgment still remains in full force and effect, not in any way reversed or set aside, nor have any proceedings for that purpose been brought.

And your orator insists that the said judgment is conclusive and is a bar and estoppel against said David A. Brown and George H. Brown as to the validity of said lease, and conclusively establishes as against them, that your orator was at the date of said judgment entitled to an estate for years in said premises and to the possession of said premises by virtue of said lease.

And your orator further shows that on or about the nineteenth day of January in the year nine-

teen hundred, the said Robert Adolph Hirner being the owner of the said first mentioned indenture of mortgage so as aforesaid made by said Gardner and wife to the Perth Amboy Savings Institution and by said Savings Institution assigned to said Hirner, filed his bill of complaint in this Court against the said Charles H. Gardner and Mary his wife, David A. Brown, George H. Brown and Elizabeth his wife and your orator defendants, for a foreclosure of said mortgage and sale of said mortgaged premises for the payment of the moneys due thereon with the costs and Sheriff's fees according to the usual course and practice of this Court in such cases; and that in said bill to foreclosure the said lease of said premises made to your orator by said Charles H. Gardner dated the twenty-first day of September, A. D. 1893 for ten years from said date, and also the said mortgage covering said premises made to your orator by said Gardner and wife dated the nineteenth day of December, A. D. 1894 and recorded in Book 130 of mortgages for Middlesex County at page 239, and also the said judgment in ejectment recovered by your orator against said David A. Brown and George H. Brown on the eighth day of November, A. D. 1899 were set forth and your orator was made a party defendant in said cause by reason of his interest in said mortgaged premises under said lease, mortgage and judgment; and the ticket served upon your orator with the subpoena to answer said bill to foreclose, so stated accordingly.

Bill to Redeem

And your orator shows that subpoena to answer the said bill to foreclose was duly issued and returned served upon all of said parties defendant, and that thereafter such proceedings were had in said cause that final decree therein was made in the usual form on or about the second day of April instant, whereby it was ordered adjudged and decreed that a certain Master's report theretofore made and filed in said cause by which it appeared that there was due to said complainant on the date of said report the sum of one thousand and three dollars and seventeen cents for principal and interest on his said mortgage and certain taxes on said mortgaged premises theretofore paid by said complainant should stand ratified and confirmed, and that said mortgaged premises be sold to raise and satisfy said sum so due to the complainant together with interest thereon and his costs of suit, and that a writ of *fieri facias* should issue to the Sheriff of Middlesex County commanding him to make sale according to law of said premises, and that out of the moneys arising from such sale he pay to the complainant or his solicitor his said debt and interest and his costs taxed at one hundred and fourteen dollars and seventy-six cents, and that if the proceeds of said sale should be more than

#10 #

sufficient to answer such payments, that the surplus be brought into this Court to abide the further order of the Court unless otherwise previously disposed of by order of this Court; and it was thereby further ordered, adjudged and decreed that the said defendants 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 said decree.

And your orator further shows that on the seventh day of April instant (1900) your orator with his counsel Alan Strong visited the office of J. H. Thayer Martin, Jr., the Solicitor of the said complainant at Newark by previous appointment for the purpose of paying or tending the amount due upon said mortgage and decree, and that your orator through his said counsel then and there did produce and tender unconditionally to the said Solicitor of the Complainant the sum of eleven hundred and seventeen dollars and ninety-three cents, which was the amount then claimed by said Solicitor of the complainant as due at that time for principal and interest and costs upon said decree.

That said sum of eleven hundred and seventeen dollars and ninety-three cents was then and there by your orator and by his said counsel counted out in the presence and view of said Solicitor of the complainant and laid upon the table before him, your orator's counsel at the same time stating to the said Solicitor of the complainant that the same was thereby tendered in payment of the moneys due on said decree on behalf of your orator and in the exercise of his right to redeem said premises from said mortgage and decree by reason of his leasehold interest in said premises under said lease from said Gardner and also by reason of his mortgage covering said premises as

above set forth, and claiming as the effect of such payments to be subrogated to the rights of said complainant; but that no receipt for such payment was asked or mentioned, nor even the surrender of any papers by said complainant.

#11 # 10

That the said solicitor of the complainant upon such tender being made (and having observed the counting of the money) acknowledged that the amount so tendered was correct and was the full amount due upon the said decree for debt and costs and interest to that time, but refused to receive the same, stating as the ground of such refusal that the said David A. Brown and George H. Brown had by an answer filed in said cause 20 denied the validity of said lease to your orator and also of your orator's said mortgage, in view of which answer and denial of your orator's interest in said premises the said solicitor of the complainant further stated that he (on behalf of said complainant) declined to recognize any right in your orator to redeem said premises from said mortgage until such right should have been judicially established; and upon the attention of said 30 solicitor being called to the fact that the validity of your orator's said lease-hold estate had *had* been conclusively established as against the said David A. Brown and George H. Brown by the said judgment in ejectment, he admitted that he knew of the said judgment and that no proceedings had been taken to set it aside, and merely said that he was informed that some such proceedings were contemplated to be taken. 40

And your orator further shows that at all times since the said tender, he has been ready and desirous to pay the said sum due to the said Robert Adolph Hirner on the said decree, and that he has kept the said sum of eleven hundred and seventeen dollars and ninety-three cents in hand for that purpose, and that he hath upon filing this bill of complaint paid the said sum to the Clerk of this Court for the benefit of the said complainant in said foreclosure suit and in satisfaction of said decree.

And your orator insists that both by virtue of his estate for years and unexpired term in the said premises under the said lease thereof so as #12 # aforesaid made to your orator by said Charles H. Gardner dated the twenty-first day of September, A. D. 1893 for ten years from that date (and which is still) subsisting and in full force and effect) and by virtue of the said mortgage for thirty-five hundred dollars and interest so as aforesaid made and given to your orator by said Gardner and wife dated the nineteenth day of December, A. D. 1894, (the principal of which is still wholly unpaid with interest thereon from the date of said mortgage), your orator is entitled in equity to redeem said premises from the said prior mortgage of said Robert Adolph Hirner and from the decree thereon by which, unless he shall be stayed and prevented by the order or process of this Court, the said Hirner threatens and intends to wholly foreclose and cut off and extinguish your orator's said several rights interests and estates in said lands and to deprive

your orator of all benefit thereof; and that upon such payment made your orator is entitled to be fully subrogated and substituted to all the rights of said Robert Adolph Hirner by virtue of said decree.

In tender consideration whereof and forasmuch as your orator is without remedy in the premises except in this Honorable Court where matters of this nature are properly cognizable and relievable, to the end therefore that the said Robert Adolph Hirner, David A. Brown, George H. Brown and Elizabeth his wife may without oath full true direct and perfect answer make to all and singular the premises as fully and particularly as though the same were here again repeated paragraph by paragraph, and they thereunto particularly interrogated, and that it may be decreed by this Honorable Court that your orator is entitled to redeem said premises from said prior mortgage and decree thereon and that the money so as aforesaid paid by your orator to the Clerk of this court for that purpose be so applied and be declared and decreed by this court to have operated as a full and complete redemption in favor of your orator from said decree and mortgage and that it may be further declared and de-

#13 #

creed that by virtue of such payment and redemption your orator be fully subrogated and substituted to all the rights of said Robert Adolph Hirner under his said bond and mortgage and decree and for the purpose of enforcing repayment of the moneys so paid by your orator, and that execution upon said decree may if necessary be is-

sued in the name of said Hirner but for your orator's benefit and under his control, and that the said bond and mortgage made by said Gardner to said The Perth Amboy Savings Institution and by said Institution assigned as aforesaid to said Hirner may be delivered by said Hirner to your orator uncanceled together with the said assignment thereof, and that your orator may if necessary be empowered to use the name of said Hirner for the purpose of enforcing said bond against said Gardner, and that your orator may recover his costs of this suit against said defendant; and that your orator may have such other or further relief in the premises as to your Honor shall seem meet and shall be agreeable to equity and good conscience.

May it please your Honor the premises considered to grant unto your orator the States writ of subpoena issuing out of this Honorable Court and under the seal thereof to be directed to the said Robert Adolph Hirner, David A. Brown, George H. Brown and Elizabeth his wife, defendants, therein, and therein commanding them and each of them on a certain day and under a certain penalty therein to be inserted to be and appear before your Honor in this Honorable Court then and there to answer all and singular the premises and to stand to abide by and perform such order and decree therein as to your Honor shall seem meet and shall be agreeable to equity and good conscience. And your orator will ever pray, &c.

ALAN H. & THEODORE STRONG
Solicitors for & of Counsel with Complainant.

A True Copy
Ferd Garretson
Clerk

ORDER FOR PAYMENT.

(Filed Apr. 12, 1900)

IN CHANCERY OF NEW JERSEY

Between WILLIAM V. CARPENTER, Complainant, and ROBERT ADOLPH HIRNER, *et al.* Defendants.	On Bill to Redeem Order.

Upon reading and filing the bill of complaint in the above entitled cause, it is on this twelfth day of April in the year nineteen hundred on motion of Alan H. & Theodore Strong of Counsel with complainants ordered that the said complainant have leave to pay to the Clerk of this Court the sum of eleven hundred and seventeen dollars and ninety-three cents in support of the tender of said sum alleged in said bill to have been made by said complainant in redemption of the decree of foreclosure in a cause between said Robert Adolph Hirner, complainant, and Charles H. Gardner and others, defendants; and that upon such payment being made the same be deposited to the credit of this cause there to remain until the further order of this Court.

By the Statute.

H. C. PITNEY,
Master.

A True Copy
Ferd Garretson
Clerk

ORDER TO PAY INTO COURT.

(Filed May 2, 1900)

IN CHANCERY OF NEW JERSEY

Between WILLIAM V. CARPENTER, Complainant, and ROBERT ADOLPH HIRNER, *et al.* Defendants.	On Bill &c. Order For Payment of Money out of Court.

The complainant in the above entitled cause having heretofore, on the twelfth day of April, nineteen hundred, paid into this Court the sum of eleven hundred and seventeen dollars and ninety three cents for the use of the defendant Robert Adolph Hirner; and the said Robert Adolph Hirner having appeared by his solicitor, J. H. Thayer Martin, Jr., and now making application for the payment of the said sum of money to him; and Alan H. & Theodore Strong, solicitors for the said complainant, consenting hereto;

It is, on this second day of May, nineteen hundred, on motion of J. H. Thayer Martin, Jr., solicitor for the said defendant Robert Adolph Hirner, ordered that the Clerk of this Court do pay to the said J. H. Thayer Martin, Jr., as solicitor for the said Robert Adolph Hirner, the said sum of money, with all interest accrued thereon.

And it is further ordered that upon payment being made as aforesaid, the said Robert A. Hir-

ner shall deliver to the complainant or his solicitors the bond and mortgage in said bill mentioned, uncanceled, together with the assignment thereof to said Hirner; and that thereupon the bill of complaint in said cause shall be dismissed as against the said defendant, Robert Adolph Hirner, without costs to either party as against the other.

W. J. MAGIE,
C.

We consent to the making and entry of the above order.

ALAN H. & THEODORE STRONG,
Solicitors for Complainant.

A True Copy
Ferd Garretson
Clerk

ORDER DISMISSING BILL.

(Filed May 22, 1900)

IN CHANCERY OF NEW JERSEY

Between
WILLIAM V. CARPENTER,
Complainant,
and
ROBERT ADOLPH HIRNER, *et al.*
Defendants.

On Bill &c. Order Dismissing Bill.

An order having been made in this cause on the application of the defendant, Robert A. Hirner, for the payment to said defendant of the moneys heretofore paid into Court by the said complainant, and upon such payment being made that the said defendant deliver to the complainant or his solicitors the bond and mortgage in said bill mentioned uncanceled together with the assignment thereof, and that thereupon the bill of complaint in said cause be dismissed as against said defendant, Robert A. Hirner, without costs to either party as against the other; and payment of said money having been made to said Robert A. Hirner and said papers having been by him delivered as directed by said order, and none of the other defendants having appeared in said cause;

It is therefore on this twenty-second day of May in the year nineteen hundred on motion of Alan H. & Theodore Strong, of Counsel with complainant, ordered that the said bill of com-

plaint be and the same is hereby dismissed as to all of the defendants therein named without costs.

W. J. MAGIE,
C.

A True Copy
Ferd Garretson
Clerk

Foreclosure searches filed March 25th, 1900, not printed.

Subpoenas to answer and tickets showing service on all defendants, not printed.

Appearance for David A. Brown, George H. Brown, and Elizabeth H. Brown, defendants, by William M. Brown, solicitor, not printed.

Stipulation extending time to answer for David A. Brown, George H. Brown and Elizabeth H. Brown, not printed.

BILL FOR RELIEF.

(Filed January 3, 1898)

To the Honorable Alexander T. McGill
Chancellor of the State of New Jersey:

Humbly complainant showeth unto your Honor, your orators David A. Brown and George H. Brown, of the Township of Woodbridge, in the County of Middlesex, and State of New Jersey. That on the ninth day of November in the year

Eighteen hundred and ninety-seven, your orators purchased of Charles H. Gardner and Mary G. Gardner, his wife, certain lands and real estate in the said Township of Woodbridge, County of Middlesex aforesaid, described as follows:

Being bounded as follows: On the west by property of Albert D. Brown, Port Reading Rail Road and Estate of Jonas Coddington; on the North by lands of the Estate of Jonas Codington and lands of James Edgar; on the East by lands of James Edgar and property known as the Honer Estate; on the South by land of Mary G. Gardner and Albert D. Brown. Being the same lands conveyed to Charles H. Gardner by Lewis Van Sycle, the same being subject to a mortgage of Eight hundred dollars, held by the Perth Amboy Savings Bank of Perth Amboy, N. J.

That the said Charles H. Gardner and Mary G. his wife, made and executed a deed of conveyance for said lands, to your orators, bearing date on the said Ninth day of November, in said year and delivered the same to your orators, who thereupon took possession of said premises and caused said deed to be recorded in the Clerk's office of the County of Middlesex, in Book 296 of Deeds page 210 &c.

That said deed contained full covenants of warranty, subject to a mortgage of Eight hundred dollars, held by the Perth Amboy Savings Bank, and is now in your orators possession ready to be produced and proved, and to which for greater certainty your orators beg leave to refer.

Bill for Relief

Your orators further show that on the nineteenth day of December, in the year Eighteen hundred and ninety four, the said Charles H. Gardner and Mary G. his wife, made and executed to a certain mortgage upon the property in this bill described to one William V. Carpenter, of the said Township of Woodbridge, County of Middlesex and State of New Jersey, for the sum of Three thousand five hundred dollars, conditioned for the payment of said sum on the nineteenth day of December, in the year One Thousand Eight Hundred and Ninety-nine, with interest on the same at the rate of six per cent per annum, payable semi-annually.

That said mortgage was afterwards delivered to the said William V. Carpenter by the said Charles H. Gardner and recorded in the Clerks office of the County of Middlesex in Book 130 of Mortgages page 239 &c.

Your orators further show and charge the truth to be that said Mortgage was given without consideration, that no part of said sum of three thousand five hundred dollars was ever paid by the said William V. Carpenter to the said Charles H. Gardner nor to any one upon his behalf, and that no interest was ever paid to the said Carpenter and none was ever demanded, either of the said Gardner or from your orators.

Your orators further show that although said Mortgage was duly recorded in the office of the Clerk of the County of Middlesex, at the time of the conveyance to your orators as herein set forth,

your orators had no actual knowledge of said mortgage.

That as soon as your orators learned of the existence of said mortgage they at once requested the said Carpenter to surrender the same to your orators so that it might be cancelled of record, but that he has refused so to do.

Your orators further show and charge the truth to be that although said mortgage is without validity and void, yet while it remains uncancelled of record it creates a cloud upon your orators title to said property.

In tender consideration whereof, and forasmuch as your orators are without adequate legal remedy in the premises, and can only obtain relief in this Honorable Court where matters of this nature are properly cognizable and relievable;

To the end therefore that the said William V. Carpenter may to the best and utmost of his knowledge, information and belief full, true and perfect answer make to all and singular the matters aforesaid and that as fully and particularly as if the same were here repeated, and he distinctly interrogated thereto, and more especially that he state what consideration if any was given by him for said mortgage.

And that the said mortgage may be decreed to be without consideration, illegal and void, and may be cancelled accordingly.

And that your orators may have such further and other relief in the premises as the nature of

the case may require and as shall be agreeable to equity and good conscience.

May it please your Honor the premises considered to grant unto your orators the State's writ of Subpoena, issuing out of and under the seal of this Honorable Court to be directed to the said William V. Carpenter, commanding him by a certain day and under a certain penalty therein to be expressed to be and appear before your Honor in this Honorable Court, then and there to answer all and singular the said premises and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet, and shall be agreeable to equity and good conscience.

And your orators as in duty bound will ever pray, etc.

VAIL & WARD
Solicitors for and of Counsel with
the Complainant.

A True Copy
Ferd Garretson
Clerk

OPINION BY THE CHANCELLOR.

(Filed November 1, 1898)

HEAD NOTE

G mortgaged his lands to C, "to", in the language of the bill, "secure and preserve the said

property (to the "amount of said mortgage) from any losses which said G might "thereafter incur", and thereafter conveyed them to B—C refuses to cancel the mortgage and B seeks to have the mortgage set aside by the decree of this court. HELD that if the language of the bill means that the purpose of making the mortgage was to defraud the creditors of G, B taking conveyance from him and succeeding to his rights only, will not be sided by the decree of this court, and if such be not the meaning of the language of the bill, that the language is uncertain, vague and indeterminate in its statement of a material fact, upon which the right to relief depends and that, in either case, the bill is bad upon demurrer.

DAVID A. BROWN and
GEORGE H. BROWN

VS.

WILLIAM V. CARPENTER.

ON DEMURRER TO BILL.

Mr. Alan H. Strong for the Demurrant.

Mr. B. A. Vail for the Complainants.

THE CHANCELLOR.

The bill states this case: That on the ninth day of November 1897 the complainants purchased from Charles H. Gardner and Mary his wife, certain lands in Woodbridge Township, Middlesex County, subject to a mortgage of $800 held by the Perth Amboy Savings Bank, which lands were on

that day conveyed by Gardner and wife to them by deed with covenant of warranty subject to the $800 mortgage; that before then, in 1894, Gardner and wife had executed and delivered to William V. Carpenter a mortgage for $3,500 upon the same lands, conditioned for the payment of the $3,500 on the 19th of December 1899, with interest at six per cent per annum payable semi-annually and that mortgage was recorded before the conveyance of 1897 to the complainants; that the mortgage was given to Carpenter to secure him against any obligation he might thereafter incur or become liable for in behalf of Gardner, for and money Carpenter might from time to time advance to Gardner at his request, "and", in the language of the bill, "to secure and preserve the said property (to the amount of "said mortgage) from any losses which the said Gardner might "thereafter incur"; that no obligations were ever incurred by Carpenter for Gardner and no money was ever paid or advanced by Carpenter upon the mortgage; that the mortgage was not intended as a gift and that no consideration ever passed from Carpenter to Gardner therefor; that the complainants had no actual knowledge of the mortgage at the time of the conveyance of the lands to them and that Carpenter will not surrender the mortgage to be cancelled. The prayer is that he be compelled to do so.

It is objected by the demurrer, in the first place, that Gardner and his wife should be parties to the suit and, in the second place, that the allegation that the mortgage was given to Carpenter to "Secure and preserve the said property (to

the "amount of said mortgage) from any losses which the said "Gardner might thereafter incur", imports that the mortgage was intended between the parties to it, as a fraudulent cover or shield of the property mortgaged against the claims of prospective creditors of Gardner to its amount, and being so intended by both mortgagors and mortgagee, will not be relieved against in equity, at the instance of Gardner for those who may hold under him.

It is not perceived that Gardner and his wife are necessary parties to the suit. They have parted with all interest in the property. It does not appear that any personal obligation attends the mortgage and it is not suggested that a decree of any kind can be made against them or either of them.

The principal insistence has been upon the second ground of demurrer. The mortgage was not a gift by Gardner and wife to Carpenter. No consideration was paid for it. It was executed and delivered to answer three purposes, (a) to secure Carpenter against obligations to be assumed for Gardner, (b) to secure Carpenter for money to be advanced for Gardner and (c) to secure and preserve the property covered by the mortgage to the value of $3,500 from losses that Gardner might thereafter incur. The first inquiry is as to the meaning of the language in which the purpose "(c)", is expressed in the bill. The demurrant claims that its meaning is that the mortgage was designed by the mortgagors and mortgagee to be a protection for Gardner

against his creditors, upon the argument that it anticipates losses by Gardner which can come over on the mortgaged land so as to take it, and is designed to defeat the collection of such losses to the extent of the amount of the mortgage. Or in plainer language it means that the mortgage was a contrivance to defeat the recovery of claims of future creditors. If this be not the proper construction of the language, I am at a loss to give it other meaning. The complainants' counsel has not been able to suggest another meaning. If it has other meaning it is at least too vague and indeterminate to manifest that meaning which must be understood before relief can be given, and the bill is demurrable to upon the ground that it is uncertain and vague in this respect. But if the construction of the language is as the defendant contends, what is the situation? Grantees of a mortgagor with fraudulent intent, who purchased the land without actual knowledge of the mortgage, for a consideration not stated, ask that the mortgage be cancelled. A Court of Equity would not afford to the mortgagor the relief they ask, because of the principle which underlies the maxim, *in pari delicto, potior est conditio possidentis, Schenck* vs. *Hart,* 5 Stew. Eq. 774, 782, and I do not think that they stand in better position. *Pillsbury* vs. *Kingon,* 6 Stew. Eq. 287, 291; *Bump on Fraudulent Conveyances* (3d edn) 446. As grantees of Gardner they are his representatives and succeed only to his rights.

The demurrer will be sustained with costs.

A True Copy
Ferd Garretson
Clerk

NOTICE OF MOTION TO STRIKE OUT BILL.

(Filed February 1, 1898)

IN CHANCERY OF NEW JERSEY

Between DAVID A. BROWN, *et al.* Complainants, and Defendant. WILLIAM V. CARPENTER,	On Bill &c. Notice.

To the said Complainants and Messrs. Vail & Ward their Solicitors:

Take notice that on Monday the thirty first day of January instant at ten o'clock in the forenoon or as soon thereafter as we can be heard we shall move before the Chancellor at the Chancery Chambers in Jersey City for an order striking out the bill of complaint in the above entitled cause for the reason that no sufficient ground is shown therein for setting aside the bond and mortgage mentioned in said bill, nor have the said complainants therein made or stated such a case as entitles them to any relief in this Court.

Dated January 19, 1898.

ALAN H. & THEODORE STRONG,
Solicitors of Defendant.

A True Copy
Ferd Garretson
Clerk

ORDER STRIKING OUT BILL.

(Filed February 1, 1898)

IN CHANCERY OF NEW JERSEY

Between DAVID A. BROWN, *et al.* Complainants, and WILLIAM V. CARPENTER, Defendant.	On Bill &c.

This matter being opened to the Court by Alan H. & Theo. Strong of counsel with the defendant upon due notice to and in the presence of Vail & Ward of counsel with the Complainants and it appearing that the complainants have not in their said bill made or stated any case which entitles them to relief in this Court, it is on this thirty first day of January in the year eighteen hundred and ninety eight ordered that as the said bill now stands, the said bill be struck out with costs *fut* it being claimed that the said bill may be so amended as to make a proper cost.

It is further ordered that the said complainants have leave within ten days from the date hereof to amend their said bill as they may be advised so as to allege facts showing the invalidity of the mortgage mentioned in said bill and that being done the bill as amended shall stand, upon the payment of costs aforesaid.

ALEXANDER T. McGILL,
C.

A True Copy
Ferd Garretson
Clerk

AMENDMENT TO BILL.

(Filed February 9, 1898)

IN CHANCERY OF NEW JERSEY

Between DAVID A. BROWN, *et al.* Complainants, and WILLIAM V. CARPENTER, Defendant.	On Bill &c.

Amend the stating part of said bill by striking out the paragraph which reads as follows:

"Your orators further show and charge the truth to be that said Mortgage was given without consideration; that no part of said sum of three thousand five hundred dollars was ever paid by the said William V. Carpenter to the said Charles H. Gardner nor to any one upon his behalf, and that no interest was ever paid to the said Carpenter and none was ever demanded, either of the said Gardner or from your orators", and insert in place thereof the following:

"Your orators further show and charge the truth to be: that no part of said sum of three thousand five hundred dollars was ever paid by the said defendant to the said Charles H. Gardner, nor to any one upon his behalf, and that no interest was ever demanded, either of the said Gardner or from your orators.

Amendment to Bill

Your orators further show and charge the truth to be that said mortgage was given to said defendant to secure him for any obligations which he might thereafter incur, or become liable for, for and on behalf of said Gardner, or for money which he might advance from time to time to said Gardner, at his request, and to secure and preserve the said property to the amount of said mortgage from any losses which the said Gardner might thereafter incur.

And your orators further show and charge the truth to be that no obligations were ever incurred by the said defendant for or on behalf of said Gardner and that no money was ever paid or advanced by said defendant upon said mortgage; that said mortgage was not intended as a gift and that no consideration ever passed from the defendant to the said Gardner therefor."

Among the prayer of the bill by adding to the first paragraph the following:

"What obligations were incurred by the said defendant for the said Gardner; and what money, if any, was ever advanced by said defendant to said Gardner."

No. Signature.

A True Copy
Ferd Garretson
Clerk

ORDER FOR TIME TO ANSWER.

(Filed February 21, 1898)

IN CHANCERY OF NEW JERSEY

Between DAVID A. BROWN, *et al.* Complainants, and WILLIAM V. CARPENTER, Defendant.	On Bill &c.

Upon good cause shown and on motion of Alan H. & Theodore Strong of counsel with the defendant, it is ordered on this seventeenth day of February, A. D. 1898, that the said defendant have ten days time from the date of this order in which to plead demur or answer to the amended bill of complaint in this cause.

ALEXANDER T. McGILL,
C.

A True Copy
Ferd Garretson
Clerk

DEMURRER.

(Filed February 26, 1898)

IN CHANCERY OF NEW JERSEY

Between DAVID A. BROWN, *et al.* Complainants, and WILLIAM V. CARPENTER, Defendant.	On Bill &c.

The demurrer of William V. Carpenter defendant to the bill of complaint of David A. Brown and George H. Brown, Complainants in the above entitled cause.

This defendant by protestation not confessing all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged doth demur thereto and for cause of demurrer shows that the complainants have not in and by their said bill made or stated such a case as entitles them in this Honorable Court to any discovery from this defendant or to any relief against him as to the matters contained in said bill or any of such matters.

And this defendant further for cause of demurrer shows that the said Charles H. Gardner

and Mary Gardner, his wife mentioned in said bill ought to be made parties thereto.

ALAN H. & THEODORE STRONG,
Solicitors for and of
Counsel with Defendant.

A True Copy
Ferd Garretson
Clerk

Middlesex County
State of New Jersey } ss.

William V. Carpenter being by me duly sworn according to law on his oath saith that he is the defendant in the above entitled cause and that the foregoing demurrer is not interposed for delay but in good faith for the causes therein set forth.

W. V. CARPENTER.

Sworn and subscribed before me
February 25, 1898
Frederick Weigel
Master in Chancery
of New Jersey.

I certify that I have perused the complainant's bill in the above entitled cause and that the above demurrer is well founded in point of law.

ALAN H. SRTONG,
Of Counsel with Defendant.

A True Copy
Ferd Garretson
Clerk

ORDER SUSTAINING DEMURRER.

(Filed January 17, 1899)

IN CHANCERY OF NEW JERSEY

Between DAVID A. BROWN, *et al.* Complainants, and WILLIAM V. CARPENTER, Defendant.	On Bill & Demurrer

This cause coming on to be heard in the presence of Benjamin A. Vail, of Counsel with Complainants and Alan H. Strong, of Counsel with defendant, and the Chancellor having heard the arguments of the respective Counsel, and being of opinion that the said demurrer is good and sufficient.

It is on this fourteenth day of January in the year eighteen hundred and ninety-nine, ordered that the same do stand and be allowed, and that the complainants pay to the said defendant his costs of the said demurrer to be taxed.

ALEXANDER T. McGILL,
C.

A True Copy
Ferd Garretson
Clerk

ORDER DISCHARGING ORDER TO SHOW CAUSE.

(Filed September 19, 1899)

IN CHANCERY OF NEW JERSEY

Between DAVID A. BROWN, *et al.* Complainants, and WILLIAM V. CARPENTER, Defendant.	On Bill for Injunction Order.

The order heretofore granted in the above entitled cause requiring the defendant to show cause why an injunction should not issue in accordance with the prayer of said bill having been duly continued until this time and now having been duly agreed by the respective Counsel it is on this eighteenth day of September in the year eighteen hundred and ninety nine, on motion of Alan H. & Theodore Strong of Counsel with the defendant ordered that the injunction prayed in and by said bill be wholly denied and the said order to show cause is hereby discharged with costs.

ALEXANDER T. McGILL,
C.

Respectfully advised
FREDERIC W. STEVENS,
V. C.

A True Copy
Ferd Garretson
Clerk

AMENDED NOTICE OF APPEAL.

(Filed July 31, 1930)

IN CHANCERY OF NEW JERSEY

74/427

Between DAVID A. BROWN and GEORGE H. BROWN, Complainants, and WILLIAM V. CARPENTER, Defendant.	On Bill to Redeem, etc.

The defendant, William V. Carpenter, hereby appeals from the final decree made in the above entitled cause on July fifteenth, 1930, by the Chancellor on the advice of Vice-Chancellor Berry, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated: July 28th, 1930.

FREDERICK F. RICHARDSON,
Solicitor for and of Counsel with defendant, William V. Carpenter.

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

FREDERICK F. RICHARDSON,
Of Counsel with defendant,
William V. Carpenter.

Served on Bernard Vogel, Solicitor of Record for the Complainants on July 29/30.

PETITION OF APPEAL.

(Filed August 5, 1930)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

DAVID A. BROWN and GEORGE H. BROWN,

Complainants and Respondents,

and

WILLIAM V. CARPENTER,

Defendant and Appellant.

} On Appeal

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

The petition of William V. Carpenter, appellant, respectfully shows:

That your 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, and advised by the Honorable MAJA LEON BERRY, one of the Vice Chancellors of the State of New Jersey, to whom said cause had been referred, to hear and determine the same and advise what order and decree should be made therein, and which decree bears date the 15th day of July, 1930, in a certain cause in the said Court of Chancery, wherein David A. Brown and George H. Brown were complainants and your petitioner, William V. Carpenter, was defendant, in this respect, to wit:

That is was decreed that the complainants were entitled to the relief prayed for by them in the bill of complaint, and that there is equitably due from the said complainants to the said defendant the sum of Eleven hundred seventeen dollars and ninety-three cents ($1,117.93), for principal and interest upon a certain mortgage made and assigned as said decree recited, and upon which mortgage a final decree of foreclosure was entered April 2, 1900, and which mortgage was redeemed as in said Final Decree recited, and by which Final Decree, it was further ordered, adjudged and decreed that the said complainants, David A. Brown and George H. Brown, were entitled to redeem the mortgage mentioned and described in their bill of complaint made by Charles H. Gardner and Mary Gardner, his wife, to the Perth Amboy Savings Institution, to secure the sum of Eight hundred ($800.00) dollars, and interest, and which said mortgage assigned as in said decree recited, covered said lands and premises in said decree mentioned, and by which it was further ordered, adjudged and decreed that this defendant and appellant, William V. Carpenter, surrender unto complainants for cancellation a properly executed instrument authorizing the Clerk of the County of Middlesex to cancel of record a certain mortgage made by one Charles H. Gardner and Mary Gardner, his wife, to the defendant, this appellant, dated the 19th day of December, 1894, to secure the sum of Thirty-five hundred ($3,500.00) dollars, and interest, covering said lands and premises and by which it was further ordered and decreed that the defendant surrender for cancellation two cer-

tain certificates of tax sale assigned to him by the Township of Woodbridge as in said decree recited, and by which it was further ordered, adjudged and decreed that upon the payment by the complainants to the said defendant and appellant of the sum of Three thousand one hundred forty-nine dollars and seventeen cents ($3,149.17), that the title of the said complainants, David A. Brown and George H. Brown, as to all of the said lands in the said decree described, was determined, advised, settled and declared to be good and by which decree it was further ordered, adjudged and decreed that a copy of said decree be served as therein stated, and that the complainants pay to this defendant, William V. Carpenter, or his solicitor, the sum of Three thousand one hundred forty-nine dollars and seventeen cents ($3,149.17), less the costs of said suit, including counsel fee as therein set forth, and that upon the making of said payment the said defendant, William V. Carpenter, forthwith deliver to the complainants, the mortgage and certificate of tax sale, having first duly endorsed the certificate of tax sale for cancellation. And this defendant and appellant shows that he appeals from the said decree, and from the whole and every part thereof, on the ground that the same is erroneous, for that the said bill of complaint of the said complainants should have been dismissed for the following reasons:

1. That the said defendant, William V. Carpenter, was entitled to have the said bill dismissed, in that the said complainants and respondents showed no equity entitling them to the relief prayed for in said Bill.

2. That the said defendant and appellant, William V. Carpenter, was a mortgagee in possession for a period of more than twenty years, under and by virtue of said mortgage of Thirty-five hundred ($3,500.00) dollars, which he held on said premises, and which mortgage had been duly recorded in the Middlesex County Clerk's Office, and of which mortgage the said complainants and respondents had full, actual and legal notice at the time of the purchase of said lands.

3. That this defendant and appellant was in actual, open and notorious possession of the said lands and premises as mortgagee, in possession under and by virtue of his said mortgage at the time of the purchase of said lands and premises by the said complainants and respondents, and held the legal title to the same.

4. That the said defendant and appellant was in possession of and under the certificates of tax sale mentioned and described in the said decree, which had been duly recorded and by reason of which possession the legal title of said property was and became vested in him.

5. Because at the time of the trial of said cause by the Honorable Maja Leon Berry, it was stipulated and agreed that a transcript of the proceedings and testimony submitted in a certain cause theretofore pending in the Middlesex County Circuit Court, wherein the said David A. Brown and George H. Brown were plaintiffs, and this defendant and appellant was defendant in an action of ejectment should be considered by the said Court as a part of the testimony in this cause, on the strength and faith of which stipula-

tion the defendant rested and closed his case. Notwithstanding said stipulation and agreement so made in open Court at the trial, the said Vice Chancellor made his decree, refusing, neglecting and failing to consider the said testimony, by reason of which the said defendant and appellant was greatly prejudiced and deprived of the benefit of said testimony, which was strongly in his favor.

6. Because said matters and things in issue in said cause between the parties or their grantors with regard to the said mortgage of Thirty-five hundred ($3,500.00) dollars, were *res adjudicata,* between the grantors of the said complainants and respondents and this defendant and appellant.

7. Because said complainants and respondents were in laches in failing and neglecting to pursue any rights they may have had under their deed promptly and diligently as required by law and equity.

8. Because the said complainants and respondents were not entitled to relief in that the title held by them by virtue of their alleged conveyance was fraudulent and void as to this defendant and appellant.

9. Because the said Vice Chancellor based said decree upon illegal evidence pending said trial, more particularly with regard to a certain letter alleged to have been written by the complainants and respondents, to one Charles H. Gardner, which evidence was incompetent and illegal.

10. Because the said decree was made before the briefs of the respective counsel was submitted contrary to the express agreement made at said trial, and with the authority of the said Vice Chancellor.

11. Because defendant was in possession for a period of over twenty years as mortgagee under and by virtue of being the purchaser of a final decree of foreclosure of the said Hirner mortgage afore recited and by reason of such possession was the legal owner of said premises.

Wherefore, the said defendant, this petitioner and appellant, prays that the said decree may be in all respects reversed, set aside and for nothing holden and a decree entered dismissing the said bill of complaint and that this petitioner may have such other and further relief in the premises as to this Honorable Court shall seem meet.

FREDERICK F. RICHARDSON,
Solicitor for and of Counsel with
Appellant.

FREEMAN WOODBRIDGE,
Of Counsel with Appellant.

Petition of Appeal served August 6, 1930.

BERNARD M. VOGEL,
Sol'r. for Compl't.

ANSWER TO PETITION OF APPEAL.

(Filed August 20, 1930)

NEW JERSEY COURT OF ERRORS AND APPEALS.

DAVID A. BROWN and GEORGE H. BROWN, Complainants-Appellees, vs. WILLIAM V. CARPENTER, Defendant-Appellant.	On Appeal from the Court of Chancery.

The answer of David A. Brown and George H. Brown, the above named appellees, to the petition of appeal of William V. Carpenter, 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 admits that a decree was on the fifteenth day of July, 1930, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, these appellees beg leave to refer thereto when the same shall be produced.

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

BERNARD W. VOGEL,
Solicitor for Appellees.

LEO S. LOWENKOPF,
Of Counsel with Appellees.

New Jersey Court of Errors and Appeals

Between DAVID A. BROWN and GEORGE H. BROWN, Complainants and Respondents, and WILLIAM V. CARPENTER, Defendant and Appellant.	Action at Law On Appeal from Court of Chancery.

BRIEF FOR DEFENDANT AND APPELLANT.

FREDERICK F. RICHARDSON and STEPHEN V. R. STRONG, Solicitors for Defendant and Appellant.

FREEMAN WOODBRIDGE, of Counsel.

This case comes before the Court on an appeal from a final decree made in the Court of Chancery by V. C. Berry, bearing date July 15, 1930 (p. 97).

PRELIMINARY.

Slight explanation of the state of the case may be helpful.

Bill of Complaint (p. 1) was filed August 7, 1929.

Answer and Answer in Lieu of Plea filed September 10, 1929 (p. 6).

New Jersey State Library

Issue joined by Replication, Order of Reference to Vice Chancellor Berry, and Designation (p. 9, l. 40, &c.).

A number of exhibits were offered in due course and are printed, regularly numbered. There was also offered in evidence but not marked as exhibits the following (see note p. 142).

a. The files of the Court of Chancery (p. 70, l. 30, &c.) in a former case wherein Robert Adolf Hirner was complainant, and Charles H. Gardner, *et al.*, were defendants, on bill filed January 16, 1900. The printing of this file commences at page 143 and ends with the printing of the final decree made on the Master's Report (p. 177).

b. The files of the Court of Chancery in another proceeding in which William V. Carpenter was complainant and Charles H. Gardner and David A. Brown and George H. Brown and Elizabeth Brown, his wife, were defendants (p. 70, ll. 30-40). These files are printed commencing page 178 and ending page 199, line 10.

c. Another file of the Court was offered in evidence (p. 71, ll. 1-3). The suit of David A. Brown and George H. Brown vs. William V. Carpenter. The files of this suit commence on page 199, line 30, &c., and extend to page 216, inclusive.

These files in all these suits are indexed on page 1 under "Records in Court of Chancery."

d. There was also offered in evidence and admitted by both sides the testimony taken in an action of ejectment brought in the Middlesex County Circuit Court wherein David A. Brown and George H. Brown were plaintiffs and William V. Carpenter was defendant. The conclu-

sions of the Honorable John P. Kirkpatrick, County Judge of Middlesex County, and before whom the case was tried at the Middlesex County Circuit Court are found (p. 140, &c.). For the convenience of the Court on this appeal the testimony in that case is printed in a book entitled in this cause, "SUPPLEMENTAL TO STATE OF CASE." That offer is found at page 81, line 23, to page 82, line 10.

We respectfully submit that in order to secure a complete grasp of the facts and issues involved in this case the files of the Court in the suits above mentioned and the testimony taken in the ejectment suit at the Middlesex County Circuit Court before Judge Kirkpatrick as found in the book submitted herewith entitled "SUPPLEMENTAL TO STATE OF CASE" will be read and considered by this Court.

FACTS.

The Bill of Complaint of David A. Brown and George H. Brown in this cause was filed August 7, 1929 (p. 1, &c.), and sets up that complainants are the owners of the lands described *locus in quo* by virtue of a deed made by Charles H. Gardner and wife, dated November 9, 1897; that at the time they became the owners the said lands and premises were subject to a mortgage held by the Perth Amboy Savings Institution for the sum of eight hundred dollars ($800) dated April 10, 1893, afterwards assigned to Robert Adolf Hirner by deed of assignment dated October 10, 1899; that Robert Adolf Hirner instituted an action to foreclose this mortgage in the Court of Chancery and that the defendant, William V. Carpenter

(who occupied said lands as lessee) paid off the mortgage, being a holder of a second mortgage on said lands (p. 2, ll. 10-40), (the record of this foreclosure is found page 143 to page 177, inclusive).

The complainants further alleged in the Bill of Complaint in this cause that at the time they became seized of the lands and premises the said William V. Carpenter held a mortgage thereon, December 19, 1894, and recorded as set forth, but they paid no interest on account of the mortgage or any part of the principal, but they charge without setting forth any facts relative to the mortgage, that the mortgage was fraudulently secured by the said William V. Carpenter, and executed without any consideration (p. 3, ll. 1-23). They also allege (p. 3, l. 24, &c., and page 4, l. 1, &c.) that the defendant William V. Carpenter is the holder of tax certificates and that he claims title to the lands and premises, but that they, complainants, are willing to pay the amount due to the said William V. Carpenter, together with interest, but have been unable to ascertain the exact amount of indebtedness in order to discharge the liens on record (p. 4, l. 30).

They pray in the bill:

1. That William V. Carpenter might answer the bill.

2. That the complainants may be entitled to redeem.

3. That the amount due the defendant, William V. Carpenter, may be ascertained.

4. That on the payment of such amount he may be required to deliver up his mortgages and tax certificates for cancellation.

5. For possession.

6. For further and other relief.

It is to be noted that this Bill carefully avoids any allegation that the defendant, William V. Carpenter, is still in possession of these premises yet and that all the time since the giving of the thirty-five hundred dollar ($3500) mortgage down to the time of the filing the Bill of Complaint in this case, a period of over thirty-five years, he has remained in possession. That fact, however, was clearly set up in the Answer to the Bill, filed September 10, 1929 (pp. 6-9). It is alleged (p. 7, l. 17, &c.), that the defendant is in possession and has remained in possession for more than twenty years; furthermore, that he has held the tax certificates for more than twenty years (p. 8, l. 21, &c.). Replication in common form, Order of Reference (pp. 49 to 90).

We respectfully submit that it was amply proved without contradiction in this case:

1. That William V. Carpenter entered originally into the possession of the premises in dispute under a lease made between Charles H. Gardner, lessor, and said William V. Carpenter, lessee, in the year 1892 (p. 17, l. 25, &c., to p. 18, l. 20; also p. 60, l. 30) where Carpenter says, however, that the lease was 1893. It was a ten-year lease. After Carpenter became lessee, Gardner, the lessor, never paid any taxes on it. On the contrary, one or two years after the making of the lease, Charles H. Gardner executed a mortgage to William V. Carpenter and his wife for thirty-five hundred dollars ($3500) (p. 18, l. 27, &c., and p. 60, l. 20, &c.), Exhibit D-2 (p. 107. l. 30, &c., to p. 113,

l. 40). This mortgage was made December 19, 1894, and recorded in the Middlesex County Clerk's office January 9, 1895, in Book 130 of Mortgages for said county, at page 239. Therefore, Carpenter has been in continuous possession for about thirty-six years.

It is undisputed in the case that the lease has been lost and that it was not recorded. Neither is there any dispute that there was such an instrument and that under it Carpenter entered into the possession of the premises and remained in possession until one or two years later, in 1894, when the mortgage was given and since that time has remained in the possession of the premises, holding under the mortgage and having purchased and held the tax certificates, Exhibit D-4 (p. 118, to p. 121), Assignment D-5 (p. 122, to p. 123), D-6 (p. 125, to p. 128), which assignments of tax certificates were recorded in the Middlesex County Clerk's office.

We do not stress particularly the point that Carpenter was in possession or claims title under these tax certificates. He claimed persistently and consistently all through the years that his title was by virtue of the mortgage as a mortgagee in possession, but we do respectfully submit that the fact that he purchased the tax certificates and had them recorded under the statute as he was entitled to do is strongly corroborative of his testimony that he was holding title and was the owner of the premises and the fact that Gardner permitted and acquiesced in the purchase of these tax certificates or at least made no attempt at any time to purchase them himself or to control them. The fact, also, that Gardner's

grantees, David A. Brown and George H. Brown, complainants and respondents, made at no time any attempt to purchase or control these tax certificates is furthermore strongly corroborative of the claim of Carpenter, defendant and appellant herein, and tends to show that both Gardner and the Browns considered that Carpenter had some substantial claim by virtue of his possession under the mortgage.

We do not waive any points of law that arises in favor of Carpenter, the appellant, under these tax certificates, but we are referring to it now as a point of fact.

A.

ARGUMENT AS TO FINDINGS OF FACT IN COURT BELOW.

THE TESTIMONY GIVEN BY CARPENTER IN THE ACTION OF EJECTMENT AND THE TESTIMONY GIVEN BY HIM IN THIS CASE WAS NOT IN CONFLICT BUT, ON THE CONTRARY, CARPENTER'S TESTIMONY IN BOTH CASES WAS CONSISTENT.

The learned Vice Chancellor, in his conclusions in this case (p. 90, l. 26, &c.), refers to the action of ejectment in the Middlesex County Court and says:

> "The cause was tried before the Court without a jury and judgment was for the defendant (Carpenter) on the ground that he was in possession under the $3500 mortgage; that the mortgage had not been declared invalid and that so long as the mortgage was in existence and possession claimed under it, the defendant was entitled to possession."

On page 92, line 30, the Vice Chancellor says:

> "I believe Gardner is speaking the truth. I was not at all impressed by the defendant's testimony and have no confidence in him as a witness. The record in the ejectment suit shows a sharp conflict with his testimony there and in this court, so that I feel I can place no reliance whatever upon what he says here."

We respectfully submit that the record of Carpenter's testimony in the ejectment suit found in the book, "Supplemental to State of Case," does not show any sharp conflict with his testimony, given in the Court of Chancery herein, and that there is no contradiction by Carpenter anywhere, or conflicting testimony. On the contrary, Carpenter's testimony in the ejectment suit and in the Court of Chancery herein was entirely consistent, as we believe will be shown by a comparison as herein pointed out. Now, the testimony in the ejectment suit before Judge Kirkpatrick in the Middlesex Circuit Court was offered in evidence on the trial in the Court of Chancery before the Vice Chancellor (p. 81, l. 25, &c., to p. 82, l. 13). The excerpt from the conclusions of the Vice Chancellor (p. 92, l. 30, &c.) indicates that he considered and weighed the testimony of Carpenter in the ejectment suit and compared it with Carpenter's testimony in the present case. It was understood by counsel that the testimony in the ejectment suit (Supplemental to State of Case) was not before the Vice Chancellor, and after reading his conclusions, application was made for a reconsideration. He heard that application and made the order found on pages 102 and 103.

Since, however, he based his decree upon his rejection ~~and~~ of testimony of Carpenter because of its conflict with Carpenter's former testimony in the ejectment suit, it may be well for us to ask in what respects the record in Carpenter's testimony in the ejectment suit was in conflict with his testimony in the instant case. We fail to find anything inconsistent. On the contrary, we respectfully point out that Carpenter's testimony in both cases was in all respects consistent.

We respectfully quote as follows (p. 66, l. 20):

"By the Court:

Q. In 1897 you demanded payment of the $3500 mortgage? A. Yes, sir.

Q. Have you ever demanded payment of it since? A. No, sir.

Q. Have you ever demanded payment of any interest on the mortgage? A. No, sir.

* * * * *

Q. Have you ever had any conversation with either of the Browns with respect to the $800 mortgage or the $3,500, since the expiration of the lease? A. No, sir; except that time I told them I was holding possession.

Q. Well, what did you say then? A. I told them I was holding possession of the property under my mortgage.

Q. Which mortgage? A. $3500.

Q. And you told him about the $800 mortgage at that time? A. Well, they were both holding—

Q. I am not asking you what the situation was. I am asking you what you said? A. I just told you. I just said to him—

Q. 'I am holding under the $3500 mortgage.' Is that what you said? A. Yes, sir.

Q. Just when did you say that? A. In the fall of 1903.

Q. You have never demanded any interest on that mortgage since then? A. No, sir.

Q. Have you ever presented, to either of the Browns or to Gardner, a statement of the amount of principal or interest which was due on the $3500 mortgage? A. No, sir.

By Mr. Richardson:

Q. Mr. Carpenter, why didn't you ever take the matter up with the Browns? A. Because I had possession of the property.

Q. What difference did that make, in your mind? A. I thought the property was good for it.

Q. Did you continue to hold possession from 1903 down to the present time? A. Yes, sir.

Q. Mr. Brown said you continued there in 1903 under a lease, or renewal of the lease, I suppose; was that lease renewed in 1903? A. No, sir.

Q. Was there any lease after 1903? A. No, sir."

Then Carpenter claimed under the mortgage. He always claimed under the mortgage after he got it and there is nothing in the record in this case or in the ejectment suit to show that he claimed otherwise after the giving of the mortgage or that he was in possession otherwise than as a MORTGAGEE IN POSSESSION.

On cross-examination (p. 75, l. 24) of Carpenter:

> "Q. Now, before Judge Kirkpatrick, the hearing before Judge Kirkpatrick, didn't you say in response to a question from me as to what consideration did you receive for this mortgage, didn't you say that Gardner owed you $400 for manure that 'I furnished him'? A. That was another item.

Q. Well, isn't that the only thing you told me that time that Gardner owed you for? A. No, sir.

Q. Didn't you say, in response to a question from me, that 'Gardner owed me $200 before the mortgage was signed'? A. I don't recall that.

Q. You don't recall that? A. No, sir (p. 76, l. 1, &c.).

Q. And didn't you further testify at that hearing that you cut down the trees to square up the Gardner debt? A. No, sir."

If it was this testimony that was meant as in conflict with his testimony in the ejectment suit, we respectfully submit that is an error. In the ejectment suit, "Supplemental to State of Case" (p. 75, l. 20) before Judge Kirkpatrick, Carpenter testified as follows:

"Cross-examination by Mr. Hanson:

Q. Isn't it a fact that when you went on that property in 1893 that you cut down a number of trees, about 200 in number, to square the indebtedness that Gardner owed you? A. No.

Q. Did you cut down any trees? A. I cleaned the place all up and made a place out of it.

Q. You cut down a number of trees, did you not? A. Sure, I cleaned up the place.

Q. How many? A. I couldn't tell you.

Q. A couple of hundred? A. No."

Was this testimony in conflict? We respectfully submit that it was not, but, on the contrary, was entirely consistent.

Again (State of Case, p. 79, l. 4):

"Q. Didn't you state before Judge Kirkpatrick on cross-examination that, 'I held as a tenant until I got my first tax title in 1912'? A. Under the mortgage.

Q. Did you say that? A. I held it under the mortgage; yes, sir.

Q. I am asking you this, didn't you say that you held as a tenant until 'I got my first tax title in 1912'? A. No, sir; I did not say that."

What he did say was this (Supplemental to State of Case, p. 85, l. 10):

"Q. Then, Mr. Carpenter, when your lease expired in 1903, you remained in possession as a tenant, did you not, until 1912? A. I stayed through my mortgage.

Q. What? A. Under the mortgage."

* * * * *

And below, line 25:

"Q. The lease had expired? A. Yes, sir; but I held on on my mortgage."

Testimony of Carpenter (Supplemental to State of Case, Ejectment Suit, p. 56, l. 1, &c.):

"Direct, by Mr. Richardson:

Q. Has that mortgage ever been paid? A. No, sir.

Q. Who is the holder of that mortgage now? A. I am.

Q. You had a lease on this property from Mr. Gardner back in 1893, had you not? A. Yes, sir.

Q. For how long? A. Ten years.

Q. And at the conclusion of that lease in 1903, did you renew it? A. No, sir.

Q. How was it that you stayed in possession there? A. On my mortgage.

Q. Was the mortgage due at that time? A. Yes, sir.

Q. How long was the mortgage? What period of years? A. The mortgage was due on about 1898.

Q. So that after 1903 you stayed in possession, claiming under that mortgage, did you? A. Yes.

Objection by Mr. Lowenkopf; no ruling."

There was no ruling, but we submit that the objection was late.

"By Mr. Richardson (p. 56, l. 28, Supplemental to State of Case):
Q. During the period of the lease, did you pay any taxes? A. Yes, sir.
Q. Under what circumstances? A. For Mr. Gardner.
Q. At his request? A. Yes, sir.
By Mr. Richardson:
Q. Did he reimburse you for those? A. No, sir."

(p. 57, l. 1 &c.)

"Q. What was done as the result of the money that you advanced him? A. That went in on this here mortgage.
Q. It was all part of the mortgage? A. Yes.
Q. You have been in possession how long? A. Since 1893.

Objection. Question withdrawn.

Q. Since 1903 who has been in possession of the property? A. I have.

Objection. Ruling by Court.

By Mr. Richardson:
Q. Who has occupied these premises since 1903? A. I have.
Q. Have you ever given up the occupancy of that property since that time? A. No, sir."

If we correctly read the testimony of Carpenter given in the ejectment suit as set forth, commencing on page 55, lines 20 &c., of the Supple-

mental to State of Case, and the testimony of Carpenter given in this cause before the learned Vice Chancellor, commencing on page 60, State of Case, line 12, we fail to note any discrepancy or conflict. On the contrary, we again respectfully submit that the testimony was in all things consistent and that in both cases Carpenter claimed that he was holding *as a mortgagee in possession* and not otherwise. It is apparent from the above that when counsel for the Browns asked him if he did not make certain statements in his testimony in the ejectment suit, his answer was correct and consistent with his testimony in the ejectment suit.

Let us now turn to a brief comparison of his testimony as to his conversation with the Browns (State of Case, p. 66, l. 30). Referring again to the above excerpt, the Browns did not contradict him. Let us note how carefully their testimony is worded.

David A. Brown, direct-examination (p. 36, l. 4):

> "Q. Did Mr. Carpenter ever ask you to return to him any of the moneys which he paid for taxes? A. He positively did not.
>
> Q. Did Mr. Carpenter ever say anything to you about the $3,500 mortgage? A. *Nothing in particular* that I know of.
>
> Q. Did he ever ask you to pay the interest on the $3,500 mortgage? A. No, sir; positively did not, never.
>
> Q. Did he ever ask you to pay the principal on the $3,500 mortgage? A. No, sir; he did not.
>
> Q. Did he ever ask you to pay interest on any mortgage? A. No.
>
> Q. Did he ever ask you to pay the principal on any mortgage? A. No, sir; never."

We respectfully ask the Court to observe how carefully counsel and witness distinguish between any claim by Carpenter under the mortgage and his request for payment under the mortgage. The answer to the question: "Did Mr. Carpenter ever say anything to you about the $3,500 mortgage" (p. 36, l. 12) "*Nothing in particular* that I know of", is obviously an evasion in that the witness does not say or swear that Carpenter did not tell him about the $3,500 mortgage or his claim thereunder.

That the Browns did know about the mortgage cannot be denied. In their answer to the Bill of Complaint in the Hirner foreclosure (p. 159, l. 28, to p. 160, l. 35) they charged that the mortgage was fraudulent and void and of no force or validity whatever; a charge that they absolutely failed to sustain. See Point IV hereunder. and Point I B. p. 30-31 of this brief

Of course Carpenter made no demand for payment. He wasn't claiming payment. He was claiming, as is obvious from the foregoing excerpt, as a *mortgagee in possession.*

See testimony of George H. Brown (p. 50, l. 11):

> "Q. At any time that you saw Mr. Carpenter, did he tell you that he was the holder of a $3,500 mortgage on this property? A. No, sir."

Why should he? The mortgage was on record. Brown ~~He~~ attacked it in his answer in the Hirner foreclosure.

The mortgage is Exhibit D-2 (p. 107, l. 25 to p. 113, l. 40). Witness then goes on to state in corroboration of his brother, the witness, David

A. Brown, that Carpenter never asked him to pay any interest on the mortgage or principal or for the return of the money that he had paid in on the $800 mortgage, or that he had purchased the tax certificates. Now, observe the testimony of the witness (p. 50, l. 31):

> "Q. Did he ever tell you that he was the owner of this property or the holder of this property under this mortgage? A. No, sir; *not that I know of.*" (Italics ours.)

A clear evasion and not to be regarded as contrary to Carpenter's testimony that he did claim under the mortgage.

Now turn to the testimony of David A. Brown, recalled (p. 82, l. 20). Direct-examination by Mr. Hanson:

> "Q. Mr. Brown, it has been testified by Mr. Carpenter that in the fall of 1903 on his property he stated to you that he was holding possession under his mortgage; is that correct? A. It is not correct; he never made such a statement, *to the best of my knowledge.*"

A clear qualification and evasion.

> "Cross-examination by Mr. Richardson:
> Q. Mr. Brown, didn't you have a conversation with him in 1903 at the expiration of the lease? A. Well, 1903 is a good many years ago and I cannot remember, but I do know that he never in the world told us that he was holding anything under the mortgage.
> Q. Do you remember any part of the conversation in 1903? A. No, I don't know; *I might remember if I tried to,* but I cannot remember anything now; I do not even remember holding a conversation with him in 1903."

Page 83:

"Q. You have testified previously that you went to see Mr. Carpenter on the expiration of this lease, did you not? A. Expiration of the lease.

Q. And told him he could stay there as a tenant? A. Yes, I ran across him after we were there on the place.

Q. Some dispute arose at that conversation, did there not? A. Not that I remember, no dispute at all. We merely talked the matter over and I said, 'Well, if you want to continue here, you are now paying the taxes, all right, we have got property enough that we are glad to have it,' and that is all that I remember. He shrugged his shoulders and did not say yes or no, but he went right on with it, and I considered that silence gave consent and said nothing more.

Q. You said nothing more about the mortgage then, did you? A. No, sir."

George H. Brown, in the action of ejectment in his re-direct testimony, "Supplemental to State of Case," page 49, lines 25 &c., testified as follows:

"What did you say, as nearly as you can recollect, you or your brother, the exact phraseology? A. Well, as far as I can remember, I said, 'Bill, you can keep on the farm as long as you pay the taxes.'

Q. What did he say? A. He laughed at me, that is all.

Q. Did he laugh every time you spoke to him about that? A. He commenced to speak about he owned it, and this and that, and that we could not do anything.

Q. Did he say he owned it? A. Yes.

Q. Did he say that every time? A. He said he owned it."

This does not accord with the testimony of this witness, George H. Brown, given in the trial of this cause (p. 54, l. 20 &c.) when his memory failed.

(See also "Supplemental to State of Case," p. 32, l. 30 &c. to p. 33, l. 40.) Carpenter did not acquiesce in any ownership or claim of the Browns, nor turn over to them any of the crops but he paid the taxes, under claim of ownership. See also Judge Kirkpatrick's remark (p. 33, l. 10 &c.).

We respectfully submit that it is obvious that neither of the witnesses contradicted Mr. Carpenter's statement that he told them that he was claiming under the mortgage. Testimony that: "I might remember if I tried to"; "I do not remember"; "not that I know of"; "you said nothing about the mortgage"; "I considered that silence gave consent." Are the statements of a witness, party to a suit, who comes out definitely and positively with statements that he did tell them that he was holding and claiming under the mortgage as a mortgagee in possession, to be regarded as contradictory by witnesses who testify as the Browns did? We respectfully submit; not, particularly in view of Brown's previous testimony that Carpenter said he owned it.

The learned Vice Chancellor, in his conclusions (p. 92, l. 8), says:

> "It is conceded by the defendant that there was never any change in the character of his possession since he first entered into possession under the lease and my own examination of the defendant when he was on the stand convinces me that his possession subsequently to the expiration

of the lease was merely that of a hold-over tenant. I find as a fact therefore that Carpenter was not in possession as mortgagee either under the $800 mortgage or the $3500 mortgage."

Moreover ~~We~~ respectfully submit that the authorities hereinafter cited do not sustain this position as a matter of law. But on the question of fact we respectfully submit that by the weight of testimony Carpenter was in possession under his mortgage and not otherwise. Carpenter says so (p. 66, l. 30 to p. 67, l. 35).

It was not so conceded. Quite the contrary.

See also testimony of George H. Brown, one of the complainants (p. 49, l. 22, State of Case).

"Q. Did you tell him that you were one of the owners of the property? A. I told him I was one of the owners and he could keep on right along if he paid the taxes.

Q. Who was with you? A. I don't know who was with me.

Q. What did Mr. Carpenter say to you when you told him that? A. He did not say anything; he shrugged his shoulders and went on."

In "Supplemental to State of Case," page 49, line 4, he says:

"Q. You say that when you and your brother met Carpenter on one occasion just before the lease expired, or perhaps after the lease expired, you said on one occasion that he could stay in for the payment of taxes, and he laughed at you. Was that the first time you spoke to him or some subsequent time? Was it before the expiration of the lease or after? A. *I couldn't tell you which it was.*

Q. But you did say that you spoke to him on more than one occasion? A. Yes, more than one occasion.

Q. I thought you had an agreement with him that he was to pay taxes and stay on the land and farm it? A. What kind of an agreement do you mean? Verbal?

Q. Yes. A. Yes, kind of a verbal agreement.

Q. What did you say, as nearly as you can recollect, you or your brother, the exact phraseology? A. Well, as far as I can remember, I said, 'Bill, you can keep on the farm as long as you pay the taxes.'

Q. What did he say? A. He laughed at me, that is all.

Q. Did he laugh every time you spoke to him about that? A. He commenced to speak about he owned it, and this and that, and that we could not do anything.

Q. Did he say he owned it? A. Yes.

Q. Did he say that every time? A. He said he owned it."

Page 50, top:

"Q. Was that before the lease expired or after it expired? A. It was before and after the lease expired, both.

Q. What did you say about that when he said he owned it? A. I told him he did not own it. I said, then, 'I own it.'

Q. Did you or your brother ever get any notice from Mr. Carpenter that he was no longer a tenant of yours and that he was the owner of that land? A. No, sir."

We respectfully submit that this testimony absolutely fails to establish, spell out, or even postulate any contract between the Browns and Carpenter after the expiration of the lease. On the contrary, it shows that Carpenter was claiming the right to possession as owner and not as tenant. The Vice Chancellor was in error in his finding of fact that Carpenter, after the expiration of the lease, was merely a hold-over tenant.

Can a contract or the meeting of the minds of parties be spelled out from laughs and the shrugging of the shoulders under the circumstances as set forth by this testimony? The best that Mr. Brown can say is found on page 83, line 20: "He shrugged his shoulders and did not say yes or no, but he went right on with it, and I considered that silence gave consent and said nothing more."

We respectfully submit that as a matter of law and of fact the grantee of a mortgagor must have something better than silence and the shrugging of the shoulders when he is talking to a known mortgagee about the possession of the mortgaged property that is actually held by the mortgagee.

He says again (Supplemental to State of Case, p. 83, l. 2): "He just laughed, that is all, and commenced to call me all kinds of names that he could think of."

The Browns knew of the mortgage. (a) It was on record. (b) Before the expiration of the lease and on January 3, 1898, the Browns had filed their Bill of Complaint for their relief against this mortgage and prayed its cancellation (p. 199, l. 30). (c) They filed their Answer in the Hirner foreclosure March 21, 1900, setting up the Carpenter mortgage (p. 158, l. 20, &c.), and charging that it was fraudulent, void and of no force or validity.

Now it is to be noted that the conversations above recited by Brown's own words occurred at about the time of the expiration of the lease, after all these acts, and after a Court of Chancery had specifically refused to sustain the Bill for the cancellation of this mortgage. It is uncontrovertible,

therefore, that the Browns knew of the existence of this mortgage; knew that Carpenter claimed under it. He contested their case successfully.

To overcome all this they relied upon the shrugging of the shoulders, a laugh and the opinion that silence gives consent.

Property rights in this state are too important to be disposed of on any such testimony.

In the case of *Ten Broeck* vs. *Jackson,* 71 N. J. Eq. 582-584, affirmed in this court, 73 N. J. Eq. 734, Vice Chancellor Stevens disposed of the testimony of a witness given about as the testimony of the Browns was given, above quoted, as follows:

> "I think that anyone perusing this testimony, and regarding the halting way in which it was given, will not be disposed to consider it as very satisfactory."

The witness was not a party to a suit. It was regarded that his testimony was hedged and qualified by the fact that he could not remember or did not remember. In this court, 73 N. J. Eq. 734, it was said:

> "In our opinion the learned Vice Chancellor correctly held that the essential allegations upon which depended the right of complainant to relief were not supported by satisfactory evidence."

We respectfully once more submit that the claim of the Browns (if they so claim) that they did not know that Carpenter was holding as mortgagee in possession is not supported by any testimony as "not that I know of," "not that I remember," "you did not say anything to him about the mortgage," in the face of the positive

and unqualified testimony of Carpenter that he did tell them that he was claiming as a mortgagee in possession, and the previous admission that Carpenter did claim to own the property.

We therefore respectfully submit that the Vice Chancellor is in error in the statement contained in his conclusions (p. 92, l. 33, &c.) that the record in the ejectment suit shows a sharp conflict with the testimony of Carpenter there and in the Court of Chancery, and that there is nothing to warrant his feeling that he could place no reliance whatever upon what Carpenter said in the trial. It appears from the order that the Vice Chancellor made (p. 102) that when he prepared his conclusions, that the testimony taken in the ejectment suit, although offered in evidence (p. 81, l. 25 &c, to p. 82) had not been received or furnished. *He must therefore have conceived that the questions propounded to Carpenter when he was on the witness stand before him correctly stated Carpenter's testimony in the ejectment suit.*

But a perusal shows that Carpenter's testimony so far from being contradictory was entirely consistent in both cases. It was the testimony of the Browns that was contradictory.

LAW.

POINT I.

THE POSSESSION OF WILLIAM D. CARPENTER, DEFENDANT AND APPELLANT, AS MORTGAGEE, BARRED THE RIGHT OR EQUITY OF REDEMPTION IN THE MORTGAGED PREMISES.

A. It is without dispute in the case that the $3,500 mortgage given by Gardner to Carpenter, was dated the 19th day of December, 1894 (Exhibit D-2, p. 107, l. 30 &c.). It was recorded in the Middlesex County Clerk's Office January 9, 1895 (p. 113, l. 10). Carpenter was then in possession of the mortgaged premises and continued in possession from that time down to the date of the filing of the Bill of Complaint here in August 7, 1929, a period of thirty-six years, less five month. It is claimed that he was in possession under his lease at the time of giving the mortgage, but if we so concede the lease was for only ten years and therefore expired in 1903 or 1904 and Carpenter then continued in possession of the premises by virtue of something, and there is no evidence in this case to show that he continued in possession of them otherwise than as a mortgagee. That is a period of twenty-six years.

Our Statute, Compld. Stat. of N. J., Vol. 3, p. 3170, Sec. 18, provides as follows:

> "That if a mortgagee and those under him be in possession of the lands, tenements and hereditaments contained in the mortgage, or any part thereof, for twenty years after default of payment by the mortgagor, then the right or equity of redemption therein shall be forever barred."

Bates v. Conrow, 11 N. J. Eq. 137.
Chapin v. Wright, 41 N. J. Eq. 438.
Heritage v. Bethel, 96 N. J. Eq. 515, Affirmed 97 N. J. Eq. 366.
Brown v. Berry, 89 N. J. Eq. 230, N. J. Ct. Err. & App.

In the last case the opinion of Vice Chancellor Stevens was affirmed in this Court and the Vice Chancellor, on page 236, says:

> "It is not the adverse possession which ripens into an absolute title in the case of a mortgagee. The mortgagee is in possession under a conveyance of the fee."

He was apparently referring to the extinguishment of the equity of redemption in twenty years without payment of interest or principal.

The Principal of the mortgage was due December 19, 1899 (p. 108, l. 20) and it provided:

> "that interest should be paid semi-annually at the rate of six per centum per annum. And it is thereby expressly agreed that should any default be made in the payment of the said interest or of any part thereof on any day whereon the same is made payable as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage and become due and payable and should the said interest remain unpaid and in arrear for the space of sixty days or said tax assessment, water rent or other municipal or governmental, rate, charge, imposition or lien or day or either of them remain unpaid and in arrear for the space of ninety days then and from thenceforth

> that is to say after the lapse or expiration of either of the said periods as the case may be the aforesaid principal sum of three thousand five hundred dollars with all arrearage of interest thereon shall at the option of the said party of the second part, or his legal representatives become and be due and payable immediately thereafter although the period above limited for the payment thereof may not then have expired anything hereinbefore contained to the contrary thereof in anywise notwithstanding as by the said bond or obligation and the condition thereof reference being thereunto had may more fully appear.''

It is without dispute that there was never any money paid for principal or interest and it was established by proof throughout the case that the mortgagee repeatedly paid the taxes.

Tax certificates (Exhibits D-3, D-4, D-5, D-6, pp. 114 to 128).

Testimony of Charles H. Gardner (p. 18, l. 21 &c.) and testimony of Carpenter (p. 69, ll. 1-10, and p. 70, ll. 1-10, p. 71, l. 8 to p. 72, l. 20).

In the case of *Shields* v. *Lozear,* 34 N. J. L. 496, on page 499, Mr. Justice Depue, writing the opinion of this Court, affirming a judgment of Chief Justice Beasley, says:

> ''By the lease, the defendant became entitled to the possession of the premises until the 1st day of April, 1868, when the mortgage money became due, and the defendant became entitled to enter and hold under his mortgage. The title of the defendant under the mortgage, as well as that under his lease, is not hostile to the plaintiff, but is in recognition of, and in subordination to the title of the plaintiff, un-

> der which the defendant was originally admitted into possession. But the argument of the plaintiff's counsel is that although the defendant's title under his mortgage was derived from the plaintiff, yet that the obligation of the defendant springing from the relation of the tenancy, was first to surrender and yield up to his landlord the possession of the premises, in obedience to his covenant to surrender at the expiration of the term, before he was to be permitted to assert any possession under the mortgage. *The law does not carry the fealty of the tenant to his landlord to such extent.* * * * The covenant to deliver possession at the expiration of the term will not estop the tenant from showing that the title of the lessor has expired. *Doe* v. *Seaton,* 2 Cr. M. & R. 728."

On page 501:

> "Having been admitted into possession under the lease, a formal entry under the mortgage was not necessary to vest in him the possession under it."

The case has been frequently cited with approval.

In the recent case of *Stewart* v. *Fairchild-Baldwin Co.,* 91 N. J. Eq. 86, Mr. Justice Trenchard writing the unanimous opinion of this Court, on page 88, says:

> "However, upon breach of condition, the mortgagee's estate has all the incidents of a common law title, and he has the right to the possession of the mortgaged premises." Citing *Woodside* v. *Adams,* 40 N. J. L. 117, and *Shields* v. *Lozear,* 34 N. J. L. 496.

And by force of the statute above cited, if the mortgagees are in possession of the lands contained in the mortgage or any part thereof for twenty years if default in payment, then the right or equity of redemption is forever barred. This statute means something. We are not dealing with a case where at some time within a period of twenty years the mortgagor or his grantees undertook to redeem. We are dealing with a case where there was no redemption nor attempt at redemption and where the Estate of the mortgagee therefore became absolute and the right or equity of redemption by the mortgagor became forever barred by force of the statute that has been in force in this state since 1846 or prior. (1799 to be exact)

We respectfully submit that under the statute above quoted and the authorities, this is a rule of law binding equally upon Courts of Equity and Courts of Law, inexorable, fundamental, and not to be relaxed because a Court of Equity happens to think that under the particular circumstances of some specific case the facts warrant the relaxation of the rule. In this respect, it is like the rule in Shelley's case; not to be unbent or molded because a Court is of the opinion that the parties intended and hoped for something different.

see Chapin v. Wright 41 N.J. Eq. 438.

B. *But it is said that this mortgage is without consideration.*

We think it sufficiently established by the testimony that the mortgage was not without consideration. It was not for the sum of $3,500, but it was given to secure advancements that

might be made by the mortgagee to the mortgagor to the amount of $3,500 and for it the mortgagee, Carpenter, was to pay and did pay year after year the taxes upon the property. The mortgage was not fraudulent as between the parties. The Bill of Complaint charges (p. 3, paragraph 6, l. 13 &c.) that said mortgage was fraudulently procured by the defendant, Carpenter, and that said mortgage was executed without any consideration. There is not one scintilla of evidence anywhere in this record to sustain the charge that the mortgage was fraudulent as between these parties. *There is no such thing as a fraudulent conveyance between parties sui juris where both of them know what they are doing and neither is the victim of any misrepresentations.* There is not one scintilla of evidence to show that Carpenter attempted to exercise any fraud upon Gardner or that Gardner attempted to exercise any fraud upon Carpenter at the time this mortgage was given. Carpenter was in possession under a lease. Gardner wanted the taxes on his property paid and certain advances made on the property from time to time. Gardner says (p. 18, l. 38):

> "It was supposed to protect him on his lease. That is what I understood and it was to be cancelled at the expiration of the lease. I never received a cent for that mortgage."

Carpenter says (p. 60, l. 37 &c.):

> "That was for money that I advanced to Mr. Gardner for taxes and for a horse and wagon, and different things that I sold him, for moneys that he might need during the lease time."

Page 61, line 1 &c.:

> "Q. And at whose suggestion was this mortgage drawn? A. Mr. Gardner's."

The question of fraud, therefore, does not enter in at all. Chancellor McGill, in the case of *David A. Brown and George H. Brown* v. *William V. Carpenter,* in his opinion sustaining demurrant to the Bill, says of this very mortgage (p. 206, l. 27, 57 N. J. Eq. 23):

> "It was executed and delivered to answer three purposes, (a) to secure Carpenter against obligations to be assumed for Gardner, (b) to secure Carpenter for money to be advanced for Gardner, and (c) to secure and preserve the property covered by the mortgage to the value of $3500 from losses that Gardner might thereafter incur. The first inquiry is as to the meaning of the language in which the purpose '(C)', is expressed in the bill. The demurrant claims that its meaning is that the mortgage was designed by the mortgagors and mortgagee to be a protection for Gardner against his creditors, upon the argument that it anticipates losses by Gardner which can come over on the mortgaged land so as to take it, and to the extent of the amount of the mortgage. Or in plainer language it means that the mortgage was a contrivance to defeat the recovery of claims of future creditors." * * *
>
> "If it has another meaning, it is at least too vague and indeterminate to manifest that meaning which must be understood before relief can be given and the Bill is demurrable upon the ground that it is uncertain and vague in this respect. Grantees of a mortgagor (that is David A. and George H. Brown, complainants in this

> case) with fraudulent intent who purchased the land without knowledge of the law, for a consideration not stated, asked that the mortgage be cancelled. A Court of Equity did not afford to the mortgagor the relief they ask because of the principle which underlies the maxim *in pari de dicto*. Citing the case, *Schenck* v. *Hart,* 32 N. J. Eq. 148. I do not think that they stand in a better position. *Pillsbury* v. *Kingon,* 6 Stewart, 33 N. J. Eq. 287-291. As grantees of Gardner they are his representatives and succeed only to his rights."

BUT NEITHER GARDNER NOR HIS GRANTEES, THE BROWNS, CAN ATTACK THIS MORTGAGE FOR LACK OF CONSIDERATION.

In the case of *Perkins* v. *Trinity Realty Co.,* 69 N. J. Eq. 723, Vice Chancellor Garrison, writing the opinion of the Court, says (p. 724):

> "It will be found that the Court of Chancery, in dealing with the question of the defense of want of consideration, has held that 'a bond and mortgage * * * is good if it is shown that none (consideration) was given. And neither courts of law or courts of equity will allow the consideration to be inquired into for the sake of declaring the instrument void for want of consideration. * * *" Citing cases.
>
> "It cannot be doubted that even now a valid mortgage may be given where no valuable consideration exists. Otherwise the absolute control of the owner of his property is taken away for he would not be permitted to give it away in his lifetime by deed and the mere fact that there was no consideration would not now render the mortgage invalid. A mortgage may be sus-

> tained as against all except creditors whose claim existed at the time of giving it although it was merely intended as a gift, and when executed and delivered it is as valid as if based upon a full consideration and it is not open to the objection that it is a voluntary executory agreement, but it may be enforced according to its terms as an executed conditional transfer of the estate mortgaged."

The case was unanimously affirmed on the opinion of the Vice Chancellor in this Court, 71 N. J. Eq. 304.

In the case of *Pillsbury* v. *Kingon,* 33 N. J. Eq. 287, Mr. Justice Depue, writing the opinion of this Court, says (p. 291):

> "No rule of law is better settled than that a conveyance in fraud of creditors is good as between the parties to it."

And it was held by Chancellor McGill in the case of *Brown* v. *Carpenter* that the Browns as grantees of Gardner are his representatives and succeed only to his rights. (p. 207 l. 36. of N.J. Eq. p. 25)

POINT II.

THE COURT BELOW FAILED TO GIVE CONSIDERATION TO THE TESTIMONY IN THE EJECTMENT SUIT TRIED BEFORE THE HONORABLE JOHN P. KIRKPATRICK, AT THE MIDDLESEX COUNTY CIRCUIT COURT IN WHICH DAVID A. BROWN AND GEORGE H. BROWN WERE PLAINTIFFS, AND WILLIAM V. CARPENTER, DEFENDANT.

As already pointed out, the testimony taken in that case is submitted to this Court in the book, "Supplemental to State of Case" and the opinion of the Honorable John P. Kirkpatrick, County Judge of Middlesex, holden at the Circuit Court, is found on page 140, State of Case, Exhibit D-9. The offer of that record is found on page 81, State of Case, line 25 &c. and it is obvious that the Vice Chancellor failed to give it the consideration that was required for a proper disposition of the case. He later determined that a consideration of this testimony is not, in the Court's opinion, necessary to a decision of this case (p. 102).

We respectfully submit that the defendants closed their case relying upon this testimony taken at the Middlesex Circuit Court as a part of their proofs (p. 82, l. 11), and that the failure of the Court to subsequently read and consider this testimony deprived the defense of the benefit of this testimony in order to show there was no contradiction in Carpenter's testimony and that what conflict existed in testimony was wholly on the Browns' part.

We respectfully submit that a perusal of the testimony as hereinabove pointed out (Point A facts), entirely disposes of any notion that there was a sharp conflict in the testimony that Gardner gave there and the testimony that he gave in this case in the Court of Chancery and also of the notion that no reliance can be placed upon what he says.

The Circuit Court placed a reliance upon what he said in an action between these same parties. See conclusions of Judge Kirkpatrick (p. 140).

As appears from the order refusing reconsideration of his conclusions, this additional testimony as set forth in the "Supplemental to State of Case" was never considered by the Vice Chancellor for the reason that the stenographer having charge thereof was unable to prepare it prior to the writing of the Vice Chancellor's conclusions (see p. 102).

The rule is as follows:

> "Once testimony is admitted it must be considered by the Court and cannot be withdrawn even on Court's own motion over plaintiff's objection."
>
> Lewars v. Weaver, 121 Pa. St. 268 (15 Atl. Rep. 514).

See also 38 Cyc. 1348 and cases in notes.

> "Where the evidence is in direct conflict the exclusions of competent evidence is a matter of much more concern than where the testimony on the point was substantially one way."
>
> Chandla v. St. Louis Transit Co., 213 Mo. 244, 112 S. W. Rep. 249.

In the case of *Missouri American Electrical Company* v. *Hamilton Brown Shoe Company,* 165 Fed. Rep. 283, the Court held it to be reversible error to refuse to hear testimony offered by the losing parties.

And in the case of *D'Arrigo* v. *Texas Produce Company,* 31 S. W. Rep. 713, the Court held that where the issues are close and if admitted might have influenced the judgment, such refusal is ground for reversal.

It is elemental that where the Trial Court has failed or refused to consider evidence properly before it the Appellate Court will reverse and not speculate as to what might have been the effect of such evidence if it had been considered.

Bird v. Veith, 7 B. C. 31.
Mantel v. Hemphill, 28 B. C. 265, 53 Dom., L. R. 37. Cited Corp. Jur., Vol. 46, p 118.

POINT III.

THE MATTERS AND THINGS IN ISSUE IN THIS CAUSE BETWEEN THE PARTIES WITH REGARD TO THE $3500 MORTGAGE WERE RES ADJUDICATA AND NOT SUBJECT TO ANOTHER LITIGATION IN THE COURT OF CHANCERY.

A. Judgment of Law Court.

The learned Vice Chancellor in his conclusions (p. 91, l. 24 &c.), says:

> "The defendant's right to possession as found in the Middlesex Circuit Court being based upon his possession as mortgagee un-

> der the $3500 mortgage the validity of which was not determined, the judgment in that suit was not *res adjudicata* on the issues here presented."

Judge Kirkpatrick, in his opinion (p. 140, l. 39, &c.), says:

> "The circumstances surrounding the making of this mortgage are such as to raise a strong suspicion of fraud and Mr. Gardner made an attempt to have the Court of Chancery declare it void. This the Court refused to do and left the parties to any remedy they might have at law."
>
> "It will appear the mortgage in question is not a very substantial foundation on which to base a claim of title. Nevertheless, whether strong or weak, it is the foundation upon which Carpenter claimed to be entitled to possession. In this action in this court he is entitled to and is in possession as mortgagee under his mortgage. Gardner could not dispute his right without satisfying the mortgage and the plaintiff's present taking with notice have no rights superior to those of their grantor."

If this is not *res adjudicata,* we are at loss to understand what can be. Assuming that these parties had one of two remedies placed before them, namely, the action of ejectment to which they resorted, or resort to this proceeding:

B. Election of Remedy.

They selected their forum which was the Middlesex County Circuit Court; tried their case there and it was determined adversely to them. Having elected the common law court, they are bound by its decision and the judgment of that

court operates as an estoppel against their proceeding for the same cause of action in any other time or in any other manner.

In that old but excellent work, "*Encyclopedia of Pleading and Practice,*" Vol. 7, page 364, the rule is thus stated:

> "It is certainly the established law in each state that has spoken on the subject that the definite adoption of two or more inconsistent remedies by a party cognizant of the material facts is a conclusion and irrevocable bar to his resort to the alternative remedy."

See also Corp. Jur., Vol. 20, pp. 38-40.

In the case of *McMichael* vs. *Barefoot,* 85 N. J. Eq. 139, Chancellor Walker, writing the opinion of this court says, collecting the authorities in this state (p. 142):

> "The complainants, by applying to the law courts, first to the District Court for new trials of the suit there; secondly, to the Circuit Court to vacate the non-suit made an election of remedies and must abide the result."

In *Roarke* vs. *Roarke,* 77 N. J. Eq. 181-184, it was held that in case an election be made in favor of an action at law proceeded to finality before application made to the Court of Chancery, the complainant must be held to have elected to stand upon the legal remedy.

If this were not so, there would be literally no end to litigation.

We respectfully submit that the case of *Hunt* vs. *O'Neil,* 44 N. J. L. 564, is not contrary to this contention. The Court there said (p. 566):

> "A judgment in ejectment will not conclude the defeated party as to title or right of possession *subsequently accruing.*"

The complainants in this case have no title or right *subsequently accruing.* They stand upon a deed made to them by Gardner on November 9, 1897 (Exhibit D-8, p. 135), the very title upon which they relied in the ejectment suit and the only title under which they claim.

> Campbell, Atlantic and Ventnor Land Co. vs. Ventnor City, &c., 147 Atl. p. 405, in this court (not yet reported in N. J. reports).

On page 407, Mr. Justice Kalisch, writing the opinion of this court in that case says:

> "According to the record in the present case nothing had accrued since the first trial which in the slightest changed the legal aspect of the case."

We respectfully submit that the judgment of the Middlesex Circuit Court as to the validity of this mortgage in the action of ejectment brought by these complainants as plaintiff against this defendant was final and is *res adjudicata* as to the issues involved in this litigation.

POINT IV—LACHES.

THE COMPLAINANTS WERE GUILTY OF SUCH LACHES THAT THEY ARE PRECLUDED FROM PURSUING ANY REMEDY NOW.

A.

The deed of Charles H. Gardner and wife to David A. Brown and George H. Brown, the complainants in this case, was dated November 9, 1897 (p. 135, Exhibit D-8), at that time Carpenter was in possession of the property. The $3500 mortgage given to him by Gardner himself was on record (Exhibit D-2, p. 107) just one year and ten months (p. 113, l. 10) and the Browns therefore took the deed from Gardner with full notice of that mortgage. On January 3, 1898, they filed in the Court of Chancery in bill for relief against Carpenter (p. 199, l. 30) and on November 1, 1898, Chancellor McGill sustained the demurrer to the bill (p. 203, l. 32, &c.), and made his order sustaining that demurrer, January 14, 1899 (p. 215).

The Browns, the complainants in this case, then waited nearly thirty years. Meanwhile Carpenter was in possession, paying taxes, exercising all the acts of ownership (Sup. State of Case, p. 32, l. 30 to p. 33, l. 40).

On January 16, 1900, Robert Adolf Hirner filed his bill of complaint in the Court of Chancery for the foreclosure of a mortgage known as the Perth Amboy Savings Institution mortgage and which had been assigned to him (Hirner) for the sum of $1,600, dated April 10, 1893, and recorded in the Middlesex County Clerk's Office (p. 143 &c.).

To that foreclosure proceeding these complainants were made parties defendant (p. 157, l. 10 &c.). They filed to it their answer (p. 158). They did not undertake to protect themselves in any way by the purchase of the Savings Institution mortgage so held by Hirner, but permitted that case to go to final decree on a Master's Report (p. 175) and permitted William V. Carpenter, who was in possession of the premises to pay that decree (see p. 64, l. 15 to p. 66, l. 20).

This is nowhere denied and Carpenter paid that mortgage for the protection of himself. Somehow there seems to have been an omission to take an assignment of the bond and mortgage and the decree as the case may be for Carpenter as might have been done, but it is undisputed in the case that the suit to which the Browns were parties, he, Carpenter, being the person in possession, was permitted to pay that decree without protest on their part and without any attempt on their part to pay it off or protect what they now claim was their interest.

Afterwards in 1928 or 1929 they brought an action of ejectment against him. In that they failed as hereinabove pointed out, and on August 7, 1929, they filed Bill of Complaint in this cause (p. 1). During all that time they made no tender of any payment to Carpenter; sought no remedy for an accounting; made no effort to ascertain the principal or interest due on the mortgage, but permitted him to exercise all the acts of ownership; to remain in possession under his mortgage and permitted the right or equity of redemption to become barred under the statute hereinabove cited.

Compld. Stat. of N. J., Vol. 3, p. 3170,
Sec. 18.

We think no citation of authorities is necessary to show the grossest sort of laches.

The leading case in New Jersey is *Lutjen* v. *Lutjen,* 64 N. J. Eq. 773. The cases are collected on pages 782 and 783.

As the result of them the rule is thus stated (p. 781, top):

> "Lapse of time alone is deemed by the authorities to be a sufficient ground of estoppel in cases like the present, when the court cannot feel confident of its ability to ascertain the truth now as well as it could when the subject for investigation was recent, and before the memories of those who had knowledge of the material facts have become faded and weakened by time. To constitute estoppel of this description, it is not essential that any actual loss of testimony through death or otherwise, or means of proof or changed relations, to the prejudice of the other party, should be proved to have occurred."

In the case of *Soper* v. *Sisco,* 85 N. J. Eq. 165, Mr. Justice Trenchard, writing the opinion of this Court (p. 174), says:

> "The general rule is well settled that he who, without adequate excuse, delays asserting his rights until the proofs respecting the transaction, out of which he claims his rights arose, are so indeterminate and obscure that it is impossible for the court to see whether what is asserted to be justice to him is not injustice to his adversary, has no right to relief. *McCartin* v. *Traphagen,* 43 N. J. Eq. 324; affd. 45 N. J. Eq. 265."

We submit that the language above quoted and approved by this Court applies with striking force to the case at hand.

B.

The complainants-respondents having been put under notice by virtue of the Chancery suit in which the Browns sought to cancel Carpenter's mortgage, that Carpenter considered the mortgage a valid and bona fide mortgage were guilty of laches in not diligently ascertaining and protesting their rights in connection therewith. From the time of the conclusion of the Chancery suit to set this mortgage aside as fraudulent until the time of ejectment action a year ago, the Browns took no steps to ascertain their rights or to protect the same.

> As was said by V. C. Leaming in *Crawford* v. *Lees,* 93 Atl. Rep. 201, 84 N. J. Equity 324, "laches may be equitably attributed to delay in the ascertainment of one's rights when the duty and opportunity of ascertainment exists to the same extent as for delay in the assertion of such rights after their ascertainment." p. 340-341

The character of the mortgage having been in issue, laches will therefore more readily run.

In the case of *Browning* v. *Browning,* 91 W. Va. 196, 112 S. E. 314, the Court held that where the mortgage character of the instrument is in issue, laches will more readily defeat the right to redeem than in the case of an admitted mortgage. See also 42 Corpus Juris 386, where the rule is so stated and an additional point stressed that where the value of the property has had a great increase in the interim that this has an important bearing on laches.

C.

By virtue of Section 17, Vol. 3 Compiled Statutes of N. J., page 3169, the time was limited for the beginning of the action in this case to a period of twenty years from and after the expiration of the lease and said action not having been brought prior to the year 1923, is accordingly barred.

The Statute reads:

> "That every real, possessory, ancestral, mixed or other action, for any lands, tenements or hereditaments, shall be brought or instituted within twenty years next after the right or title thereto, or cause of such action shall accrue, and not after; provided, always, that the time during which the person who hath or shall have such right or title, or cause of action, shall have been under the age of twenty-one years, or insane, shall not be taken or computed as part of the said limited period of twenty years. (Rev. 1877, p. 597.)"

POINT V.

EVIDENCE IMPROPERLY ADMITTED.

The Court admitted in evidence (p. 57, l. 25 &c.) a paper of writing signed by the Browns and giving to Mr. Gardner a right to go over the property (Exhibit C-1, p. 103, l. 20 &c.).

This was over the objection of counsel (p. 58, l. 20 &c.).

We think it was not of great importance but it was clearly incompetent evidence. It appears from the conclusions of Vice Chancellor (p. 91, l. 1 &c.) that he gave some weight to it as well as to the right of way that the Browns had executed to the Tidewater Pipe Company (Exhibit C-4, p. 104).

Carpenter was in no way bound by these instruments and by no possibility could they preclude any rights that he had. These transactions so far as Carpenter was concerned were *res inter alios acta*. They could no way affect Carpenter's rights, nor were they any evidence against him.

We would not refer to the point if the Vice Chancellor had not made so much of it and apparently based his conclusions and the decree, in part, upon these instruments. As far as the Tidewater Pipe Company's right of way was concerned, it appeared that Carpenter had granted a right of way for which the Tidewater Pipe Company had paid him (p. 73, l. 20 &c.). It is evident, therefore, that the Title Searcher for the Tidewater Pipe Company got agreements from the record holders and from the owners in pos-

session which was certainly a proper precaution for a company seeking a right of way across lands, but the instruments were not conclusive or indeed relevant in this suit.

The Vice Chancellor was of the opinion that the defendant claimed title in this case by adverse possession (see p. 90, l. 39 &c.). We respectfully submit that that was not the claim of the defendant. The defendant claims as mortgagee in possession under the statute hereinabove cited.

FINAL.

It is respectfully submitted that the decree of the learned Vice Chancellor should be reversed and the record remitted to the Court of Chancery for a dismissal of the Bill with costs in this Court and in the Court below.

FREDERICK F. RICHARDSON,
STEPHEN V. R. STRONG,
Solicitors for Defendant and Appellant.

FREEMAN WOODBRIDGE,
Of Counsel.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

BETWEEN
DAVID A. BROWN AND GEORGE H. BROWN,
Complainants-Appellees,

and

WILLIAM V. CARPENTER,
Defendant-Appellant.

ON APPEAL FROM THE COURT OF CHANCERY.

BRIEF OF COMPLAINANTS-APPELLEES.

BERNARD W. VOGEL, Solicitor for Complainants-Appellees.

LEO S. LOWENKOPF and THOMAS L. HANSON, of Counsel.

STATEMENT OF FACT.

(Italics, ours)

This was on a bill to redeem certain lands situate in the Township of Woodbridge, Middlesex County, from the lien of two mortgages and two certificates of tax sale alleged to be held by the appellant, William V. Carpenter. Said action was instituted by the appellees, David A. Brown and George H. Brown, who claim title to said lands in question by virtue of a certain deed executed unto them by Charles H. Gardner and Mary G. Gardner, his wife, which said deed was dated November 9, 1897, and recorded on the 10th day of November, 1897, in the office of the Clerk of the County of Middlesex in

Book 296 of Deeds on page 210.

At the time of said conveyance unto appellees there appeared of record against said lands two mortgages, the first being one executed by appellees' grantors unto the Perth Amboy Savings Institution, in the sum of Eight Hundred ($800.00) Dollars, dated April 10, 1893, and duly recorded in the office of the Clerk of the County of Middlesex; and which said mortgage was subsequently assigned to one Robert A. Hirner on the 10th day of October, 1899, and which assignment was also duly recorded; and the second mortgage being also executed by appellees' grantors but unto the appellant, in the sum of Thirty five Hundred ($3,500.00) Dollars, and which said mortgage was dated December 19, 1894, and duly recorded.

At the time of the conveyance of said lands unto appellees, the appellant was a tenant in possession of same by virtue of a written lease executed unto him in September of 1893, by appellees' grantors for the term of ten years.

In August of 1899, said lands were sold for the non-payment of taxes by the Collector of the Township of Woodbridge, to "the Inhabitants of the Township of Woodbridge in the County of Middlesex," for a term of thirty years, and which said tax certificate was recorded in Book 309 of Deeds on page 569. The said lands were again, in February of 1906, sold for the non-payment of taxes by the Collector of the Township of Woodbridge, to the "Township of Woodbridge in the County of Middlesex," in fee, and which said tax certificate was recorded in Book 189 of Mortgages on page 85. The two certificates evidencing these sales were assigned by the municipality to the appellant, on February 1, 1912, and recorded on January 22, 1915,

in Book 15 of Releases on pages 382 and 383. These assignments were re-recorded on April 14, 1928, in Book 915 of Deeds on pages 75 and 77.

In 1900 the Eight Hundred ($800.00) Dollar mortgage which had been assigned to Hirner was foreclosed and a final decree entered in said foreclosure suit on April 2, 1900. No execution was issued upon that decree. On April 12, 1900, the appellant, who was also made a party defendant in the foreclosure suit, filed a bill in this court to redeem the premises from the lien of the mortgage which had been foreclosed and the decree in said suit, and pursuant to an order of this court entered in the 12th day of April, 1900, paid into this court the sum of One Thousand One Hundred Seventeen Dollars and Ninety Three ($1,117.93) Cents, and on May 2, 1900, an order was entered in that cause directing the payment of said sum to Robert A. Hirner, the complainant in the foreclosure suit. No further proceedings were had in either the foreclosure suit or the suit to redeem. The final decree in the foreclosure suit was not assigned and no sale of the premises ever had pursuant to that decree.

Appellant in his answer to appellees' bill, by way of answer in lieu of plea, claims to have been in possession for a period of twenty years as mortgagee under the aforesaid mortgage and that appellees' right or equity of redemption is forever barred. However, at the trial of said cause in the Court of Chancery appellant specifically, in response to questions by the court, claimed title by virtue of possession under the Thirty five Hundred ($3,500.00) Dollar mortgage, and the court in its conclusions states " * * * * * *the defendant while on the witness stand expressly disclaimed possession except as mortgagee under the Thirty-five Hundred* ($3,500.-

New Jersey State Library

00) *Dollar mortgage.*" (*Italics, ours*) (State of Case p. 93, l. 32 to l. 34)

Appellant further claims title to the premises in question by virtue of having been in possession of same for a period of twenty years as mortgagee under the Thirty five Hundred ($3,500.00) Dollar mortgage. Appellant by his own testimony (State of Case p. 60, l. 36 to l. 40) (Supp. to State of Case p. 69, l. 33-34; p. 86, l. 1 to l. 12) admits that said mortgage was executed unto him by appellees' grantor as security for his lease and also as security for a past indebtedness of the said Gardner unto appellant as well as for future loans that might be made by appellant unto the said Gardner. As to the amount of said indebtedness, appellant was uncertain and vague, in one instance it being set at Five Hundred ($500.00) Dollars (State of Case p. 75 l. 8 to l. 10); in another at Two Hundred ($200.-00) Dollars (Supp. to State of Case p. 70 l. 5 to l. 12); and again in another at Four Hundred ($400.-00) Dollars (Supp. to State of Case p. 65, l 36); and still in another at Six Hundred Dollars or Seven Hundred Dollars (Supp. to State of Case p. 68, l. 29). Appellees' grantor, Gardner, a man of eighty-three years, testified that said mortgage for Thirty-five Hundred ($3,500.00) Dollars was given at the solicitations and request of the appellant as security for said lease (State of Case p. 20 l. 13 to l. 37; p. 21 top to l. 10), and said Gardner further testified that the understanding between him and appellant was that upon the expiration of said ten year lease that appellant was to have said mortgage discharged of record (State of Case p. 18, l. 36 to p. 19, l. 10). Appellees also testified that upon the conveyance unto them by Gardner that they were informed by said Gardner that said Thirty five Hundred ($3,500.-

00) Dollar mortgage was merely given as security for appellant's lease (State of Case p. 33, l. 39 to p. 34, l. 8; p. 56, l. 13 to p. 57, l. 7).

The court found as a fact that *"So far as the Thirty five Hundred* ($3,500.00) *Dollar mortgage is concerned the evidence is convincing that the defendant has no rights thereunder. (Italics, ours).* The mortgage was given in connection with the lease and it is said as security therefor, and also to secure the defendant Carpenter for loans to be made or liability to be incurred by him for the mortgagor. Carpenter claims that at the time the mortgage was given Gardner owed him about Five Hundred ($500.00) Dollars and that thereafter he loaned him certain sums for payment of taxes. This is denied by Gardner and I believe Gardner is speaking the truth. *I was not at all impressed by the defendant's testimony and have no confidence in him as a witness.* (State of Case p. 92, l. 19 to l. 32). *My conclusion with reference to this mortgage is that Gardner's explanation of it is the correct one; that it was to have been surrendered and cancelled by Carpenter upon the expiration of the lease; that no moneys were ever advanced thereon and that there is nothing due thereon to Carpenter."* (State of Case p. 93, l. 21 to l. 27)

In January of 1898, the appellees filed a bill in this court against the appellant seeking the cancellation of the Thirty five Hundred ($3,500.00) Dollar mortgage on the ground that it was fraudulently obtained from appellees' grantor and that there was no consideration therefor. The appellant demurred to the bill of complaint and the demurrer was sustained by the Chancellor on the ground that the bill of complaint was too vague and uncertain in its charges to set out a cause of action. Appellant in

his answer alleges that the issue as to the validity of said Thirty five Hundred ($3,500.00) Dollar mortgage is *res adjudicata* because of the decree in the above mentioned suit brought to cancel that mortgage. The files in that suit having been introduced in evidence the court found as a fact that the question of the validity of said mortgage was not *res adjudicata* in that suit at all (State of Case p. 91, l. 14 to l. 25). The court in its conclusions held, "The defendant demurred to the bill of complaint and the demurrer was sustained in an opinion by the Chancellor on the ground that the bill of Complaint was too indefinite in its charges to set out a cause of action. It was suggested in the opinion that the mortgage may have been given in fraud of creditors but the decision was not based upon that ground." (State of Case p. 88, l. 15 to l. 24). The court further held, in referring the matter to a master to state an account between the parties, "the master will not consider, however, the Thirty five Hundred ($3,500.00) Dollar mortgage in stating this account, as *I find as a fact that there is not now and never was anything due on that mortgage.*" (State of Case p. 94 l. 9 to l. 13).

In July of 1899, a dispute arose between appellees' and appellant with respect to appellant's rights under his lease and he was physically disposed, whereupon appellant brought an action in ejectment in the Supreme Court against the appellees for the recovery of possession of said premises and in that suit the lease was established and appellant restored to possession and he has continued in possession ever since.

In 1928 appellees brought an action in ejectment in the Middlesex County Circuit Court against the appellant. The cause was tried before the court

without a jury and judgment was for the appellant on the ground that he was in possession under the Thirty five Hundred ($3,500.00) Dollar mortgage; that the said mortgage had been declared invalid and that so long as the mortgage was in existence and possession claimed under it, the appellant was entitled to possession. The Circuit Court judge indicated that the validity of the mortgage was questionable but held that in said action the court had no jurisdiction to determine that point. The Circuit Court judge in his conclusions stated that, *"the circumstances surrounding the making of this mortgage are such as to raise a strong suspicion of fraud * * * * * "* (State of Case p. 140, l. 39 to p. 141, top line). The court also said *"thus it will appear the mortgage in question is not a very substantial foundation upon which to base a claim of title"*. (State of Case p. 141, l. 11 to l. 13).

In regard to the assignments of the certificates of tax sale by the municipality of the Township of Woodbridge to the appellant, and by virtue of which assignment said appellant in his answer contends that the right of redemption of appellees is barred, the court found as a fact that *"It being the obligation of defendant as lessee to pay the taxes he is not entitled to any credit either by reason of such payments or by reason of the assignments of the certificates of tax sale * * * * * It was his obligation to pay these taxes and his failure to do so, resulting in the tax sale, cannot enure to his benefit. He obtained no rights as against the Complainants by reason of the assignment of these certificates of tax sale."* (State of Case p. 94, l. 25 to l. 35).

These certificates of tax sale having been assigned by said municipality unto appellant and recorded as a release; the subsequent re-recording on April 14th

1928, as a deed raises a strong presumption that the duty having been upon the appellant to pay the taxes and said lands having been sold because of the non-payment of same that the said appellant released said lands from said lien by paying unto the Township of Woodbridge said taxes, and that subsequently and a few weeks before the institution of suit by the appellees in the ejectment suit, and after negotiations with the subleasee were entered into for the leasing of said lands, appellant had said instruments re-recorded in the deed book in order to give him additional grounds for claiming said lands in the event his first two failed.

The evidence disclosing, and it being admitted by the parties, that appellant went into possession of said lands as a tenant in September of 1893 under a written lease for a term of ten years, the court thereupon found as a fact that there never was any change in the character of appellant's possession since he first entered into possession under the lease and that appellant's possession subsequent to the expiration of the lease was merely that of a hold-over tenant (State of Case p. 93, bottom). The court further held that appellees were entitled to redeem said lands of said Eight Hundred ($800.-00) Dollar mortgage, in addition to interest to date, and which sum so ascertained has been duly paid unto the solicitor of appellant in accordance with the terms of the decree entered in this cause.

The appellees, in their brief, will meet and argue the respective points advanced by the appellant in the order in which they are set forth in appellant's brief, with the exception of Point I, under which appellees contend that by virtue of the payment of the sum of money decreed by the Court of Chancery to be paid by appellees unto appellant, and the ac-

ceptance thereof, that appellant has precluded and estopped himself from prosecuting this appeal.

POINT 1.

The final decree advised by the Court of Chancery provided, amongst other things, that * * * " *upon the payment by the complainants unto the defendant of the sum of Thirty one Hundred Forty-Nine Dollars and Seventeen* ($3,149.17) *Cents, that, as to all of the said lands and premises hereinabove mentioned, so far as relates to any claim thereon, by or on behalf of said defendant, William V. Carpenter, the title of the said complainants, David A. Brown and George H. Brown, in and to the same and every part thereof is hereby determined, advised, settled and declared to be good.*" (State of Case p. 100, l. 34 to p. 101, l. 9).

(a) " * * * * * the general rule is that a party who enforces, or otherwise accepts the benefit of a judgment, order or decree cannot afterward maintain an appeal * * * to review the same * * * * * *A party cannot avail himself of that portion of an indivisible judgment, order or decree which is favorable to him, and secure its fruits, while prosecuting an appeal to reverse in the appellate court such portions as militate against him.*" 3 C. J. p. 679, Par. 552.

(b) "As a rule a party cannot reserve the right of appeal while accepting payment or otherwise taking a benefit under the judgment." 3 C. J. p. 681.

(c) "It is a settled rule that where a party recovers a judgment or decree and accepts the benefits thereof voluntarily and knowing the facts, he is estopped to afterwards reverse the

judgment or decree on error. The acceptance operates as and may be pleaded as a release of error." 2 Cyc. Pl. & Pr. 174, 175; 2 Cyc. 651; All. App. Pro. Par. 162.

(d) "The language of the text in these books of authority is sustained by a great array of cases. From this rule springs the difference between the position of a party who pays a judgment against him and a party who accepts the payment of a sum awarded to him by the judgment. The former has his right of appeal because he receives no benefit from the judgment, while he who accepts the fruits of the judgment is estopped from appealing." Ell. App. Pro. Par. 152.

(e) "From this rule, that when he accepts the benefit awarded to him by the judgment or decree, flows the corollary that *where the award of a benefit is coupled with the imposition of conditions to be performed by the person benefited, and he accepts the benefits, he is precluded from afterward challenging the validity of the conditions by an appeal.* A party cannot avail himself of that portion of the decree which is favorable to him and secure its fruits while prosecuting an appeal to reverse such portion as mitigates against him." *Moore vs. Williams,* 29 Ill. App. 597.

(f) "Where one has applied for and secured an order from the court of chancery purging him of contempt and discharging him from an attachment, said order being made upon certain conditions to be performed by the party

discharged, *such party cannot, after accepting the benefit of the order, attach by appeal one or more of the conditions imposed.*" *Krauss vs. Krauss,* 74 Eq. 417.

POINT 2.

THE TESTIMONY GIVEN BY CARPENTER IN THE ACTION OF EJECTMENT WAS IN SHARP CONFLICT WITH HIS TESTIMONY GIVEN IN THIS CASE, AND THE LOWER COURT QUITE CORRECTLY FOUND THAT IT COULD PLACE NO RELIANCE WHATEVER UPON HIS TESTIMONY.

Counsel for the appellant contends that the testimony given by appellant in the action of ejectment and the testimony given by him in this case was not in conflict, but, on the contrary, was consistent, and in an attempt to convince this court of this assertion refers to various excerpts of the testimony of Carpenter both in the ejectment action and the chancery action.

Counsel has evidently not read the entire cross-examination of Carpenter in the ejectment action, or is deliberately refraining from citing that part of the testimony which is absolutely inconsistent with that given in the chancery action.

In the chancery action the following questions and answers were given by appellant regarding the alleged indebtedness of Gardner to Carpenter:-

(State of Case, p. 74, l. 27 to l. 34.)

Q. Mr. Carpenter, will you state in particular just what you gave Mr. Gardner as consideration for this $3,500.00 mortgage?

A. I said cash, a horse and buggy and harness.

Q. How much cash?

A. $500.00, I think $500.00.

Q. Did you give that all at one time?

A. No, sir.

Q. Different times?

A. Yes, sir.

(P. 75, l. 7 to l. 9.)

Q. From that time until he gave you this mortgage you loaned him altogether $500.00?

A. Yes, sir.

(P. 75, l. 25 to l. 40.)

Q. Now, before Judge Kirkpatrick, the hearing before Judge Kirkpatrick, didn't you say in response to a question from me as to what consideration did you receive for this mortgage, didn't you say that Gardner owed you $400 for manure that I furnished him?

A. That was another item.

Q. Well, isn't that the only thing you told me that time that Gardner owed you for?

A. No, sir.

Q. Didn't you say in response to a question from me that Gardner owed me $200 before the mortgage was signed?

A. I don't recall that.

Q. You don't recall that?

A. No, sir.

The following testimony was given by appellant in the ejectment suit (Supp. to State of Case, p. 65, l. 34 to l. 37) :-

Q. At the time of this transfer in 1897,

did Gardner owe you any money?

A. Yes, sir.

Q. How much?

A. Something like $400 on that lease *for manure and stuff*.

COMMENT:-

It will be born in mind that in 1897 the appellant had been in possession under his lease for a period of almost four years and that appellant was to get $1.50 a load for each and every load of manure put upon the lands by appellant. (Supp. to State of Case, p. 88, l. 24 to l. 25).

(Supp. to State of Case, p. 68, l. 24 to l. 39.)

Q. And you say that Gardner owed you $400 at the time you got this mortgage?

A. Yes, sir; and more, too.

Q. Do you mean the $3,500 mortgage?

A. Yes.

Q. How much did he owe you?

A. Six or Seven hundred dollars at that time; yes, sir.

Q. And you took a $3,500 mortgage for a $600 or $700 check?

A. That is—

Q. Is that right or not?

A. That is for the $600 and the protection of my lease.

Q. And the protection of your lease?

A. Yes.

Q. Then, as a matter of fact, at the time you took the $3,500 mortgage from Mr. Gardner, he owed you $600. Is that correct?

A. Yes, sir.

(Supp. to State of Case, p. 69, l. 40 to l. 41.)

Q. How did he come to owe you $600?

A. For moneys that he borrowed.

(Supp.to State of Case, p. 70, l. 5 to l. 12.)

Q. How much did he borrow?

A. I say $600.

Q. On your direct examination you say he borrowed $400. Now you say he borrowed $600. How much did he borrow?

A. It was $400 on that lease, that manure bill.

Q. $400 *for manure that you furnished him* and $200 that you loaned him?

A. Yes.

COMMENT:-

Here for the first time appellant admits that Gardner owed him $200. at the time the $3,500. mortgage was signed and that the remainder of the amount claimed by him accrued thereafter for manure. This was some of the testimony that was meant as in sharp conflict with the testimony in the chancery action.

A further confliction in testimony appears in (State of Case, p. 79, l. 8 to l. 17.)

Q. Didn't you state before Judge Kirkpatrick on cross-examination that, "I held as a tenant until I got my first tax title in 1912?"

A. Under the mortgage.

Q. Did you say that?

A. I held it under the mortgage; yes, sir.

Q. I am asking you this, didn't you say that you held as a tenant until, "I got my first tax title in 1912"?

A. *No, sir; I did not say that.*

What he did say, was this, (Supp. to State of Case, p. 84, l. 28 to p. 85, l. 10.)

Q. Now, then, the first time, then, that you claimed ownership of this land was when you bought this tax title; is that so?

A. Yes, sir.

Q. That was in 1912; is that so?

A. Yes, sir.

Q. And then you never—I want you to understand this question—then you never claimed to have owned this property until you bought this tax title in 1912; is that so or not?

A. Yes, sir. I could not claim it until I bought it, could I?

Q. I am asking you, Mr. Carpenter- *in 1912 was the first time you claimd to own that property?*

A. *Yes, sir.*

Q. Is that right?

A.. Yes, sir.

Q. You don't want to vary that statement in any way?

A. Yes, sir. You heard me say, "Yes, sir."

Q. I just want to be positive about it?

A. Yes, sir.

It is respectfully submitted that the above testimony is dispositive of the contention of appellant that by the weight of testimony Carpenter was in possession under his mortgage and not otherwise.

We respectfully submit that the learned Vice-Chancellor who had the opportunity of observing the actions and manner of testifying of the appellant while on the witness stand did not err when he stated that he had no confidence in him as a witness and could place no reliance whatever upon what he said. And we refer at this time to the comment by the court in the ejectment action during the cross-examination of the appellant.

(P. 83, l. 16 to l. 20, Supp. to State of Case.)

MR. LOWENKOPF:

I want to show the attitude of this man throughout the whole case.

THE COURT:

I think it is easily seen.

And the further comment by that court in the conclusions filed and marked Exhibit D-9 on p. 140 in the State of the Case, as follows:-

"The circumstances surrounding the making of this mortgage are such as to raise a strong suspicion of fraud....." *"thus it will appear the mortgage in question is not a very substantial foundation upon which to base a claim of title"* "there may be equitable questions presented by the bizarre facts developed in this litigation...."

COMMENT:-

Not only was the learned Vice-Chancellor impelled to comment upon the impression made by appellant's testimony (but the Circuit Court Judge also in his conclusions) and during the trial of the cause was evidently impressed in the same manner.

Counsel takes too much for granted when he states on p. 6 of his brief that " neither is there any dispute that.....Carpenter has remained in possession of the premises, holding under the mortgage....." On the contrary, even appellant himself admits that he held possession under his lease and not otherwise, in one instance until the expiration of the lease in 1903, (State of the Case, p. 63, 1. 28 to 1. 31).

Q. . . . thereby you continued to hold under your lease, did you not, after that?

A. Yes, sir.

Q. Until your lease expired in 1903?

A. Yes, sir.

And at another time, until 1912, (Supp. to State of Case, p. 84, l. 28 to l. 32.)

Q. Now, then, the first time you claimed ownership of this land was when you bought this tax title, is that so?

A. Yes, sir.

Q. That was in 1912; is that so?

A. Yes, sir.

Another glaring contrast in testimony is to be noted on (p. 76, l. 34 to p. 77, l. 29, State of the Case) Refering to the value of the lands in question.

Q. Well, what was it worth at the time you entered into possession under your lease?

A. About six thousand dollars.

Q. About six thousand dollars. Now, in an affidavit in a suit instituted by Brown against the Perth Amboy Speedway, Inc., did you say this: "The statement that in the year 1903"—you probably meant 1893—"Charles H. Gardner named in the bill of complaint let and rented unto me said lands for the period of ten years is true?" Did you say that?

A. From 1893 to 1903—

Q. Did you say that in the affidavit?

A. Yes, sir.

Q. Did you say this: "The property was then of very little value, perhaps not worth more than the amount of the mortgages hereinafter stated?"

A. No.

The Court: Did you say that? You didn't say that?

The Witness: I say I don't remember saying

that.

The Court: What are you reading from, Mr. Hanson?

Mr. Hanson: I am reading from a copy of an affidavit that was furnished to the solicitors for the complainants on the return day of the order to show cause.

The Court: Does that purport to be a copy of an affidavit taken by this witness which was filed in the cause?

Mr. Hanson: Yes, sir.

POINT 3.

THE POSSESSION OF WILLIAM D. CARPENTER, DEFENDANT AND APPELLANT, WAS NOT AS MORTGAGEE BUT MERELY AS A HOLDOVER TENANT AND THE RIGHT OR EQUITY OF REDEMPTION WAS NOT BARRED.

The court found as a fact that the $3,500 mortgage, by virtue of possession under which appellant claims title, was given without any consideration whatsoever, that Carpenter had no rights thereunder and that Carpenter was not in possession as mortgagee either under the $800. or the $3,500. mortgage, but that he was a holdover tenant under the original lease.

It is obvious that a person claiming title by virtue of possession under a mortgage cannot claim the benefits of any statute where the mortgage under which he claims was given without consideration or in fraud.

Counsel cites several cases on p. 25 of his brief to substantiate his contention that if a mortgagee be in possession under his mortgage for a period of

twenty years after default in payment by the mortgagor that the right or equity of redemption therein shall be forever barred.

> In the case of *Bates vs. Conroe,* 11 Eq. 137 one of the cases so cited, the court *also* held that *"if to protect his possession the tenant is compelled to purchase outstanding mortgages upon the property, a court of equity will protect his equitable title and his possession under it, until the mortgage money is re-paid."*

It is respectfully submitted that appellees have paid unto appellant the amount decreed by the Court of Chancery, in full satisfaction of the $800. mortgage which appellant paid in order to protect his possession as tenant in 1900.

In the case of *Chapin vs. Wright,* 41 Eq. 438, also cited by Appellant, while the court held:

> "Twenty years" possession of the premises by a mortgagee, under his mortgage, pursuant to the eighteenth section of the statute of limitations, bars the mortgagor's equity of redemption, and the extinguishment of the mortgagor's equity effected by this statute, unlike the extinguishment effected by mere judicial action, is not subject to be waived by an incautious admission of the mortgagee."

The court went further and qualified this statement by saying:

> "But the mortgagee's acts in taking possession must be unequivocal, and therefore if he enters as a tenant of the mortgagor that relation is presumed to continue unless rebutted, *Ayres vs. Waite,* 10 Cush. 72; *Anderson vs. Lanterman,* 27 Ohio St. 104; "see *Shields vs. Lozear,* 5 Vr. 496; *Orde vs. Heming,* 1 Vern. 418; *Sanders vs. Sanders,* 44 L. T. (N. S.) 171

L. R. (19 Ch. Div.) 373; *Clowes vs. Hughes,* L. R. (5 Exch.) 160; *Edwards vs. Wray,* 12 Fed. Rep. 42; *Stedman vs. Gassett,* 18 Vt. 346.

The court in this case on page 443 and 444 further qualifies the former statement in the following language:

"And as twenty years' adverse possession will bar a right of entry or an action of ejectment, courts of equity have, in analogy to the statute of limitations, adopted that as the period which shall be sufficient to bar an equity of redemption. *This rule, however, is a mere judicial regulation*—it is founded on the maxim, interest reipublicae ut sit finis litium—*and, like other judicial rules, is subject to change by the power which created it, whenever that course may seem necessary for the furtherance of justice.* The courts have accordingly annexed to this rule the following important qualification: *if a mortgagee in possession shall, after the equity of the mortgagor has become barred by lapse of time, admit, either by word or act, that his mortgage is still a subsisting lien, the bar previously existing will be considered to have been waived, and the equity of the mortgagor revived.* 2 Jones on Mort. Par. 1163. And an admission having this effect will be considered to have been made if the mortgagee institutes proceedings, either by suit or otherwise, to foreclose his mortgage, the reason assigned being that such act is entirely inconsistent with any pretension on his part that his possession had ripened into a title. 2 Jones on Mort. Par. 1170; Angell on Lim. Par. 458; *Calkins vs. Isbell,* 20 N. Y. 147. And it has also been held that an admission

entitled to like effect may be made by the mortgagee offering to purchase the mortgagor's equity of redemption. Angell on Lim. Par. 458.

COMMENT:-

It is without dispute in the case that in 1899 and again in 1906 the lands in question were purchased by the Township of Woodbridge for the taxes accruing in the years 1898 and 1903, respectively, and that in February of 1912 assignments of said tax deeds were taken by the appellant from the municipality, and which assignments were recorded in the office of the Clerk of the County of Middlesex as releases. It is also without dispute that these same assignments were subsequently and on the 14th day of April, 1928, re-recorded as deeds in the Deed Book of Middlesex County.

Was this re-recording of said assignments in 1928, twenty five years after the expiration of the lease, the natural action of one claiming title? Does a person whose lands have been sold for the non-payment of taxes and who subsequently redeems, ordinarily have that lien released or does he record such assignment as a deed? This rerecording was not the natural action of one who has claimed title for a period of twenty five years and can not be construed as an incautious admission as set forth in the syllabus prefacing the case of *Chapin vs. Wright,* but must be interpretated as *"being entirely inconsistent with any pretention on his part that his possession had ripened into a title."*

In the case of *Brown vs. Berry,* appellant again overlooks an important fact when he disregards the statement of the court on page 235 as follows: * * * *and Mr. Brown remained in possession, having ori-*

inally taken possession as mortgagee." In the present case appellant originally took possession as a tenant.

In 35 C. J., p. 1252 Par. 616, the following interesting concensus of a large number of the states appear as follows:

> "There are a number of decisions which hold that, where a person enters into possession by virtue of a lease, he cannot initiate an adverse possession without first surrendering the premises to the landlord. (Ala. Cal. Ga. Ill. Me. Pa.) Furthermore, when the lease has expired, the tenant may without surrender start in motion the statute by a disclaimer with notice to the landlord. (Conn. Fla. Miss. R. I. S. C. W. Va. Eng.) According to the great weight of authority, however, an adverse possession may be initiated by a tenant against his landlord by a disclaimer that the tenant holds under the lease, and the statute will begin to run from the time when the landlord has notice of the disclaimer. (U. S. Ala. Fla. Kan. Ky. Me. Mass. Mich. Miss. Okl. S. C. Tenn. Pa. Tex. Vt. Va. W. Va. Eng.)

Counsel for appellant argues on page 31 of his brief that appellees cannot attack this mortgage for lack of consideration and cites the case of *Perkins vs. Trinity Realty Co.,* but in quoting an excerpt from that case fails to include what we respectfully contend is of the utmost importance, i. e. *"but they will for the purpose of ascertaining what is due upon it."*

The court went further in this case and on page 727 cited with approval the case of *Baird vs. Baird,* 145 N. Y. 659, at p. 664 where it held."

* * * * * *the court will inquire into the con-*

*sideration of a mortgage * * * * * , and that "it is the debt which gives the mortgage vitality as a charge upon the land, and generally where there is no debt or obligation there is no mortgage."* The court also quoted with approval Jones on Mortgages (3d ed.), Par. 610: *"A mortgage, like every other contract, must be founded upon a valuable consideration."*

POINT 4.

IT IS VERY EVIDENT FROM THE CONCLUSIONS FILED BY THE COURT BELOW THAT CONSIDERATION WAS GIVEN TO THE TESTIMONY IN THE EJECTMENT SUIT TRIED PRIOR TO THE CHANCERY ACTION.

From the cross-examination of appellant as heretofore stressed and certain references to testimony given in the ejectment suit which are not positively denied by appellant, the court had before it for consideration such references and from the demeanor and answers of appellant had the right to assume and find, as it did, that there was a sharp confliction in the testimony, and it consequently follows that the testimony given in the ejectment action was given due consideration.

POINT 5.

THE MATTERS AND THINGS IN ISSUE IN THIS CAUSE BETWEEN THE PARTIES WITH REGARD TO THE $3,500 MORTGAGE WERE NOT RES ADJUDICATA.

A. Judgment of Law Court.

The action in ejectment brought in the Middlesex County Circuit Court was for possession of the *Locus in Quo* and in nowise attempted to dispose of any question of title. The court held that the appellant was entitled to possession under the $3,500 mortgage which was and still is open of record.

The action instituted in the Court of Chancery was to redeem the lands of this mortgage and the other liens by virtue of which appellant claimed title.

It cannot be disputed that the Court of Chancery is the proper court in which to bring an action for redemption, and consequently the mere adjudication of possession was not dispositive of the rights of appellees to bring an action in chancery to redeem.

B. Election of Remedy.

There was no election of remedies as there were two separate and distinct rights being sought; in the law court possession was sought, while in the Court of Chancery redemption was the relief being sought.

Under this heading counsel for appellant on pages 37 and 38 of his brief cites the case of *Hunt vs. O'Neil,* 44 N. J. L. 564, quoting the following in substantiation of his contention that there had been an election of remedies: "A judgment in ejectment will not conclude the defeated party as to title or right of possession *subsequently accruing.*"

But again counsel has overlooked what we respectfully contend was the most important portion of the opinion of the court, which was the sentence immediately following the one quoted above. *"If*

the defendant shall exercise his power of redemption, he will thereby acquire a new title, and may recover in ejectment, in virtue of that new title, without regard to the judgment in the present suit."

POINT 6.

APPELLEES WERE NOT GUILTY OF LACHES.

It is without dispute in this case that appellant went into possession under a ten year lease and that he held, at least, until 1903 as a tenant.

Appellees testified that they were the owners of several large tracts of land which they rented merely for the payment of taxes by the tenant. (Pg. 36 and 37), that at the expiration of appellant's lease they were willing to permit him to hold over as a tenant upon the payment by him of taxes, (Pg. 35, l. 30, to l. 38) (Pg. 41, l. 35 to l. 40) (Pg. 49, l. 22 to l. 30), that appellant by his actions acquiesced in this arrangement and by his payments of taxes and failure to demand interest or principal on either of the two mortgages or repayment of taxes paid by him, lulled appellees into that state of security where they believed that appellant was a tenant. No notice was ever given by appellant that he was holding under his mortgage and not as tenant; and there was absolutely no change in the conditions under which appellant held from 1897 to date.

Appellees have all through these years proceeded upon the theory that they were the owners of the title and appellant was their tenant. In 1914 a right of way was granted by appellees unto the Tidewater Pipe Company and in 1919 written permission was given to Gardner to go upon said lands. These

acts were entirely consistent with appellees contention that they were the owners of said lands.

It is respectfully urged that appellant could not sit back and by his apparent acquiescence of the existence of a landlord and tenant status invoke the statutes of limitations against the owner of the fee.

Counsel for appellant argues under point B. on page 42 of his brief that appellees are guilty of laches because no steps were taken since the institution of the suit in Chancery in 1898, regarding this mortgage, until the present suit. A perusal of the papers filed in that action discloses no denial on the part of appellant that said mortgage was without consideration and the validity of said mortgage not being at issue, appellees had the right to attack it upon the termination of the tenancy, which they did.

POINT 7.

EVIDENCE NOT IMPROPERLY ADMITTED

Counsel for appellant argues that the admission of the paper writing signed by appellees and giving to Gardner the right to go over the property was error.

In the case of *Lindsley vs. McGrath,* 62 Eq. 478, the court held:

> *"Where the issue was whether land occupied by husband and wife was that of the husband or of the wife, the wife being deceased, it was proper to admit evidence of declarations made by her to show that she claimed the title to the land."*

In the case of *N. Y. Mutual Life Ins. Co., vs. Hillman* 45 U. S. 285, the court held:

> ." *A letter * * * * * may be admitted as evidence of * * * * * the existence of a particular intention on the part of the writer at the time of the writing.*"

And in conclusion we cite the case of *Minton vs. Sutton & Reilly,* 100 Eq. 403, holding that:

> *"Self-serving letters not purposely written are admissable in evidence on behalf of the writer to prove his intention.*"

It is respectfully urged that from the above citations it was not error on the part of the court to have admitted in evidence the paper writing in question.

CONCLUSION.

It is respectfully submitted that the decree of the learned Vice Chancellor is equitable to equity; and that the same should be affirmed with costs to be taxed in favor of these appellees.

BERNARD W. VOGEL,
Solicitor for Appellees.

LEO S. LOWENKOPF, and
THOMAS L. HANSON,
of Counsel with Appellees.

INDEX

Testimony

Page

Plaintiff's:

Charles H. Gardner,
- Direct 3
- Cross 7
- Re-direct 25
- Re-cross 25

George H. Brown,
- Direct 28
- Cross 37
- Re-direct 47
- Re-cross 52

Defendant's:

William V. Carpenter,
- Direct 55
- Cross 66
- Re-direct 80

Stephen Strong,
- Direct 97

John Leasen,
- Direct 98

Rebuttal:

David A. Brown,
- Direct 100
- Cross 104
- Re-direct 105

Exhibits

Plaintiff's:

	Offered Page
Exhibit 1—Deed from Charles H. Gardner and wife to David A. Brown, dated Nov. 9, 1897	5

Defendant's:

Exhibit 1—Letter dated July 13, 1897, from C. H. Gardner to Mr. Carpenter	10
Exhibit 2—Original mortgage, Geo. H. Gardner and wife to Perth Amboy Savings Institution, dated April 10, 1893, for $800	60
Exhibit 3—Assignment to Perth Amboy Savings Institution to Robert A. Herner, $885.33, Oct. 10, 1899	60
Exhibit 4—Final Decree in foreclosure between Robert A. Herner and Charles H. Gardner	60
Exhibit 5 — Letter showing payment into Court	60
Exhibit 6—Letter	61
Exhibit 7—Release of taxes	62
Exhibit 8—Tax deed dated Feb. 8, 1906	62
Exhibit 9—Lawsuit, Carpenter v. Brown	65

New Jersey Court of Errors and Appeals

TESTIMONY.

MIDDLESEX COUNTY CIRCUIT COURT

April Term, 1929

DAVID A. BROWN, and GEORGE H. BROWN, Plaintiffs, vs. WILLIAM V. CARPENTER, Defendant.	In Ejectment

Transcript of stenographer's notes of evidence in the above-entitled cause, taken before HON. JOHN P. KIRKPATRICK, Judge, and a Jury, at the Middlesex County Court-house, in the City of New Brunswick, New Jersey, on the eleventh day of April, 1929.

Appearances:

Bernard W. Vogel, Esq.,
Leo S. Lowenkopf, Esq., (Present)
Attorneys for the Plaintiffs.

Theodore Strong, Esq.,
Fred F. Richardson, Esq., (Present)
Attorneys for the Defendant.

(A jury was duly empaneled and sworn.)

(Adjourned until tomorrow, Friday, April 12, 1929, at 10:00 a. m.)

Hearing of April 12, 1929

MIDDLESEX COUNTY CIRCUIT COURT

April Term, 1929

DAVID A. BROWN, and GEORGE H. BROWN,

Plaintiffs,

vs.

WILLIAM V. CARPENTER,

Defendant.

Transcript of stenographer's notes of evidence in the above-entitled cause, taken before HON. JOHN P. KIRKPATRICK, Judge, and a Jury, at the Middlesex County Court-house, in the city of New Brunswick, New Jersey, on the twelfth day of April, A. D. 1929.

Appearances:

Bernard W. Vogel, Esq.,
Leo S. Lowenkopf, Esq., (Present)
Attorneys for the Plaintiffs.

Theodore Strong, Esq.,
Fred F. Richardson, Esq., (Present)
Attorneys for the Defendant.

(Mr. Lowenkopf made an opening statement to the jury on behalf of the Plaintiffs, after which Mr. Richardson made an opening statement to the jury on behalf of the Defendant.)

Mr. Lowenkopf: If your Honor please, I would like, at this time, to ask that the first defense of

the Defendant be stricken out. The defense which he enumerates as number one is that the deed was no good or fraudulent, and in order to sustain my request, I call your Honor's attention to a bill of particulars filed in this case. I call the Court's attention to the answer filed. Fraud must be specially pleaded, and if not specially—

The Court: I know, but that does not mean the same thing as the statute of limitations or any other special legal defense between the persons, but where a man sets up, as a matter of defense to an action that is based upon an instrument, that the instrument upon which the action is based is no good, it does not have to be especially pleaded. At any rate, I do not think it is important at this time, nor do I think that that matter is proper at this time. The question is not properly raised at this time by you. You are anticipating something that may never happen.

Mr. Lowenkopf: It is going to save a lot of time in the trial of the case.

The Court: I don't know whether or not it is. Mr. Richardson may never offer any evidence concerning the deed. I am not stopping you from making your objection. You may make your objection when the time comes.

CHARLES H. GARDNER, a witness produced on behalf of the Plaintiffs, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Lowenkopf:

Q. Mr. Gardner, where do you live? A. Woodbridge.

Q. How old are you? A. Eighty-two.

Q. How long have you lived in Woodbridge? A. All my lifetime.

Q. Are you acquainted with the old Van Sickle tract? A. Yes, he was my uncle.

Q. How did you acquire title to that tract? A. He deeded it to me.

Q. Who deeded it to you? A. My uncle, Louis Van Sickle.

Q. Do you know William V. Carpenter? A. I don't remember the dates.

Q. I said, do you know William V. Carpenter? A. Oh, yes, he married my niece; he is my nephew by marriage.

Q. Did you ever give him a lease on this Van Sickle tract? A. Yes, I gave him a lease for ten years.

Q. Do you remember what year it was? A. No, I don't remember the date.

Q. You will have to talk a little louder, so that the jury can hear you. A. I don't remember the dates; we have the dates, but I don't remember them.

Q. But you did give a lease to Mr. Carpenter? A. Yes, for ten years.

Q. Do you remember how long before you conveyed this property to the Browns that you gave this lease to Carpenter? A. Carpenter held this lease about four years, and then I sold the property to the Browns.

Q. Did you convey this property to the Browns? A. I did.

Q. What was the consideration for that conveyance?

Mr. Richardson: I object. The deed is here and it ought to be offered. It is self explanatory.

Mr. Lowenkopf: I will offer this deed in evidence, a certified copy of the deed.

By Mr. Lowenkopf:

Q. Can you say that four years after the lease was entered into with Carpenter, you conveyed this tract of land to the Browns? A. I did.

Q. Who are the Browns? What are their names? A. George H. Brown and David A. Brown.

Q. Are they any relation to you? A. George H. Brown is my son-in-law.

Mr. Richardson: No objection.

(The paper referred to was received in evidence and marked "Plaintiff's Exhibit 1.")

Mr. Lowenkopf: This is a deed from Charles H. Gardner and wife to David A. Brown and George H. Brown, dated November 9, 1897, and conveyed property in the township of Woodbridge, describing the property.

The Court: Does it convey the property in question?

Mr. Lowenkopf: Yes, and the consideration being $400, and the conveyance is made subject to a mortgage of $800, held by the Perth Amboy Savings Bank of Perth Amboy, New Jersey.

By Mr. Lowenkopf:

Q. When this property was conveyed to the Browns, were they told that there was also a lease on the property? A. Yes.

Q. Mr. Gardner, what were the terms on this ten-year lease with Mr. Carpenter? A. I was to

receive a certain share of the proceeds of the place.

By the Court:

Q. Was that a written lease? A. I was to receive a certain share of the proceeds of the place. I was to work at the farm.

By Mr. Lowenkopf:

Q. Was that lease signed? A. Yes.

Q. Did you have a copy of it? A. Yes.

Q. Have you looked for it? A. I give that lease to the Browns when I sold them the property.

Q. You said something about a farm. A. It was for farming purposes, and I was to receive a certain amount of the proceeds from the farm.

Q. Mr. Gardner, during the four years that you owned the property, and Mr. Carpenter was your tenant, before conveying to the Browns, did you pay any taxes on this property? A. No, Mr. Carpenter paid the taxes.

Q. Did he ever ask you to reimburse him for the taxes? A. No, not at the time—no, not for the taxes.

Q. Is it your recollection that a consideration for the lease was the payment of taxes by Carpenter? A. Well, I can't possibly remember that, but he paid the taxes. I don't remember now how the lease was drawn up, but Mr. Carpenter paid the taxes, but I received two or three wagon loads of corn for my share in that four years. He never farmed the place any way properly. He just scratched it over.

The Court: Have you got the deed from Mr. Gardner's uncle to him?

Mr. Lowenkopf: No, sir, we don't have that.

Mr. Richardson: We will admit that.

CROSS-EXAMINATION by Mr. Richardson:

Q. Mr. Gardner, can you hear me all right? A. You will have to speak louder; I am a little deaf.

Q. What relation are you to David Brown? A. No relation.

Q. What relation are you to George Brown? A. I am his father-in-law.

Q. This deed that you have just identified is made to David Brown and George Brown, is it not? A. Yes.

Q. And it is dated in 1897, is that right? A. I can't remember the date. It must be on record. I don't remember the date.

Q. This lease that you had with Mr. Carpenter was made four years prior to that deed, was it not? A. Yes.

Q. Assuming the date of that deed to be 1897, the date of this lease was 1893, wasn't it? A. I presume so; it was about four years before I sold it.

Q. The lease was for ten years? A. Yes.

Q. And it expired in 1903? A. I presume so; the record must show it.

Q. There was never any written lease after that time, was there, after 1903? A. No.

Q. When you made this lease in 1893 to Mr. Carpenter, you were on friendly terms with him, weren't you? A. I was, yes.

Q. And at the time you made that deed to Mr. Brown, you were not on friendly terms with Mr. Carpenter, were you? A. Well, not particularly so.

Q. Were you or were you not on friendly terms with him? A. No, I was not. Do you want me to tell you why?

Q. No, I will ask you that later on. You may tell me when I ask you. A. All right.

Q. You were not on friendly terms with Mr. Carpenter? A. No.

Q. Prior to giving that deed, you had given Mr. Carpenter a mortgage? A. Yes.

Q. For $3500? A. Yes. Do you want me to tell you why?

Q. I will ask you later on. You will get an opportunity to tell everything later. You executed a mortgage to Mr. Carpenter for $3500, did you not? A. I did, yes.

Q. That mortgage was made about the same time as the lease was made or shortly after? A. It was probably a year or so afterwards; I don't remember the date, but it was while I was still on friendly terms with him.

Q. How long a period did that mortgage have to run? What was the term of it? A. I don't remember that.

Q. Was it five years? A. I couldn't tell you; I don't remember.

Q. At the time you executed that deed to Mr. Brown, you owed Mr. Brown some money, did you not? A. Not that I was aware of. I received a bill from him after I deeded this property to him. I didn't know that I owed him anything. I didn't owe anybody anything at that time.

Discussion

Mr. Lowenkopf: I object to this line of questioning. I don't think it is proper cross-examination. This witness was put on merely for the purpose of establishing the change of title, and I don't think any negotiations had—

The Court: Yes, but these questions go to the very execution of the deed itself. I cannot see why they are not proper, and I will admit it.

Mr. Lowenkopf: Exception.

The Court: We will recess at this time until 1:45 p. m.

(A recess was had until 1:45 o'clock p. m.)

Afternoon session 1:45 p. m.

The Court: Members of the Jury, the Court and counsel feel that this case is one which is likely to present a question of law and not a question of fact, and counsel have agreed to proceed with the trial of this case before the Court without a jury. You will therefore be excused until tomorrow morning, or Monday morning at ten o'clock.

(The jury retired.)

CHARLES H. GARDNER resumed the stand and testified further as follows:

Cross-examination (continued) by Mr. Richardson:

Q. Mr. Gardner, you said that Mr. Carpenter was supposed to pay the taxes under the lease, did you? A. Well, I don't remember whether it was in the lease or not, but he always paid the taxes. I had the lease.

Q. Is that your signature (indicating)? A. I believe it is.

The Court: Do you want that letter marked for identification?

Mr. Richardson: I think I will offer it and have it marked.

Mr. Lowenkopf: No objection.

(The paper referred to was received in evidence and marked "Defendant's Exhibit 1.")

The Court: The letter is offered in evidence and consented to by counsel for the Plaintiffs that it be admitted at this time, as an exhibit by and on behalf of the Defendant.

By Mr. Richardson:

Q. Mr. Gardner, you state in this letter, "I have just received notice from the tax collector in relation to my taxes, that if not paid by July 15, they will be advertised, which will increase the amount. Did I understand you to say that you would see Brans about them and settle them for me? I will enclose the notice of taxes, and if you can do anything about them, you will accom-

modate me very much. (Signed) C. H. Gardner. P. S. I will be down to see you tomorrow night and would like to have a talk with you. Woodbridge, New Jersey, July 13, 1897."

The letter begins, "Friend Will."

Mr. Gardner, when you wrote this letter, doesn't that show that you were paying taxes at that time?

Mr. Lowenkopf: I object to that.

Mr. Richardson: This is cross-examination.

The Court: I understand that it is. I think the letter will speak for itself.

By Mr. Lowenkopf:

Q. Mr. Gardner, when you executed that deed to Mr. Brown, the deed dated 1897, and offered in evidence, that was practically all the property that you had at that time, was that so? A. It was the Van Sickle Estate, that is, the property that I received from Van Sickle.

Q. No, that is not the question. That conveyed practically all the property that you owned at that time, isn't that so? A. It simply meant the property that I received from Van Sickle. It was to be forty acres.

Q. Did you have any other property after you conveyed the Van Sickle Estate? A. Yes, I don't know whether my mother was dead at that time or not, but I had a piece of property at Port Reading from my mother.

Q. How much was that property worth at the time that the deed was executed? A. According

to Mr. Carpenter—I can tell you that according to Mr. Carpenter's witness, it was worth $5,000.

Q. And you owned it at the time? A. I owned one-quarter interest in it.

Q. At the time you sold that to Brown? A. Yes.

Q. Was your mother dead then or not? A. My mother was dead at that time.

Q. When did she die? A. Well, I don't know. It is thirty odd years ago.

The Court: The witness says that he owned one-quarter interest in the property. Is that all that was conveyed to the Browns for that deed, the one-quarter interest in this property?

Mr. Richardson: It is a different property. The property conveyed to the Browns was the Van Sickle Estate, but what he is talking about is an entirely different property from his mother to him. That is the property that was worth $5,000.

The Court: I didn't know just what counsel had in mind. I thought they were referring to the property in question.

By Mr. Richardson:

Q. Is the property that you are speaking of, that is, your one-quarter interest—did you afterwards sell that to Dave Brown's father for $136?

Mr. Lowenkopf: I object to this. This has no relevancy.

The Court: I do not see the connection of it yet, but counsel probably has something in mind. If it is immaterial, I cannot see how it hurts the Plaintiffs.

A. It was some time after I sold this to Brown that refers to this property that I inherited from my mother.

Q. Did you sell it to Brown's father? A. Yes.

Q. For how much? A. I don't remember the amount.

Mr. Lowenkopf: I object to that.

By Mr. Richardson:

Q. Was that conveyance set aside as fraudulent?

Mr. Lowenkopf: I object to that.

The Court: Yes, I don't think that is material.

Mr. Richardson: I may be mistaken about it, but I thought if this other conveyance, which was made about the same time as our conveyance, was set aside in defraud of creditors, that it would be some evidence that this deed to Brown would be a similar conveyance.

The Court: I will sustain the objection to that question. You may have your exception noted on the record.

By Mr. Richardson:

Q. Mr. Gardner, you say that Mr. Carpenter, under this lease, was to furnish you certain crops? A. He was to deliver to me a certain portion of the crops.

Q. Did they do that? A. Oh, yes, two or three loads of corn. He never farmed the place; he just scratched it. He cut his hay probably just before a frost. I suppose he used it for feeding. He put manure on the place. He gathered ashes

from different people in town and charged me with the manure. He put dry corn stalks on the farm and never produced anything, in the four years, I never received but three or four loads of corn.

Q. After 1903, did he ever deliver any produce to you at all?

Mr. Lowenkopf: I object to that. He did not own the property after that.

Mr. Richardson: I will withdraw the question.

Q. The consideration in that deed is $400, is it not? A. Yes.

Q. What was the real value of that property at that time? A. Well, I couldn't tell you.

Mr. Lowenkopf: I object.

The Court: I will permit the question.

A. I don't know what it was worth.

Mr. Lowenkopf: Exception.

Q. Well, you owned it, didn't you? A. I did, yes.

Q. Why didn't you know what it was worth? A. Well, I don't know; it was deeded to me. I was in another business, and I leased it to him to farm, and I supposed that probably what I would receive from him would remunerate me for my interest in the place, but I never received anything from him. He started in to defraud me the very minute he got it. I visited him at one time—will you let me tell it?

Q. No. Don't you know that the real value of this farm was $10,000 at the time of this convey-

ance? A. I don't know it, no; I don't know what the value was.

Q. One of the Browns was a relative of yours at the time of the conveyance, was he not? A. No.

Q. When was he a relation? A. I conveyed the ground to him before he married my daughter.

Q. How long before? A. I couldn't tell you that.

Q. Was it a year before? A. I don't know whether or not it was. I don't remember the time, but it was previous to his marriage to my daughter.

Q. He was going with her at that time, was he? A. I suppose so; it is a good many years ago.

Q. How long before? A. I couldn't tell you that.

Q. Was it a year before? A. I don't know whether or not it was. I don't remember the time, but it was previous to his marriage to my daughter.

Q. He was going with her at that time, was he? A. I suppose so; it is a good many years ago, and I can't remember those things.

Q. You made that deed subject to a mortgage of $800? A. Yes, and this lease.

Q. You do not recite anything about Mr. Carpenter's mortgage, in there, did you? A. He obtained that mortgage from me through fraud.

Q. Do you know? A. No, I did not, because it was an illegal mortgage. That mortgage I never received a cent for. You may shake your head, young man, but I never received a cent for that mortgage.

Q. You have a clear recollection of that remaining mortgage, have you not? A. I know nothing about the Herner mortgage. That $800 was given to the Perth Amboy Savings Bank.

Q. Didn't you know that it was afterwards assigned to Mr. Herner? A. I didn't know it until I heard lately. I knew nothing about it. The property had passed out of my hands, and I knew nothing more about it.

Q. Are you sure you knew nothing more about that mortgage? A. No, I knew nothing more about that mortgage.

Q. Then why did you say, in your affidavit, in the Court of Chancery, affidavit dated June 6, 1928, "that the $800 mortgage mentioned in the affidavit of William V. Carpenter was a bona fide mortgage, and to my knowledge, and during the period I owned said land, said mortgage was never foreclosed, nor was there ever any final decree ever entered in foreclosure suit on this mortgage." If you knew nothing about the mortgage, why did you say that in your affidavit? A. What is that affidavit?

Q. The one you signed in the Court of Chancery. A. I don't know anything about it; I don't remember about it at all.

Q. You don't remember about what? A. What you are reading there.

Q. Is that your signature (indicating)? A. No, sir, that is not my signature. I never signed that paper.

Q. Did you say in this affidavit that there was never any final decree ever entered in the foreclosure suit on said mortgage, referring to the

$800 mortgage? Did you or did you not say that? A. No, I did not.

Mr. Richardson: I want to offer this copy of the affidavit that was used in the Chancery suit, made by Mr. Charles H. Gardner and served upon us in that Chancery suit. It is part of the Chancery records. Is there any objection?

Mr. Lowenkopf: There are objections. The truth of the matter is that I came into Chancery on a motion and served some papers on Mr. Strong, and the Court refused the application. I asked for the return of my papers, and Vice-Chancellor Berry said that as long as I had given them to Mr. Strong that he had them as a gift. The originals are not on file, and it is not a part of the records of the Court of Chancery by any means. They were not used in the argument at all.

The Court: The records whether or not they were used in the Court of Chancery, if for the purpose of discrediting the witness, if he has made an affidavit which is contrary to the testimony that he has given here now and they are properly identified, they become proper matters of evidence before this Court. However, as I understand it, the document which Mr. Richardson has in his hand is merely a carbon copy of the original affidavit, and the Defendant denies that it is his signature, and without the original affidavit, I do not see how you can put it in.

Mr. Richardson: I cannot, but I just wanted Mr. Lowenkopf to object to it, and I will prove it otherwise.

By Mr. Richardson:

Q. You had borrowed large sums of money from Mr. Carpenter during the time he was in possession of this property under the lease, had you not? A. No, not large amounts at all.

Mr. Lowenkopf: Objection.

The Court: I will permit that question.

Mr. Lowenkopf: Exception.

(The stenographer read the last question as follows:)

"Question: You had borrowed large sums of money from Mr. Carpenter during the time he was in possession of this property under the lease, had you not?" A. No, not large amounts at all. The greatest amount probably was about $50.

Q. At any one time? A. At any time, or no more than that at all times.

Q. Did you ever make any affidavit in the Chancery suit before Vice Chancellor Berry in connection with the injunction proceeding? A. At what time do you mean?

Q. Last June? A. No, I have never been in court in the case at all.

Q. Did you make any affidavit? Did you sign any affidavit? A. No, not that I am aware of. I never was in any Chancery Court in this case. I have never been questioned.

Q. Did you start an affidavit, "Charles H. Gardner, being duly sworn according to law, on

his oath deposes and says, 'I reside in the Township of Woodbridge, County of Middlesex, State of New Jersey, and am eighty years old. The Complainant, William V. Carpenter, is the husband of my niece, which said niece is the daughter of my sister.' " Do you remember saying that in an affidavit? A. I don't remember it.

Q. You don't remember saying that? A. No, but it is the fact. His wife was my niece.

Q. You don't remember signing an affidavit? A. No, I don't. I have never been in court in this matter at all. This is my first appearance in court in this whole case.

Q. Since 1903 you have not been very friendly with Mr. Carpenter, have you? A. No, I don't know the date, but I could tell you the reason why.

Q. Never mind why. A. I had him indicted for assault and battery, and you would not think we would be very friendly after that, would you?

Mr. Richardson: No, I should not think so.

By Mr. Richardson:

Q. How many acres were in this land? A. The deed that I received from my uncle called for forty acres.

Q. How much was property worth an acre? How much was this property worth an acre at the time you sold to the Browns? A. I don't know.

Q. You haven't any idea? A. No.

Q. Do you recall a Board or a Commission assessing this property for tax purposes on or about the year 1898? A. No.

Q. You do not recall that? A. No.

Q. Just why did you execute this deed to the Browns? For what purpose? A. To settle a debt that I owed them.

Q. You owed the Browns how much? A. I don't remember the amount. It is some years ago.

Q. Was it a large or a small amount? A. Quite a large amount.

Q. Would it be $10,000? A. No.

Q. Would it be $5,000? A. No.

Q. Would it be $1,000? A. I don't know.

Q. You haven't any idea? A. No, it wasn't as much as five.

Q. What kind of a debt was it? A. A store bill and borrowed money.

Q. How much was the store bill? Have you any idea? A. I don't remember.

Q. You don't know whether it was a large amount or a small amount? A. It was a large amount.

Q. What would you call a large amount? A. Well, that is a difference of opinion. I don't know. Some people—

Q. Did you get full value for this property at the time you sold it to the Browns? A. I was satisfied with it. This man here had a mortgage of $3500 that he procured from me, that I never received a cent for, and I supposed it was all gone. I had no money to go into court, and I could not prosecute this man. I didn't want to go to court. I can't afford to.

Q. You did sign a mortgage, did you not? A. Oh, yes, I signed the mortgage, $3500, but never

received a cent for it, to accommodate him. He said it was necessary for me to give him that mortgage. I don't know why it was. I don't owe him anything.

Q. You knew, when you signed this mortgage, that it was for $3500, did you not? A. Oh, yes; I knew it was for $3500.

Q. You signed that mortgage because you owed Carpenter some money, did you not? A. No, I didn't; I never received a bill from him. I didn't owe him a cent, but he came to me and he said it was necessary for me to give him this mortgage to protect him in his lease. That is all I know about it.

Q. And on the strength of that, you signed a mortgage for $3500? A. Yes.

Q. And your wife signed it? A. Yes. I had a boy who was very sick. He brought his lawyer there. I had a boy that I thought was dying, and I was willing to do anything at that time. I thought he was a friend of mine, but instead of that, it proved that he was just—

Q. Are you in the habit of executing $3500 mortgages— A. No, no.

Q. (Continued)—even for friends of yours? A. No, no.

Q. You tried afterward to get this mortgage set aside, did you not? A. No, I did not, no. I have never been in court on this case until today. This is my first appearance in court on this matter. I have never had any questions asked of me.

Q. At about the time you signed that deed to the Browns, you owed Mr. Carpenter some money on some notes, did you not? A. Not at the time

I sold that. At the time I sold that property to Mr. Brown, he was so vexed about it that he went to an old aunt of mine that held some notes of mine, and he told her that I was a bankrupt, and if she would hand those notes over to him, he would get what he could for them, and he only held them two or three days before he put them in the lawyer's hands for collection. It was after I sold this property to the Browns, and he came up there then, and it was simply—ever since that, he and I have had no dealings with the exception of two years, he has done everything he possibly could to annoy me. He annoyed my wife, and he has persecuted me in every way whatever.

Q. Are you all through now? A. Yes, I suppose so.

Q. He instituted suit on these notes about that that time, did he not? Mr. Carpenter instituted suit on these notes and got a judgment about that time, didn't he? A. Afterwards, after I sold this property to them. That is the reason he went to my aunt and told her this.

Q. Did you ever pay that judgment? A. No.

Mr. Lowenkopf: I object to that.

Mr. Richardson: I wanted to show the relevancy, that this deed to the Browns practically bankrupted this man.

Mr. Hanson: May I ask what if it did? He had the right to do so. Apparently, the deed has not been set aside.

The Court: The witness has said that he never received anything for the mortgage that he executed on the property. It may be true that things that transpired after

the mortgage was executed may not be evidential of the fact that he received anything for the mortgage, but I think, if the whole picture comes out before the Court, that the court will be able to winnow the chaff from the wheat and determine what is and what is not relevant to the issue. That is one reason why we are trying the case without a jury, because I anticipated that there will be a lot coming in—a lot of chaff from both sides—and the Court probably can do a better job by proceeding that way.

By Mr. Lowenkopf:

Q. That was because you could not pay it, was it not? A. That was one of the reasons.

Q. And you have not paid it to this day, have you? A. No, why should I pay a judgment when he owes me for $3500 for a mortgage I never received a cent for?

The Court: Didn't you intimate here a moment ago that the validity of this mortgage had been the subject to attack by the Court of Chancery?

Mr. Richardson: That is true. We tried to set it aside, but the Court refused to set it aside.

Mr. Lowenkopf: We are willing to let the Court read the opinion of the decree.

The Court: Why should we waste time on the mortgage, if the Court of Chancery has some thirty years ago determined the mortgage? Let me see the opinion, if you have it there.

By Mr. Richardson:

Q. The reason that you could not pay it was because you sold all your property or gave it to the Browns in that deed, isn't that so? A. No, it is not. I will tell you why I would not pay that. He went to my aunt and lied to her to get those notes. Previous to this I had visited my aunt with my wife, and I knew that I owed her this money, and I offered to deed to her my interest in my mother's estate to settle those notes, but she told me never mind. Then this man, after I sold to Brown, this man goes to her and tells her that I am a bankrupt, and she turns those notes over to him for collection. He brought a witness in court that said that that property was worth $5,000. My interest in that property would have been over $1200, which would have paid his note and would have paid Brown. It was a scheme with this man here to rob me. That is all there is about it.

Q. Are you all through now? A. Yes, and after that he even assaulted me when I went to speak to him about this mortgage and about the crops that I was receiving. He assaulted me, and I had him indicted and convicted in the court for assault and battery.

Q. You were engaged in some business, mining clay around Woodbridge about the time of this conveyance, weren't you? A. Yes, I was with the Valentines.

Q. There were some suits about to be instituted against you, were there not? A. No.

Q. There were not? A. No.

Mr. Richardson: That is all.

RE-DIRECT EXAMINATION by Mr. Lowenkopf:

Q. Mr. Gardner, do you remember in June of last year that Mr. Vogel called at your home and took you down, or brought up August F. Kreiner to take an affidavit that Mr. Vogel wanted to use in court? A. I signed an affidavit for Mr. Vogel.

Q. That is right. Do you remember in that affidavit you said, or rather it was read to you, and you signed it, that the $800 mortgage mentioned in the affidavit of William V. Carpenter was a bona fide mortgage? A. Yes.

Q. "But to my knowledge and during the period that I owned said land, said mortgage was never foreclosed"? A. Yes, that is right.

Q. "Nor was there any final decree ever entered in foreclosure suit on said mortgage"? A. No.

Q. "I paid the interest on said mortgage up to the time that I sold said lands to George H. Brown and David Brown." A. I have never been called on—

Q. You signed an affidavit for Mr. Vogel that was read to you, wasn't it? A. Yes.

Q. And that is all so, isn't it? A. Yes.

RE-CROSS EXAMINATION by Mr. Richardson:

Q. Then why did you tell me that you had not said that in an affidavit? A. I understood you to say that that affidavit was given in court. I never signed any affidavit in court. That affidavit was signed in my house to Mr. Vogel. I never signed an affidavit in court.

Q. Then you did say that there was never any final decree in that Herner foreclosure, didn't you? A. No, no, not at all.

The Court: He said that to his knowledge there was never any final decree.

Mr. Richardson: And further than that, "during the period that I owned said land—"

The Court: I don't think that is very important one way or the other.

By Mr. Lowenkopf:

Q. This letter which was shown to you and which you admitted contained your signature— A. Can I read it?

Q. Yes, you may read it. A. That is my signature.

Q. Do you recollect the circumstances under which this letter was written? A. No, I don't remember. It is some years ago.

Q. Can you say with any degree of certainty whether the taxes referred to in this letter were the taxes on the Port Reading property or taxes on the Van Sickle tract? A. No, I can't, but I presume that they were on the Van Sickle property. I don't know.

Q. You do not know? A. No.

Q. Who is Braus? A. He was the tax collector.

Q. Do you know whether or not Mr. Carpenter paid these taxes that you spoke about? A. I don't know.

Q. Did he ever come to you and ask you to refund any taxes which he may have paid on the Van Sickle tract? A. No, after I sold the prop-

erty to the Browns, Mr. Carpenter sent me a bill then for two horses that I bought off him and a buggy, and charged me $300 or $400 a year for manure and gave me credit for two or three loads of nubbins of corn.

Mr. Richardson: Why all this speech? I ask that that be stricken out.

By Mr. Lowenkopf:

Q. You are positive that you received no bill from him for taxes that he may have paid? A. No.

By Mr. Richardson:

Q. Mr. Carpenter had nothing to do with the Port Reading property that he speaks of, did he?

The Court: He says he thinks the letter referred to the Van Sickle property.

The Witness: This is the Van Sickle property that we are talking about, but after I sold that to the Browns, he went to my aunt that held the notes against me and induced her to hand those notes to him. You may just as well know the whole of it. There is nothing I am trying to get out of. I want to prove to you that this man started in, even when I went down to remonstrate with him, and he attacked me and struck me.

By Mr. Lowenkopf:

Q. How long after you had sold the Van Sickle tract to the Browns did these lawsuits on the notes come about? A. I couldn't tell you how soon after it was, but it was shortly afterwards

he went to my aunt and induced her to hand him those notes.

Mr. Richardson: Please don't tell us that again.

Mr. Lowenkopf: That is all.

GEORGE H. BROWN, one of the Plaintiffs, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Lowenkopf:

Q. Mr. Brown, you are one of the Plaintiffs in this action? A. I am.

Q. Where do you live, please? A. Woodbridge.

Q. How long have you lived in Woodbridge? A. All my life.

Q. How old are you? A. Sixty-one years old.

Q. Mr. Brown, on or about 1897 did you own any property in Middlesex County? A. Yes, we owned lots of property.

Q. Will you kindly enumerate where and the number of acres, please? A. Well, we owned about 120 acres in Port Reading, and about 80 acres up here in Raritan Township on the salt meadows, and about twelve acres of sand hills, twelve acres of Bordentown lots, and we owned at that time about twenty acres of salt meadows.

Q. Whereabouts? A. Some were situated on the sunken marsh, and others on the Woodbridge Creek.

Q. Did you own any property adjoining the Van Sickle tract? A. Yes, we owned the whole front of it.

Q. Have you listed that? A. No, I didn't list that. It was twenty-one acres in that.

Q. In front of it? A. In front of this piece of forty acres on the property, the whole front on the road.

Q. Did you own any property in Bayway? A. No, not that I know of.

Q. Did you own any at that time? A. No.

Q. Was it formerly? A. We used to call the farm formerly East Rahway. It had four or five names.

Q. How many acres did you have around there? A. That is the 120 acre farm. That is what we call Port Reading. It was called Rahway at that time, and whatever it may have been called—

Q. When did you marry Mr. Gardner's daughter? In what year? A. I couldn't tell you; it was about thirty some years ago.

Q. Was it before or after you acquired this Van Sickle tract? A. After.

Q. Was it much after? A. About two years, I would say.

Q. You still own this twenty-one acres from the Van Sickle tract? A. No, we sold.

Q. When did you sell it? A. I think we sold six acres to the Pennsylvania Railroad the time they were going to put a freight line through there.

Q. When? A. That must be about twelve or fifteen years ago.

Q. What did you get per acre? A. Well, I couldn't tell you. It is so long ago. I didn't have any of the dealings with them.

Q. Do you recollect the acquiring of the Van Sickle tract? A. Yes, I do.

Q. Do you recollect what consideration was paid for it? A. About $1,000 for the 21 acres.

Q. That was based on what price per acre, if it was? A. I don't know. It was sold, all 21 acres, for about $1,000. My father bought it.

Q. Your father bought it? A. Yes.

Q. For whom? A. He bought it from the heirs of the last Van Sickle. They were settling up the estate, I believe.

Q. This deed from Gardner to you and your brother Dave, this Van Sickle tract, you say you paid $1,000 for that? A. More than that. I don't mean in acreage. It must have been about $1800, I guess, for the grocery bill and everything else.

Q. He owed you some money on a grocery bill? A. Oh, yes, he owed a big grocery bill, and I went to him and told him he would have to do something, so we agreed to give him so much money and settle the grocery bill.

Q. And he gave you a deed? A. Yes, he gave me a deed.

Q. This 21 acres in front of this plot, did you sell that? A. Yes.

Q. How much? A. I couldn't say.

Q. When? A. I sold to White and Hayes.

Q. When? A. About two or three years ago.

Q. Do you remember how much you got for the twenty-one acres? A. No, I don't; somewheres around $1,000 an acre, something like that.

Q. Two or three years ago? A. About two or three.

Q. What was land in that neighborhood worth per acre in 1897? A. It wasn't worth very much; you could not sell it.

Q. Suppose you wanted to buy it? What would you have to pay for it? A. Well, I don't know; they would take most anything you could get for property around there. The taxes was eating it up.

Q. Does this property front on any highway? A. No.

Q. In fact, it is in the rear? A. It is in the rear, and we owned the whole front of it.

Q. Mr. Brown, when you and your brother bought this tract of land from Mr. Gardner, you took it subject to an $800 mortgage, is that so? A. Yes.

Q. You took it subject to a lease held by William V. Carpenter? A. Yes.

Q. How many years lease was that? A. A ten-year lease.

Q. Do you know when it expired? A. No, I don't.

Q. Do you recollect that at or about the expiration of that lease you ever had any conversation with Mr. Carpenter? A. I did.

Q. What was the conversation about? A. I told him he could continue on the place and farm it as long as he paid the taxes.

Q. He could continue on the place and farm it as long as he paid the taxes? A. Yes.

Q. Did you have that conversation only on one occasion? A. Two or three occasions.

Q. When was the last time in reference to the

expiration of the lease? A. Oh, it must have been twelve or fifteen years ago since I told him that.

Q. Who was present at that time? A. I think my brother and I were together at that time.

Q. Where did you meet Carpenter? A. Up on the farm.

Q. But you met him there on every occasion? A. Yes, on several occasions I met him there.

Q. During the balance of the term of the ten-year lease, that is, during the time you got title to the expiration of the lease, did you ever pay any taxes on this land? A. No.

Q. Who paid the taxes? A. I suppose Mr. Carpenter did.

Mr. Richardson: I object to that and move that it be stricken out.

The Court: It may be stricken out. Ask him if he knows whether or not the taxes were paid.

By Mr. Lowenkopf:

Q. Do you know whether or not the taxes were paid? A. Yes, they were paid.

Q. And you did not pay them? A. No.

Q. Did Carpenter ever come to you and ask you to pay the taxes? A. No, sir.

Mr. Richardson: I object to that.

The Court: His answer is no, sir.

Mr. Richardson: He is leading this witness all the time.

(Argument)

By Mr. Lowenkopf:

Q. After you told Carpenter in the presence of your brother that he could stay on the land and

farm it, if he paid the taxes, what, if anything, did he say? A. He just laughed, that is all, and commenced to call me all kinds of names he could think of.

By the Court:

Q. I take it from that that he did not agree to your proposition? A. He didn't say yes or no.

Q. You said he started to call you names and laughed. You don't mean that that was, in your opinion, evidential of agreement to the proposition, do you? A. Well, I don't know. He would not say yes or no when I asked him. He laughed, that is all.

By Mr. Lowenkopf:

Q. Did he continue in possession of the place after the expiration of his lease? A. He did.

Q. During the six years that you owned the property, during the unexpired portion of the ten-year lease, did you ever pay any taxes? A. No, sir.

Q. Were they paid? A. They must have been paid.

Q. During that time did Carpenter come to you and demand that you pay those taxes? A. No, sir.

Q. Did he ever send you a bill to— A. No, sir.

Q. (Continued)—to recompense him for taxes? A. No, sir.

Q. During this six years, did you get any portion of the crops that might have been raised on this tract of land? A. No, sir.

Q. In other words, you were satisfied to leave the land as it was just so long as the taxes were paid? A. That is right.

Q. After the expiration of this ten-year lease, did you, from that date, 1903, and up to the present time or prior to the institution of suit, assert your ownership in that land? A. Yes.

Q. What, if anything, did you do? A. We sold the pipe line and right-of-way to him.

Q. When was that? A. I don't know, I can't remember the dates.

Q. What pipe line was it? A. That was the Tidewater Oil Company.

Q. Did you give them a right-of-way for the purpose of constructing two iron pipes for the transportation of petroleum through the land known as the Van Sickle tract? A. Yes, we gave them the right-of-way.

Q. By "we," whom do you mean? A. My brother and I.

Q. Do you recollect whether or not that was in 1914? A. Well, it was when the oil line went through. I can't say for a certainty.

Q. Did you ever, at any other time, exercise any acts of ownership? A. Yes, a year ago last August he had a flying—they were going to have an airplane, and I went up and objected about it, and I had a talk with him, and he left the field. That was about a year ago last August, and I had my son and father-in-law with me at the time.

By the Court:

Q. What did you say to the man and what did he say to you? A. I went up to the man and had

a talk with him, and when he understood the matter, he went off, he would not hire the field. That is about the size of it, I guess.

Mr. Lowenkopf: I offer this in evidence.

(The paper referred to was received in evidence and marked "Plaintiff's Exhibit 2.")

Q. Since you acquired title of this land, or your brother, has Mr. Carpenter at any time demanded interest of you on any mortgage which he might hold on that land? A. No, sir.

Q. You knew that he had a mortgage on the property, did you not? A. Yes.

Q. When did you learn that for the first time? A. I knew it after we bought the property.

Q. You say he never demanded any interest for this mortgage? A. No.

Q. Do you know whether Carpenter actually farmed this land? A. Well, I don't think he farmed it very good. He had not raised any crops of any kind. He sold some dirt off it and things like that and sand. He had some sand, and he sold some sand off it.

By the Court:

Q. When? A. While he had it, after the lease was had.

By Mr. Lowenkopf:

Q. Did you have knowledge of the fact that he was taking sand from the property? A. I heard about it afterwards.

Q. What did you do about it? A. It stopped then. I don't know. He sold some and I stopped it.

Q. Did you speak to Carpenter about taking sand from your land? A. I went up there once or twice to see him about it, but I couldn't find anybody up there.

Q. You knew where he lived? A. Yes.

Q. Did you go to his home? A. No.

Q. You were not on friendly terms, with him, were you? A. No, I wouldn't go there and be put off his place.

Q. Do you know whether your brother Dave ever went to see him about taking the sand from the land? A. I don't know.

Q. Have you seen this property lately? A. Yes, I have been on it not over a week ago.

Q. What is on there now? A. A race track.

Q. What kind of a race track? A. A wooden race track. I think it is a half-mile track.

Q. For what purpose? A. For automobile racing, and I believe they are going to have dog races there and a lot of everything, prize fights and everything, I understand, now.

Q. There is a large grandstand on it also? A. Yes, it is covered around on one side with a grandstand.

Q. Do you know who is operating that race track? A. No, I don't know. There has been so many there that I don't know who exactly, who operates it.

Q. Did you, at any time, inform the speedway people that you were the owner of this property? A. Yes, sir, notified them just as soon as we heard of the lease, we notified them.

Q. What lease are you referring to? A. The one Mr. Carpenter gave.

Q. And as a result of your notifying them, what happened? A. They came and wanted to see us.

Q. What took place?

Mr. Richardson: I object. He testified that he did something.

Mr. Lowenkopf: I will withdraw the question.

Q. Referring to this lease that you are speaking about, from whom did you learn about it? A. The first I saw was in the paper, the first I knew of it.

Q. Do you know the duration of this lease? A. I do not.

Mr. Lowenkopf: Cross-examine.

CROSS-EXAMINATION by Mr. Richardson:

Q. At the time of this conveyance from Gardner, you were on friendly terms with him, I presume? A. With whom?

Q. With Gardner. A. I was on friendly terms with Gardner and Carpenter both.

Q. At the time of this conveyance, I presume you were on friendly terms with Gardner? A. Yes.

The Court: He says he was on friendly terms with both of them.

By Mr. Richardson:

Q. Were you going with Gardner's daughter at that time? A. No, she was working for me as a bookkeeper.

Q. How long before you married her was this deed signed? A. Somewheres around about two years.

Q. That was $400 expressed in the deed, wasn't it? A. I think there was $400.

Q. How much besides that was the consideration? A. The grocery bill was about $1200 or $1400.

Q. What objection was there to putting through the consideration in the deed? A. They never do.

Q. Who don't? A. In the deeds. One dollar and other valuable considerations, don't they?

Q. Yes, but this deed had $400 in it. A. Why should we mention the grocery bill? We had $400, and we turned the grocery bill in.

Q. Why did you make it $400 instead of $400 plus the grocery bill? A. I don't know. The lawyer who drew the deed up drew it up in that way. That is all I know about it.

Q. Have you any record to show just how much the grocery bill actually was? A. No, I have not. I have been out of business thirty years pretty nearly.

Q. This lease that Mr. Carpenter obtained was obtained by him in 1893, was it not? A. I suppose so, according to what his records say. I suppose I will have to go according to them.

Q. After Mr. Gardner conveyed this property to you, you started the suit to annul that mortgage, did you not? A. I think we did, but I never heard of the suit.

Q. You only think you did? A. I knew the matter was given to Judge Vail (?), and that is the last I ever heard of it. I never was in court or subpoenaed or nothing. The matter was given to Judge Vail (?) and that was the last I ever heard of it.

Q. And then you did hear of the ejectment suit, didn't you? A. I believe there was, but I wasn't there at the time. I never went to the sale.

Q. Didn't you bring a suit in the Court of Chancery one year after you got this deed, and after losing that suit, you brought an ejectment suit in the Court of Common Pleas in Middlesex County? A. I don't remember. I know the matter was given to Mr. Vail, and he attended to the whole thing. I never got a notice of any suit at all.

Q. At any rate, you sent men to Carpenter's property and put Carpenter off there during the time he had this lease, did you not? A. I think we did, yes.

Q. And you kept them off there, did you not? A. Kept them off for a day or two until they took them down to the lock-up.

Q. Then Carpenter went to Court and got possession of that property again, did he not? A. I don't know; I never went any further. Everything was turned over to Judge Vail, and that is the last I heard of it.

Q. Don't you recall whether or not Mr. Carpenter got possession of that property after you put him off? A. I believe—I would not say, as this is only hearing—that the Court decided that the lease was good. That is where it was, that the lease would hold as it was until it expired. That is what I heard, and that is the only thing I heard.

Q. Didn't you take this property from Gardner for two purposes, one to try to cancel that mortgage, and the other to get Mr. Carpenter off that property, if you could? A. No, sir.

Q. How long after you got the deed did you go around to put Mr. Carpenter off the property? A. I couldn't tell you, it is so long ago.

Q. And right after the deed, you took the attitude that you wanted to get Carpenter dispossessed and off that property, did you not? A. Yes, why not? We had the property.

Q. And you wanted to get him off so bad that you went over there yourself and helped to put him off, did you not? A. No, sir.

Q. You sent your men over there? A. Sent an officer over there.

Q. You went over again at the end of this lease in 1923, did you not? A. Not that I know of, no.

Q. When did you talk to Carpenter? A. I talked to him just before—after the lease expired.

Q. The lease expired in 1923. When did you talk to him? A. It must have been about the latter part of—just before the lease expired, within about a month or so after it expired.

Q. You were anxious to get him off this property all the time? A. We wanted the property ourselves.

Q. And notwithstanding the fact that you went over there, you tell us now that you went there for the purpose of renewing the lease? A. I went there to talk to him, and then we came to an agreemnt on it that he would stay there. We didn't want to pay the taxes on the property.

Q. Didn't you just tell the Court that when you went there Mr. Carpenter cursed you and laughed at you? A. He did, yes, sometimes.

Q. Do you call that an agreement? A. No.

Q. You knew that Mr. Carpenter was in there under a claim of a mortgage, did you not? A. After he bought the place, yes,—no, before we bought the place we knew of that mortgage, but we didn't consider it any good.

Q. Didn't you testify on your direct-examination that you did not know of the existence of the Carpenter mortgage until after Mr. Gardner had been— A. No, I said the Carpenter lease.

Q. But you knew about the mortgage? A. I had heard of a mortgage, yes.

Q. But you did not know anything about the lease? A. I said I had heard of the lease. No, we didn't exactly know anything about the lease until after we got it, and then we heard of the lease.

Q. Don't you remember Gardner saying that that deed was conveyed to you subject to the mortgage and the lease? A. No, I don't remember whether he said it or not.

Q. You and Mr. David Brown considered yourselves to be the right owners of this property, is that right? A. Yes.

Q. And you have permitted Mr. Carpenter to stay on that property from 1903 down to the present time without any action against him whatever, isn't that so? A. Because we had an understanding. I thought he would pay the taxes for the use of the property.

Q. You knew that the taxes on this property were not paid on several occasions? And you went down to the tax sales office, don't you know that? A. No, I don't.

Q. Didn't you ever get a notice of the intention of the town of Woodbridge to sell this property for taxes? A. No, sir.

Q. Didn't you get a notice from Braus Drummond of the intention of the Township of Woodbridge to sell certain land, recited as forty acres of land on the seventh day of October, 1899 at the hour of two o'clock in the afternoon? A. No, sir.

Q. You never got that notice? A. No, sir, never got that notice.

Q. You never got any notice of any tax sale? A. No, I never did.

Q. Have you received in any other way a notice of a tax sale of this property being held on two different occasions? A. No, sir.

Q. And you never knew that taxes were in arrears at all? A. No, I never bothered looking.

Q. And yet you were the owner of this property? A. Yes, the owner of the property.

Q. During the period of 1923 to 1929 you never inquired whether or not the taxes were paid? A. Yes, I may have asked the collector, and he said yes.

Q. Did you ask the collector or not? A. Yes, I asked the collector, and he said they were paid.

Q. When did you ask him? A. I don't know when.

Q. You did not take much interest? A. I took all the interest required in it.

Q. In what way? A. We looked after the property, and as long as the taxes was paid, we didn't care.

Q. Isn't Carpenter a bitter enemy of yours since the time you threw him in the Court of Chan-

cery, and isn't it true that when you came over there, he cursed and swore at you and ordered you off the property? A. I didn't sue in any court of chancery; I know nothing about that. Mr. Vail had that matter, and I knew nothing more about that at all than a stranger. He took all the papers.

Q. You remember when you put Carpenter off that property? A. Yes, a number of years ago.

Q. And the feeling has been bitter ever since? A. No bitterer for him than for me. He is the one that started it.

Q. You left that man in possession of that property all these years without taking any precaution to see whether or not the taxes were paid? A. We found out that the taxes were paid, and what did we care? We thought he paid them.

Q. How much was the value of this land at the time you purchased it? A. It wasn't worth very much; it was away in from the road and no frontage.

Q. What is your idea of not very much? A. Fifty or seventy-five dollars an acre, I suppose, at the most.

Q. You think it was worth about two or three thousand dollars? A. Something along that line, it might be.

Q. Did you know that it was assessed for $10,000 a year or two after you bought it? A. Assessed for $10,000? No, I never saw the assessment tax bill.

Q. You never tried to find out, did you? A. As long as the taxes were paid, it didn't worry me.

Q. You have never done one single thing, except to give this right-of-way to a pipe company, in all these years since 1903, have you? A. Yes, after the lease expired, we had trouble with him there. When was the Court of Chancery case?

Q. That was before the lease expired. Since 1903 you haven't done anything except to give that right-of-way? A. Yes, we gave the right-of-way and told them that an air field could not come there.

Q. You have never paid this mortgage, have you? A. Which mortgage?

Q. The $3500 mortgage. A. No, sir.

Q. You knew Mr. Carpenter bought in this Herner mortgage, did you not?

Mr. Lowenkopf: I object to that.

A. Yes.

The Court: He is asked whether or not he knew it. There is no dispute about the fact. The question is whether or not Mr. Brown had self knowledge of that fact.

The Witness: I heard after it was bought in.

By Mr. Richardson:

Q. And you have never paid that off, have you? A. No.

Q. You knew that Mr. Carpenter had purchased this property in a tax sale, did you not? A. No, sir.

Q. You never knew it? A. Never knew it.

Q. You live in the Township of Woodbridge and have lived there all your life? A. Yes, sir.

Q. If an advertisement was inserted in the newspaper, advertising your property for sale, you would no doubt see it or your attention would be no doubt called to it, isn't that so? A. It might have, but I would not bother looking at it. The paper didn't amount to much in Woodbridge at all at that time, and I never bought the paper at all, never bothered with it.

Q. You never saw the paper? A. I never took any Woodbridge paper; I took the Amboy paper.

Q. You never saw it in the Woodbridge paper? A. No.

Q. Nobody ever called your attention to it? A. No, sir.

Q. Isn't it a fact that Mr. Gardner, by conveying this property to you, practically bankrupted himself? A. I don't know.

Mr. Lowenkopf: I object to that.

The Court: Objection sustained.

By Mr. Richardson:

Q. You say you were to get some part of the crops under this lease? A. Yes, sir.

Q. Did you ever get it? A. No, sir.

Q. Did you ever sue Mr. Carpenter for not giving it to you? A. No, sir.

Q. You never brought an action for an accounting of any kind, did you? A. No, sir.

Q. Of course, Mr. Brown, if you really felt that Mr. Carpenter had owed you any money, feeling the way that you did, you would probably sue him, would you not? A. No, but I thought the fellow had all he could do to make the taxes out of the place. That is why we didn't do anything.

Q. You said you never bothered about the taxes? You never knew anything about it? A. I told you they were paid. We would find out when they were paid.

Q. You could not tell whether or not he was operating the farm at a profit or a loss? A. We could very well tell that from the way it was operating. He would plant three or four acres of corn, and it would grow that high (indicating), and the weeds would beat it up, and he would sow some wheat or something, and the weeds would beat that up, too.

Q. And of course, that was the reason why you renewed the lease? If he was such a poor operator of the farm, that is the reason you wanted him to stay there all these years? A. If he wanted to take the farm and pay the taxes, it didn't make any difference to us who took it.

Q. A nice valuable piece of property being worked by a poor farmer, and you wanted to renew the lease? A. It wasn't so valuable at that time.

Q. In the last twenty years it has grown in value, has it not? A. Somewhat, yes.

Q. Is your brother here today? A. No, he is out. I don't know where he went.

Q. He is half owner of this, isn't he? A. Yes.

Q. And he knew that this case was coming up? A. I don't know whether or not he did.

Q. You knew it, didn't you? A. Ten o'clock last night.

Q. Didn't he know it yesterday afternoon? A. Not that I know of. I haven't seen him since

about nine o'clock yesterday morning, the last I seen of him.

Q. Did you attempt to get word and tell him about this case? A. I did. He was in New York somewheres. I don't know where he is at all. I had no way of getting hold of him.

Q. You knew that this case was listed for this term, and that it was number fifty? A. No, I didn't know the number of the case.

Q. Haven't you talked with your brother the likelihood of this suit coming up most any day? A. No.

Q. You valued this land as somewhere in the neighborhood of $80,000, didn't you?

Mr. Lowenkopf: I object.

The Court: I will permit the question.

A. The value for the race track, and that is bought for that amount.

The Court: The only question here is the value of the land itself.

RE-DIRECT EXAMINATION by Mr. Lowenkopf:

Q. Mr. Richardson says that the value of this land has increased during the last twenty years. The taxes have increased, too, haven't they? A. Yes, sir.

Q. And they have been paid? A. Yes, sir.

By the Court:

Q. How much are the taxes? A. I don't know.

The Court: I am curious to know whether they increased it, if he did not know.

By the Court:

Q. You know that they increased generally? A. I know they increased from my other property, ten or twenty points.

By Mr. Lowenkopf:

Q. You have another parcel of land adjacent to this, or you have had, you and your brother? A. Yes—no, that belonged to the estate, father's estate.

Q. Is that vacant land also? A. That was vacant land, but White and Hayes took it.

Q. How long ago was that? A. Two or three years ago, I guess they bought it.

Q. Have you any other land that you now own, you and your brother, or individually? A. That brother Dave and I own individually? No, sir.

Q. Do you own any more property jointly? A. No, the rest is all the estate.

Q. Did you have any particular use for this land during these years? A. No, sir, no particular use.

Q. What are you doing with the rest of the estate? A. Why, we have got the farm. We sold the Raritan farm at one time. We got a farm down there, and there is a milk man on it.

Q. You have no definite program for your property in the way of making lots or developing? A. No, we haven't done anything yet, just leaving it for farm property.

Q. Do you have tenants on other property who pay taxes? A. They don't pay taxes. 120-acre farm, I got $480 a year and paid $700 taxes.

Q. Do you know that White and Hayes have property adjacent to this property? A. Yes.

Q. Do you know that they are giving as low as $40 a lot for that? A. I don't know what they are getting.

Q. You say that when you and your brother met Carpenter on one occasion just before the lease expired, or perhaps after the lease expired, you said on one occasion that he could stay in for the payment of taxes, and he laughed at you. Was that the first time you spoke to him or some subsequent time? Was it before the expiration of the lease or after? A. I couldn't tell you which it was.

Q. But you did say that you spoke to him on more than one occasion? A. Yes, more than one occasion.

Q. I thought you had an agreement with him that he was to pay taxes and stay on the land and farm it? A. What kind of an agreement do you mean? Verbal?

Q. Yes. A. Yes, kind of a verbal agreement.

Q. What did you say, as nearly as you can recollect, you or your brother, the exact phraseology? A. Well, as far as I can remember, I said, "Bill, you can keep on the farm as long as you pay the taxes."

Q. What did he say? A. He laughed at me, that is all.

Q. Did he laugh every time you spoke to him about that? A. He commenced to speak about he owned it, and this and that, and that we could not do anything.

Q. Did he say he owned it? A. Yes.

Q. Did he say that every time? A. He said he owned it.

Q. Was that before the lease expired or after it expired? A. It was before and after the lease expired, both.

Q. What did you say about that when he said he owned it? A. I told him he did not own it. I said then, "I own it."

Q. Did you or your brother ever get any notice from Mr. Carpenter that he was no longer a tenant of yours and that he was the owner of that land? A. No, sir.

Q. You said before that you never paid any interest to Carpenter on this $3500 mortgage? A. No, sir.

Q. Did he ever come to you and demand it? A. No, sir.

Q. You also testified that you heard that Carpenter had purchased Herner's mortgage, is that right? A. I heard that, yes.

Q. Did Carpenter ever come to you and demand that you pay him that amount of that mortgage or any interest on it? A. No, sir.

Q. How did you find out that Mr. Carpenter had not paid taxes for the last three or four years? A. I had Mr. Vogel look it up.

Q. That was the first time that you learned that he was back in taxes? A. Yes, that is the first I knew of it.

By the Court:

Q. When was that? A. After the race track got there, when we started this suit with the company.

Q. That was how long ago in years? A. It is only last Spring, or a year ago last January I think they got their lease.

Q. I am asking you. A. I didn't know until I saw it in the papers, and it was April before we knew it.

Q. When did you get knowledge that your taxes had not been paid? A. Right away after that, I got Vogel to look it up.

Q. Why did you get him to look it up? A. Because I wanted to find out whether or not they were paid.

Q. Why was it that you became interested in the taxes at that time to question whether or not they were paid? You had not paid any attention to them before that. What was there that drew your attention to the question of the taxes spent? A. My brother-in-law is the treasurer of the township, and he said I better look after those taxes or they will sell them, and then I got Vogel to look it up.

Q. There was no connection between your interest in the taxes and the fact that the race track people had leased the property? A. No, I thought the taxes was paid at the time, and my brother-in-law told me they was not paid, and I got Vogel to look up what years was not paid.

Q. He did not tell you that until about a year ago? A. About a year ago this month, I think it was, when we first found out that the race track was coming there.

Q. How long has your brother-in-law been treasurer of the township? A. About two years, I think. This is the second year.

RE-CROSS EXAMINATION by Mr. Richardson:

Q. Isn't it a fact that after the Perth Amboy speedway lease became known to you that you informed the Perth Amboy speedway company that if they went into possession there you were going to sue? Isn't that a fact? A. No.

Mr. Lowenkopf: I object to that.

The Court: Well, he has testified that he served some sort of a notice on the people that have the speedway. I cannot see why it is not material to develop what the nature of that notice was.

By Mr. Richardson:

Q. Isn't it a fact that the only reason you became interested was because of the fact that the Perth Amboy speedway had leased that ground? Isn't that the fact? Isn't that how you became interested? A. When I found out he was not going to farm it, we was going to look out for ourselves then.

Q. Isn't it a fact that you became interested because he leased it to the Perth Amboy speedway? A. We became interested at the time he was going to put the airplane field up there.

Q. When was that? A. Oh, about two years ago this coming August.

Q. Did you go and look up the taxes then? A. Yes, I told the man just how the property stood.

Q. Did you look up the taxes then? A. No, I didn't look up the taxes then.

Q. You looked up the taxes for the first time when the Perth Amboy speedway lease became known, isn't that right? A. Yes.

Q. Did you know that Mr. Carpenter had purchased the Herner mortgage? A. I don't know who purchased.

Q. Do you know that Mr. Carpenter had purchased the Perth Amboy Savings Institution mortgage? A. I heard it, but I don't know it for a certainty.

Q. Did you know that the mortgage had been foreclosed, and that there had been a final decree in it? A. No, sir, I understood there was not.

Q. You signed an affidavit to the effect that $800 mortgage mentioned in the affidavit of Charles H. Gardner was never foreclosed and that the same never went to a final decree as the records of this court will disclose. You signed that affidavit, did you not? A. That I said in the affidavit to that effect? Yes, it had never been foreclosed, as far as I knew.

Q. When you went to negotiate the extension of this lease with Carpenter, and he told you, "Why I am the owner of this property," and you said, "No, you are not. We are the owner," did you really come away from that conference with the conviction that that lease had been extended? A. Yes, I did.

Q. You thought that there was an agreement, a meeting of the minds to extend this lease? A. Yes, just as much an agreement as any other, yes.

Mr. Lowenkopf: If your Honor please, there is another matter here, and unless counsel is willing to stipulate, I shall have to take the stand myself about looking up the records of the County Clerk's office and finding this lease from William V. Car-

penter to the race track people, and for the period of the years—

Mr. Richardson: We will admit that.

Mr. Lowenkopf: May we have that on the record that on February 25, 1928, there was a lease executed from William V. Carpenter to Wilburt J. Baires and Clell B. Aunks, both of Pittsburg, in the County of Allegheny, in the Sate of Pennsylvania for a period of five years from January 1, 1928, with a yearly rental of $1200 payable quarterly, with a purpose recital in the lease that the land was to be used for an Automobile speedway and there is also a consent in that lease to an assignment by the lessees to the Perth Amboy Speedway, Incorporated, a corporation in the State of Delaware, which at that time had not yet been incorporated and was in contemplation, and that this lease was recorded on April 16, 1928, book 915 of Deeds on page 432.

Mr. Richardson: We will admit all that.

Mr. Lowenkopf: And that there is also a five-year optional period in it of renewal.

That is our case.

(The Plaintiffs rested.)

Mr. Richardson: If the Court please, I may be a little premature in my motion, but it seems to me that on the strength of their own witnesses, there ought to be a nonsuit here. This last witness has testified that

Carpenter was in possession in 1903. The eveidence is that he stayed in possession since that time without the slightest effort on the part of the Plaintiffs to dispossess him, and the only thing that was done in all that time was the fact that they did grant a right-of-way to a pipe line. They likewise admit that there are two mortgages here unpaid.

The Court: I don't think you need to go any further with this argument. I think that I should like to hear the defense in this case.

DEFENDANT'S CASE.

WILLIAM V. CARPENTER, the defendant, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Richardson:

Q. Mr. Carpenter, you are the defendant in this suit? A. Yes, sir.

Q. Do you know Charles Gardner? A. Yes, sir.

Q. Did he execute a mortgage to you in the sum of $3,500? A. Yes, sir; he did.

Q. On December 19, 1894? A. Yes, sir.

Mr. Richardson: Is there any objection to a certified copy?

By Mr. Richardson:

Q. Has that mortgage ever been paid? A. No, sir.

Q. Who is the holder of that mortgage now? A. I am.

Q. You had a lease on this property from Mr. Gardner back in 1893, had you not? A. Yes, sir.

Q. For how long? A. Ten years.

Q. And at the conclusion of that lease in 1903, did you renew it? A. No, sir.

Q. How was it that you stayed in possession there? A. On my mortgage.

Q. Was the mortgage due at that time? A. Yes, sir.

Q. How long was the mortgage? What period of years? A. The mortgage was due on about 1898.

Q. So that after 1903 you stayed in possession, claiming under that mortgage, did you? A. Yes.

Mr. Lowenkopf: I object to this as leading. That is the very essence of the case.

By Mr. Richardson:

Q. During the period of the lease, did you pay any taxes? A. Yes, sir.

Q. Under what circumstances? A. For Mr. Gardner.

Q. At his request? A. Yes, sir.

Mr. Lowenkopf: I submit that that is all very leading, if your Honor please.

The Court: Yes, that is true.

By Mr. Richardson:

Q. Did he reimburse you for those? A. No, sir.

Q. What was done as the result of the money that you advanced him? A. That went in on this here mortgage.

Q. It was all part of the mortgage? A. Yes.

Q. You have been in possession how long? A. Since 1893.

Mr. Lowenkopf: I object to the way that question is asked.

Mr. Richardson: I will withdraw the question.

Q. Since 1903 who has been in possession of the property? A. I have.

Mr. Lowenkopf: I object to that. I think the word "possession" is a legal conclusion. I don't think the witness should testify as to possession.

The Court: I presume that counsel's question means in the physical possession.

Mr. Lowenkopf: Perhaps that would be better.

By Mr. Richardson:

Q. Who has occupied these premises since 1903? A. I have.

Q. Have you ever given up the occupancy of that property since that time? A. No, sir.

Q. What, if anything, have the Browns done to dispossess you from that property since 1903? A. They took an ejectment suit out.

Q. Since 1903? A. No, sir; nothing.

Q. When did the Browns manifest their first interest in this property?

Mr. Lowenkopf: I object to that.

By Mr. Richardson:

Q. After 1903 when did the Browns manifest their first interest in this property?

Mr. Lowenkopf: I object to that question.

The Court: If he knows. I think the question is proper. I think it would be better to ask him whether or not they had, so far as he knows.

By Mr. Richardson:

Q. Do you know whether or not the Browns have evinced or shown any interest in this property since 1903? A. Why, they came down there when I rented the ground out for an aviation field in 1927. Mr. Gardner came there first, and he said, "Are you going to have an aviation field here?" I says, "Yes, sir."

Mr. Lowenkopf: I object to what Gardner told him. Gardner has no interest in this matter.

By Mr. Richardson:

Q. Between 1903 and 1927 did the Browns ever come to see you about this property? A. No, sir.

Q. Do you hold any other mortgage on that property? A. Yes, sir; an $800 mortgage.

Q. Was that the so-called Herner mortgage? A. Yes.

Q. How did you come to acquire that? A. They brought a foreclosure, and I bought it in.

Q. Who brought the foreclosure? A. The Browns—Herner.

Q. And you bought it in? A. Yes, sir.
Q. By payment to whom?

Mr. Lowenkopf: I object, unless they have the proof of it.

Mr. Richardson: We will connect it up.

By Mr. Richardson:

Q. Whom did you pay for it? A. I paid the money in to the collector of the Court of Chancery, L. A. Thompson.

Q. He was the clerk of the Court? A. Yes.
Q. Do you remember how much? A. $1,117.93.
Q. When was that? A. April 11, 1900.

Mr. Lowenkopf: I object to this as being a self-serving declaration.

The Court: Can you show the receipt by the clerk of the Court of Chancery?

Mr. Richardson: Yes, sir.

By Mr. Richardson:

Q. Who was your attorney at the time you paid him this money? A. Mr. Strong.
Q. Allan H. Strong? A. Allan H. Strong.

Mr. Lowenkopf: For the purpose of showing that certain moneys were paid in a certain cause, we have no objection to this letter, but we do not want to admit that we had anything to do with it. We do not want to admit that that binds us in any way. We will consent that the money was paid there, but it is for the purpose of subsequent legal argument.

Mr. Richardson: We offer in evidence the original mortgage from the Perth Am-

boy Savings Institution to Robert A. Herner for 8—

The Court: That is the assignment, isn't it?

Mr. Richardson: Yes, that is the assignment. We offer first, George H. Gardner and wife to the Perth Amboy Savings Institution a mortgage dated April 10, 1893, for $800, and the assignment to the Perth Amboy Savings Institution to Robert A. Herner, $885.33, October 10, 1899.

(The papers referred to were received in evidence and marked "Defendant's Exhibits 2 and 3," respectively.

Mr. Richardson: We offer in evidence the final decree in the foreclosure matter between Robert A. Herner and Charles H. Gardner.

(The paper referred to was received in evidence and marked "Defendant's Exhibit 4.")

Mr. Richardson: We also offer in evidence the letter showing payment into Court.

(The paper referred to was received in evidence and marked "Defendant's Exhibit 5.")

The Court: Do you have any receipt?

Mr. Richardson: No. Those payments have been lost.

The Court: The receipt from A. H. Strong showing the receipt?

Mr. Richardson: Yes.

The Court: That letter simply shows that there was $1,117.93 received and $1,-116 paid over to Herner.

Mr. Richardson: In the case of Carpenter against Herner.

(Argument.)

Mr. Richardson: I offer in evidence this letter.

(The paper referred to was received in evidence and marked "Defendant's Exhibit 6.")

Mr. Lowenkopf: I want to call the Court's attention to the heading, Robert Herner vs. Brown, *et al.*

Mr. Richardson: As I understand the situation, there was a bill after that foreclosure to redeem, and the money was paid under that bill.

Mr. Lowenkopf: So then this receipt is of no avail?

The Court: It shows the whole connection. We want to get all the facts in here. The mere title of a case, which might be in a letter, is not so important. The substance is what we are after. Get it all in, and the effect of it, we can get later on. The witness ought not to be penalized if the money got paid to the Court of Chancery for something different than what he expected to pay. Anyway, the result, as I understand it, from what has been said by counsel, is that it was this money that took care of the $800 Savings Bank mortgage, one way or the other.

Mr. Richardson: Settled with a decree. It did not result in an assignment. The Court—

The Court: I understand that, it did not result in a legal assignment.

By Mr. Richardson:

Q. Was this property ever sold for taxes? A. Yes, sir.

Q. Who bought it in? A. The township bought it in first, and I bought it from the township.

Q. Is that the deed (indicating)? Is that your deed from the township? A. Yes, sir.

Mr. Richardson: I want to offer that in evidence.

Mr. Lowenkopf: We object to the designation as a deed.

Mr. Richardson: Call it whatever you want. It is a release of taxes for title which wiped out the deed from the collector of the Township of Woodbridge. I offer them for what they are worth.

(The paper referred to was received in evidence and marked "Defendant's Exhibit 7.")

Mr. Richardson: And the same procedure with another tax deed, February 8, 1906.

(The paper referred to was received in evidence and marked "Defendant's Exhibit 8.")

Mr. Lowenkopf: No objection to those.

The Court: Are you sure this is the same property?

Mr. Richardson: Yes, sir.

The Court: It says in this assignment from the Township Committee to Mr. Carpenter that forty acres owned by Mr. George H. Brown and adjoining Gardner —Gardner did not own any other property there, did he? This is the Gardner property, isn't it ?

Mr. Richardson: Yes, this covers the Van Sickle property. I think Gardner owns some other property adjacent thereto.

The Court: I will ask counsel for the plaintiff why they said this was only a release.

(Argument.)

By Mr. Richardson:

Q. Mr. Carpenter, going back to the period right subsequent to the deed from the Gardner to the Browns, what did the Browns do to dispossess you from that property? A. Why, they arrested my men.

Q. Did you put them off? A. Yes.

Q. What did you do then? A. I brought an ejectment suit and put them off.

Q. Were you successful in that suit? A. Yes, sir.

Mr. Lowenkopf: I object. I think the record will state for itself.

Mr. Richardson: We have the records here, if you want them.

By Mr. Richardson:

Q. What else did they do besides putting you off the property and making an ejectment suit?

What other kind of action did they bring against you? Was there any other suit against you besides the ejectment suit? What was done about this mortgage? A. They started suit to set aside that mortgage.

Q. And as a result of all this, you still stayed in possession of the property, didn't you? A. Yes, sir.

Q. After 1903 did you make any arrangements with the Browns to renew that lease? A. No, sir.

Q. Did you grant a right-of-way to anybody around that time? Did you ever grant a right-of-way to the Tidewater Oil Company for the pipe line? A. Yes, sir.

Q. Did you know at that time that your lawyer went to Mr. Brown? A. No, sir.

Q. Did you pay to the Township of Woodbridge the money as represented in these township certificates as recited in those certificates? A. Yes, sir.

Q. The taxes for periods other than recited in those certificates and subsequent to 1903, were paid by whom? A. By me.

Q. And why? A. By request of Mr. Gardner.

Q. I mean subsequent to 1903, after 1903, that is. A. I paid all the taxes. I bought the property in for the taxes and paid them ever since.

Q. Why? A. I got possession of them.

Q. In order to protect your position? A. Yes, sir.

Q. Is it admitted in evidence that this ejectment suit—

Mr. Lowenkopf: We would like to have the proceedings in.

The Court: Who is the plaintiff in that suit?

Mr. Richardson: William V. Carpenter. He brought the suit against Brown.

The Court: What was the judgment?

Mr. Richardson: A verdict for possession, 1899.

(Argument.)

Mr. Richardson: I offer that in evidence.

(The paper referred to was received in evidence and marked "Defendant's Exhibit 9.")

By Mr. Lowenkopf:

Q. At the time this property was conveyed to the Browns, what was the value of these forty acres?

The Court: In 1897.

A. Around between $9,000 and $10,000.

Q. How do you know that? A. Shortly after Mr. Loshen, Mr. Boynton, and Smith were appointed a special committee of assessment of the Board, and they assessed the value, and they made it $9,920, I think.

Q. At the time of this transfer in 1897, did Gardner owe you any money? A. Yes, sir.

Q. How much? A. Something like $400 on that lease for manure and stuff.

Q. And this property that he conveyed, did he have any property left after the conveyance? A. He had a one-fourth interest in the Gardner Es-

tate in Port Reading and a one-sixteenth interest in the Mary Van Sickle Estate.

Q. What would be the value of those two interests? Did they amount to much? A. According to Mr. Brown's testimony, he said $130, but he was allowed $136.

Q. Then he was worth $136 at that time? A. Yes, sir.

Q. For this conveyance? A. Yes, sir.

CROSS-EXAMINATION by Mr. Hanson:

Q. You say that Mr. Gardner had a one-fourth interest in some Port Reading property after this conveyance to the Browns? A. Yes.

Q. How many acres was that tract? A. About five acres in there.

Q. What was it worth an acre? A. As I just said—

Q. Just answer the question. How much was it worth an acre? A. $5,000.

Q. $5,000 an acre? A. No.

Q. You mean that altogether it was worth $5,000? A. Yes, $1,000 an acre, about.

Q. And Mr. Gardner had a one-fourth interest in that, did he not? A. Yes.

Q. Well, one-fourth of $5,000 is $1,250, is it not? A. Yes.

Q. Didn't you say a minute ago that, in your opinion, Gardner was only worth $136 after— A. I said Mr. Brown said that. He testified to that.

Q. But, in your opinion, he was worth a little more than that, wasn't he? A. Yes.

Q. And you say he had an interest in another piece of property? A. Yes, sir; a one-sixteenth interest.

Q. Where was that property situated? A. Right adjoining this other property.

Q. How many acres was in that? A. His interest in that was about four acres.

Q. How much was that worth an acre? A. About the same thing.

Q. About a thousand dollars? A. Yes.

Q. So that Mr. Gardner's interest in that would be about $250? A. It would be a fourth of $1,000, or $250. That would be $1,450.

Q. He had equity in property, after this conveyance to Brown, to the extent of $1,500? A. About that.

Q. He was not bankrupt, then, was he? A. No, sir.

Q. He still owned enough money to pay you your $400? A. If I would ever get it.

Q. Did you attempt to get it from him? A. Yes.

Q. Why didn't you get it? A. He transferred the property to Brown.

Q. Did you attempt to set this other conveyance aside? A. I did.

Q. Did you attempt to set the conveyance to this particular property aside? A. I did set that aside.

Q. Do you mean this particular piece of property that we are litigating over today? A. Yes, these two interests, yes.

Q. You set that conveyance aside? A. I did.

Q. When was this done? A. Shortly after the transfer.

Q. Do you know where the record of this proceeding is? A. I guess so.

Q. Where? A. In the Chancery in Newark, set it aside.

Q. Who got the property then? A. I did.

Q. You are talking about a different property. I specifically said this particular property. What I am talking about, Mr. Carpenter, is this particular property that is in dispute today. That is where the race track is. Did you ever set that sale aside? A. No.

Q. Why didn't you do that? A. Because I had the mortgage on it, and I held onto the mortgage and took the property and I was in possession of it and kept it.

Q. You had a mortgage for $3,500, did you not? A. Yes, and an $800 mortgage that brought in—

Q. You did not have an $800 mortgage at that time, did you? A. Shortly after.

Q. When? A. 1899.

Q. That was two years after that, wasn't it? A. Yes, sir.

Q. And you say that Gardner owed you $400 at the time you got this mortgage? A. Yes, sir; and more, too. Do you mean the $3,500 mortgage?

Q. Yes. A. Yes.

Q. How much did he owe you? A. Six or seven hundred dollars at that time; yes, sir.

Q. And you took a $3,500 mortgage for a $600 or $700 check? A. That is—

Q. Is that right or not? A. That is for the $600 and the protection of my lease.

Q. And the protection of your lease? A. Yes.

Q. Then, as a matter of fact, at the time you took the $3,500 mortgage from Mr. Gardner, he owed you $600. Is that correct? A. Yes, sir.

Q. Why did you want $2,900 additional security for the protection of your lease? A. Because

Mr. Gardner was borrowing various sums at this time.

Q. You had your lease, did you not? A. Yes, sir.

Q. And you had it in writing? A. Yes, sir.

Q. Didn't you think that that lease was good enough to let you remain in possession during the term of it without this additional security? A. Not if he was borrowing money, no.

Q. How did you expect that lease to be worth so much money? A. I couldn't tell how much he was going to borrow.

Q. How did you expect that lease to be worth so much money to you that you wanted a mortgage of $3,500 to protect yourself? A. Because I just told you, Mr. Gardner was borrowing money. He was to pay me $1.50 a load for each and every load of manure that went on that farm.

Q. That was to cover anything that you might sell him during the term of that lease? Is that what you were doing to protect yourself? A. Yes.

Q. You did not record the lease, did you? A. No, sir.

Q. Why didn't you? A. I didn't think that was necessary.

Q. Didn't you know that that would protect you during the term of that lease? A. It would protect me against other people's claims.

Q. You knew that, didn't you? A. Yes.

Q. But nevertheless you wanted this mortgage from Gardner? A. Yes.

Q. Is that right? A. That is right.

Q. How did he come to owe you $600? A. For moneys that he borrowed.

Q. How much money did be borrow? A. I say $600.

Q. On your direct-examination you say he borrowed $400. Now you say he borrowed $600. How much did he borrow? A. It was $400 on that lease, that manure bill.

Q. $400 for manure that you furnished him and $200 that you loaned him? A. Yes.

Q. What did you mean when you said that taxes were added to the mortgage? A. Up to 1897.

Q. Up to when? A. Up to 1897, when the Browns bought it.

Q. You took this mortgage in 1894. You had not paid the taxes up to 1897, then? A. Well, I say I paid the taxes up till that time.

Q. I am asking you just what you meant when you said the taxes were added to the mortgage. What taxes were added to the mortgage? A. The taxes up to 1897.

Q. How could you add taxes of 1897 when you took the mortgage in 1894? A. That wasn't the amount up to that time. The taxes had been added to the mortgage up to 1897. When the time the mortgage was given, it was only the money that was paid up to that time.

Q. What you mean is that at the time when the mortgage was executed, that Mr. Gardner owed you $600, and that there accrued as a debt to you thereafter taxes that you paid up to 1897. Is that what you mean? A. Yes.

Q. Did you pay taxes after 1897? A. Yes, sir; always paid the taxes excepting the last half of 1896.

Q. Why did you pay taxes after 1897 after Browns bought the property? A. After it was sold, I bought it in.

Q. Why did you pay the taxes after 1897? A. It was sold for taxes and I bought it in.

Q. You did not pay them, but you bought them in at a tax sale, is that it? A. Yes, sir.

Q. When did you start this ejectment suit that you speak about? A. After he arrested my men.

Q. That was in 1899, August, 1899, wasn't it? A. In May.

Q. May, 1899? A. Yes, sir; Dave Brown, Joe Allan Underhill from the Van Sickle farm, started May 13. They put a wire fence up across the entrance.

Q. And that was in May, 1899? A. Yes.

Q. And you were a tenant at that time, weren't you? You had your lease at that time? A. Yes.

Q. Isn't that right? You were a tenant? A. Yes.

Q. And in this suit, that you started, you set up the fact that you had this lease, did you not? A. I had the lease, but they put my men off.

Q. In this suit that you started in 1899, this ejectment suit, you set up the claim that you had this ten-year lease? A. Yes.

Q. Your lease would not expire until 1903? A. Yes, sir.

Q. That was right, wasn't it? A. Yes.

Q. And therefore, inasmuch as you held this lease and was a tenant, they did not have the right to eject you until your lease was expired; that is correct, isn't it? A. Yes.

Q. And in 1903, when your lease expired— A. I don't understand the question.

Q. (Continued) —what, if anything, did you do? In 1903 when your lease expired? A. I just hung onto the property, kept possession of it.

Q. And you were in possession at that time? A. Yes, sir.

Q. And you had been in possession under your lease for ten years? A. Yes.

Q. And you just stayed there? A. Yes, and I am still there.

Q. Since 1903, just what have you done with reference to this property? A. I have worked it.

Q. For what purposes? A. Farming, clay mining, sand.

Q. When was the last time you worked it for farming? A. The summer before last.

Q. How many years during that period since 1903 have you worked it for farming? A. Every year.

Q. When was the last time you worked it for clay mining? A. I sold some clay to Mr. Bock, I think his name was.

Q. How long ago was that? A. I think it is in the neighborhood of maybe six or seven years ago.

Q. What is his first name? A. I don't know his name just to tell you now. He manufactured door knobs in Woodbridge.

Q. How much clay did you sell him? A. $35 worth—$25.

Q. Did you sell the clay to anyone else? A. No, sir.

Q. How many loads was that? A. About 140.

Q. 140 loads of clay? A. About 140 tons.

Q. 140 tons of clay for $35? A. Yes.

Q. How many loads was that? A. It is according to what Mr. Bock took out. I couldn't tell you, but he gave me the weight of it.

Q. Who dug the clay? A. Mr. Bock. I sold it to him for $.25 a ton in the bank.

Q. Is Mr. Bock alive? A. No, sir; not now.

Q. How long did it take Mr. Bock to dig this clay? A. He took it out in one season, if I am not mistaken.

Q. What did he use it for? A. Making door knobs.

Q. When was the last time you dug any sand out of this bank or property? A. Last summer.

Q. How much did you take then? A. Just a few ton or yards for myself.

Q. For yourself? A. Yes.

Q. You did not sell it? A. No.

Q. You never sold any sand? A. Oh, yes.

Q. When did you sell any? A. Some seven or eight years ago I sold some to Dave Grossman, a manufacturer of cement blocks.

Q. Is that the first time you ever took any sand out? A. No.

Q. Have you ever had a building on the place? A. I had a barn on it; yes, sir.

Q. Just a barn? A. Just a barn.

Q. What did you raise last year? A. Last year? We raised a race track on there, a grandstand for the speedway.

Q. I thought you said that last summer you used it for farming? A. No, sir; I did not. I said the summer before last.

Q. What did you raise then? A. I raised some corn and hay.

Q. You just go in and cut the hay? A. Yes, cut it and gather it.

Q. You have done that every summer? A. Yes, sir.

Q. After you acquired the first tax deed or the first tax certificate from the township, did you continue to pay the taxes? A. Yes, sir.

Q. When did you start to pay taxes after the conveyance to the Browns of this property? A. I guess at the time of the sale.

Q. You say you did not pay taxes in 1897? A. I was referring to the tax sale.

Q. The Browns bought this property in 1897, did they not? A. Yes.

Q. And from that time on you stopped paying taxes? A. Stopped? No, I paid the taxes after that tax sale. I paid them up after that.

Q. After the tax sale you started to pay taxes yourself, is that right? A. Yes.

Q. Why didn't you pay the taxes in 1903? A. I had paid all the taxes.

Q. If you have paid all the taxes, why were the taxes sold by the township for the year 1903? Why were they sold if you had paid them? A. I told you they were paid at the tax sale when I bought them in at the tax sale. They had been sold to the Township of Woodbridge for taxes at one time.

Q. Why is it that in some of these years you paid the taxes yourself, and for other years you permitted the township to sell the property for taxes? A. I didn't pay them until after the township had sold it, and the township bought it in after the Browns got it.

Q. Do you mean to say that you never paid any taxes through the township except where the property has been sold for taxes? A. Not until after they were sold by the township, and I bought it in from the township.

Q. When was this committee appointed to assess the property, which you mentioned a little while ago? A. I just can't give you the date.

Q. Just recently, wasn't it? A. Oh, no, some time back.

Q. Isn't it a fact that it was in 1917 that this commission was appointed to appraise the properties? A. Somewheres near that neighborhood.

Q. That is when they assessed it at $9,200? A. Yes, sir.

The Court: What has that got to do with the value of the property in 1897, twenty years before?

By Mr. Hanson:

Q. Isn't it a fact that when you went on that property in 1893 that you cut down a number of trees, about 200 in number, to square the indebtedness that Gardner owed you? A. No.

Q. Did you cut down any trees? A. I cleaned the place all up and made a place out of it.

Q. You cut down a number of trees, did you not? A. Sure, I cleaned up the place.

Q. How many? A. I couldn't tell you.

Q. A couple of hundred? A. No.

Q. You have not got it down on that little slip of paper that you pulled out a minute ago, have you? A. No, I have not; if I had, I would tell you about it.

Q. Do you recall the time that the Browns started suit to cancel this $3,500 mortgage? A. Well, it is shortly after they had bought it.

Q. You recall that, do you? A. Yes, sir.

Q. And Allan Strong represented you? A. Yes, sir.

Q. Are you familiar with the pleading raised by Mr. Strong at that time? A. No.

Q. Did you see the complaint? A. No, I don't think I did.

Q. Were you in court when it was argued? A. No, because they only filed a bill. They filed the first bill, and the Chancellor, I understood, set it aside and gave them a chance to amend it, and they filed a second one, and he left them where he found them, he said, in the soup.

Q. You remember pretty well? A. Yes, I remember about it.

Q. They also left your mortgage in the soup, didn't they? A. No, I still have it.

Q. Why didn't you get an assignment of this $800 mortgage? A. Get an assignment from whom?

Q. From Herner? A. Because he would not give it.

Q. He would not give it to you? A. No.

Q. But you had your attorney pay the money in the Court of Chancery, did you not? A. Yes.

Q. To pay off the decree? A. Yes.

Q. Did you get any papers outside of the receipt from Mr. Strong? A. Mr. Strong got all the papers.

Q. That is all you have got? Just the receipt? A. That is all.

Q. This mortgage that Mr. Gardner gave you was for a period of five years, wasn't it? A. Yes.

Q. Did he ever pay you interest? A. No, sir.

Q. Did you ever ask him for interest? A. I don't know as I ever did.

Q. At the expiration of five years, did you ask for your $3,500? A. No, sir.

Q. Why didn't you do it? A. I was in possession of the property.

Q. You were in possession under the lease, weren't you, in 1899? A. Yes, sir.

Q. Why didn't you ask for your money in 1899, inasmuch as you were only a tenant? A. Well, I didn't think it was necessary.

Q. Why wasn't it necessary? A. Because I didn't think so.

Q. You had in mind at that time of trying to keep this $3,500 mortgage, so you could gain the property, did you not? A. Well, the mortgage was good enough for me.

Q. Wasn't that your purpose in taking the $3,500, so you could finally get this property? A. From the Browns?

Q. From anybody. A. Well, they would have to pay it until they got it.

Q. They would have to pay you $3,500 to cancel that mortgage? A. Before they got that property, yes.

Q. Although you had only let Gardner have $600? A. At that time, yes.

Mr. Lowenkopf: If your Honor please, I don't think the witness has answered the question.

The Court: He says, "At that time, yes."

Mr. Lowenkopf: I thought he referred to the $600.

The Court: That is the answer to the question, evidently. I don't know what he means by "at that time," but I presume that he means at the time the Browns got him.

We will adjourn at this time until 10:00 o'clock A. M., Monday, April 15, 1929.

IN THE

CIRCUIT COURT

MIDDLESEX COUNTY—NEW BRUNSWICK, N. J.

April Term, 1929

DAVID A. BROWN and GEORGE H. BROWN, Plaintiffs, vs. WILLIAM V. CARPENTER, Defendant.	No. 50.

Before: HON. JOHN P. KIRKPATRICK.

Appearances:

BERNARD W. VOGEL, by LEO S. LOWENKOPF, Esq., and THOMAS HANSON, Esq., Attorneys for Plaintiffs.

THEODORE STRONG & SON, by FRED F. RICHARDSON, Esq., Attorney for Defendant.

(Trial Continued.)

WILLIAM V. CARPENTER, resumed the stand, and further testified as follows:

CROSS-EXAMINATION by Mr. Richardson:

Q. I just want to clear up one or two points. It was a quarter and a one-sixteenth interest that

Mr. Gardner had in his mother's estate—I understood you to say that she had purchased them subsequently. A. Yes, sir.

Q. How much did you pay for those two interests? A. $136 and costs.

Q. And when you say "costs," in what court was the costs imposed? A. Chancery Court.

Q. Do you know how much those costs were?

Mr. Lowenkopf: If your Honor please, I object to this because I don't think it is material what happened to this other portion of land belonging to Gardner.

The Court: I don't know what counsel has in mind, but I assume that while the materiality of the question does not appear to me yet, it will. But I will hear it, because if it is not material, it will have no bearing on the result.

Mr. Lowenkopf: There are a lot of loose ends that have not been connected up and this is another one floating around the atmosphere.

Q. Do you know how much the costs were, approximately? A. The total amounted to about two hundred and forty some odd dollars and forty-eight cents.

Q. That is the price you paid for them? A. Yes.

Q. Was that all the property that Mr. Gardner had at that time, do you know? A. Yes, sir; I think it was.

Q. So that after he conveyed to Brown, the only property he had was what you purchased from him? A. Yes, sir.

Q. For $248.76? A. Yes, sir.

Mr. Richardson: That is all.

RE-DIRECT EXAMINATION by Mr. Lowenkopf:

Q. Now, Mr. Carpenter, when you first went into possession of this Van Sickle tract, you went in as a tenant for ten years; is that right? A. Under a lease; yes, sir.

Q. Under a lease? A. Yes, sir.

Q. And that was a written lease? A. Yes, sir.

Q. For ten years? A. For ten years.

Q. And that was drawn in 1893? A. 1893.

Q. Yes. Now, you stayed in possession of that land for ten years under that lease, did you not? A. I did—

Q. (Interrupting) Now, answer yes or no. You stayed in possession of that land for ten years under that lease, did you not? A. I was out of it for one year.

The Court: Pardon?

Q. You were out of it for one year? A. Yes, sir.

Q. What year was that? A. '98. 1898.

Q. 1898? A. Yes, sir.

Q. How was it that you came to be out of possession for one year? A. Brown arrested my men and locked them up and put me off.

Q. In other words, they evicted you from the premises? A. Yes, sir.

Q. And you got possession of it by virtue of a suit at law, did you not? A. Yes, sir.

Q. And the Court held that you were entitled to possession under your lease until 1903, did it not? A. Yes, sir.

Q. And then you went back into possession and stayed until 1903? A. Yes, sir.

Q. Under your lease? A. Yes, sir.

Q. Then, when your lease expired in 1893, did you give notice to the Browns that you were going to hold that under the lease? A. No, sir.

Q. Did you give notice to the Browns that you were going to stay in possession, not under the lease, but under some other right that you claimed to have? A. No, sir.

Q. Now, Gardner sold this land to the Browns in 1897? A. Yes, sir.

Q. You paid taxes on these lands from 1893 till 1897, did you not? A. Yes, sir.

Q. You paid taxes on these lands from 1897 to 1903, did you not? A. Yes, sir.

Q. Now, during those ten years that you paid the taxes, did you ever make a claim to Gardner to refund the taxes to you, or to the Browns to refund any taxes to you? A. No, I don't think I did.

Q. You don't think you did? A. No, sir.

Q. In fact, you know that you did not; isn't that so? A. Well, I should say I did not.

Q. You did not? A. No.

Q. Now, think about it. You did not. Now, wasn't one of the terms of that written lease, one of the provisions of that written lease, that you pay the taxes as part of the rental? A. No, sir.

Q. "No, sir"? A. No, sir.

Q. Why did you pay the taxes, then? First, for Gardner? A. Mr. Gardner asked me.

Q. Mr. Gardner asked you to? A. Yes, sir.

Q. Why did you pay them for Brown? A. Because I bought the place in for taxes.

Q. Oh, you bought the place in for taxes. When did you buy the place in for taxes? A. Why, the place was down to the township and I bought it from the township.

Q. My question is: When did you buy this in for taxes? A. Just the year, I don't recall now, but the record shows that.

Q. Pardon? A. At the time of that deed from the township.

Q. Well, now, if you paid the taxes during the seven years that the Browns owned this land, and you say that you paid them because you had purchased it in for taxes, what year was it that you purchased it in for taxes? A. Well, those deeds will show what year that was.

Q. Don't you remember? A. I could not just tell you the date.

Q. Did you buy this in for taxes before the expiration of that ten-year lease? A. Yes, sir.

Q. Then, how could you pay taxes under a claim of ownership, if you did not buy it in until after the expiration of the lease? A. I don't understand your question.

Q. You say, Mr. Carpenter, that you paid taxes on this land because you had purchased the property under a tax sale? A. Yes, sir.

Q. And then you say that you purchased this property under the tax sale after 1903? A. Yes, sir. I did not buy it under a tax sale before 1903.

Q. Then you bought it after 1903? A. Yes, sir.

Q. That is right? A. Yes, sir.

Q. So, how did you come to pay taxes before 1903, if you did not acquire your tax title until after 1903?

Mr. Richardson: He has already answered that question. He said at the request of Gardner he paid them.

Mr. Lowenkopf: If your Honor please—

The Court: That is argumentative any way, Mr. Lowenkopf.

Mr. Lowenkopf: I want to show the attitude of this man throughout the whole case.

The Court: I think it is easily seen.

Q. Isn't it a fact, Mr. Carpenter, that you did not buy your first tax title in until 1912? A. Well, just the date—as I say, the deeds will show that.

Q. That was the first time you bought in the tax title? A. Yes, sir.

Q. Then when you make the statement that you paid the taxes from 1893 to 1903, you are not telling the truth? A. I am not, eh?

Q. Then, how did you—how do you account for the fact that the property was sold for taxes in 1899, when you allege you were paying taxes for Brown? A. It was assessed to the Browns at that time, wasn't it?

Q. Just answer my question. The property was sold in 1899 for non-payment of taxes?

The Court: That was the year he was out of possession, wasn't it?

Mr. Lowenkopf: 1898?

The Court: It was sold for 1898 taxes, as I remember it.

Mr. Lowenkopf: Not necessarily. It does not show here.

The Court: I thought the certificate said sold for 1898 taxes. I have the certificate here. That is my recollection of it. I am not trying to shut you off.

Mr. Lowenkopf: If that is so, I am glad to know myself.

The Court: (Reading from certificate): That is the first tax sale.

Q. Mr. Carpenter, you just made a statement that you paid the taxes while the Browns—did you pay the taxes after the property had been conveyed to the Browns because of the fact that you owned under a tax title? Do you understand that statement? A. Yes, sir.

Q. Now, was it your contention during the latter years of that lease; that is, from 1897 to 1903, that the land belonged to you? A. No, I did not say the land belonged to me at that time.

Q. Now, then, the first time, then, that you claimed ownership of this land was when you bought this tax title; is that so? A. Yes, sir.

Q. That was in 1912; is that so? A. Yes, sir.

Q. And then you never—I want you to understand this question—then you never claimed to have owned this property until you bought this tax title in 1912; is that so or not? A. Yes, sir. I could not claim it until I bought it, could I?

Q. I am asking you, Mr. Carpenter—in 1912 was the first time you claimed to own that property? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. You don't want to vary that statement in any way? A. Yes, sir. You heard me say, "Yes, sir."

Q. I just want to be positive about it? A. Yes, sir.

Q. Then, Mr. Carpenter, when your lease expired in 1903, you remained in possession as a tenant, did you not, until 1912? A. I stayed through my mortgage.

Q. What? A. Under the mortgage.

Q. What did you say before "mortgage"?

The Court: He went into possession under his mortgage.

Q. You went into possession under your mortgage? A. Yes, sir.

Q. Well, you were in possession, were you not, under your lease? A. Yes, sir; but the lease had expired.

Q. The lease had expired? A. Yes, sir; but I held on on my mortgage.

Q. Did you really hold on under your mortgage, or is that the advice that you have received subsequently from counsel, that you held on under your mortgage? A. Well, Mr. Strong at that time advised me to.

Q. Which Strong was it? A. Allan H.

Q. He advised you to hold on? A. Yes, sir.

Q. Under your mortgage? A. Under my mortgage.

Q. Under which mortgage? A. The only mortgage I had—$3,500.

Q. Then at the expiration of this lease in 1903, you held on under your $3,500 mortgage? A. Yes, sir.

Q. And this was the mortgage which was given to you in consideration of $600, as you stated Friday? A. Securing of my lease; yes, sir.

Q. To secure your lease? A. Yes, sir.

Q. Now, what was it? Was it given to secure your lease or was it given to secure this $600 loan? A. The $600 and the lease.

Q. The $600 and the lease? Did you have the advice of counsel at that time, too? A. Yes, sir.

Q. You have always had the advice of counsel? A. Yes, sir.

Q. It was you who brought the lawyer to Mr. Gardner's home when that $3,500 mortgage was executed, was it not? A. I brought him there by the request of Mr. Gardner; yes, sir.

Q. But you selected the lawyer. He was your lawyer, wasn't he? A. He just drew the paper up; yes, sir.

Q. You went to him and asked him to draw a $3,500 mortgage? A. What?

Q. What—you went to him and asked him to draw a $3,500 mortgage? A. Yes, sir.

Q. To draw it? A. Yes, sir.

Q. And he drew it? A. Yes, sir.

Q. And you took him to the Gardner home to have the mortgage executed, did you not? A. Yes, sir. Mr. Gardner asked me, for the convenience of his wife.

Q. And this mortgage you took to protect your lease? A. Yes, sir.

Q. And also this $600? A. Yes, sir.

Q. Didn't the lawyer advise you that by recording your lease you had ample protection? A. That the lease was not recorded?

Q. No. Answer my question. Didn't the lawyer advise you that by recording the lease you were obtaining ample security? A. No, sir; he did not say that.

Q. Did you ask him? A. No, sir.

Q. Way back in 1897 you made up your mind you were going to get these lands some day, did you not? A. I had in mind that I was going to get them, but I know there were some claims to be satisfied.

Q. Different claims, were they? A. That $3,500 mortgage—

Q. You wanted to get $3,500 out of that land for your $600 indebtedness; is that right? A. Sir?

Q. You wanted to get $3,500 out of that land for the $600 that was coming to you, did you not? A. That lease had six years to go yet, didn't it?

Q. Now, at the expiration of the lease, the expiration of the ten-year lease, did you go to Brown and say, "See here, I have $600 coming under this mortgage. If you pay me $600, I will cancel that mortgage of record"? A. No, sir.

Q. You did not? A. No, sir.

Q. Did you go to Brown and say, "See here, my lease has expired and I am holding this land now by virtue of my mortgage"? A. Sir?

Q. At the expiration of your lease in 1903 did you go to Brown and say, "See here, my lease has expired and I am now holding this land by virtue of that $3,500"? A. No, sir. I told you that before.

Q. How did you get this sum of $600 that you claim Gardner owed you? A. There is $200 of

that that he borrowed before the lease—no; he borrowed the first $50 to pay back the $50 he borrowed from somebody else.

Q. Is that included in this? A. And then he borrowed $50 to pay 1892 taxes.

Q. Just a minute. Is that all included in this $200 you are talking about? A. The 200 and the other.

Q. Let's get the other 400. A. And I said to him, "How do you expect to go on this way? Borrow from one to pay one, and borrowing from me to pay these taxes, and then the next year's again? Why don't you put your property in such shape that you get some revenue from it?" He said, "I would, but nobody wants it." "Well," I said, "If you give me your lease for ten years, I will take it." He says, "On what terms?" I said, "For one-half of the product, and you pay me a dollar and a half a load for each and every load of manure."

Q. Go on. But where does this $400 more come in here? A. That came along after the year the lease started in, the 400.

Q. But before the mortgage was signed? A. What?

Q. But before the mortgage was signed? A. No. I don't know. It was just about the $200 when the mortgage was signed.

Q. Then Gardner owed you $200 when this $3,500 mortgage was signed? A. Yes, sir.

Q. Tell us where the other 400 came in. A. It followed after that.

Q. What for? A. Money, horses, harness.

Q. Did you ever demand that the Gardners pay this $3,500 mortgage? A. No.

Q. Did you ever demand interest from them? A. No, sir.

Q. In accordance with your agreement with Gardner, how much did you pay him under that lease? A. How much did I pay him under that lease?

Q. Yes. A. Why, I don't remember what his share of the products was. I gave him credit on the amount of manure due me from him.

Q. Did his share of the product equal or exceed the cost of the manure that you put on the land? A. Not for the first four years; no, sir.

Q. And you did not do much farming, did you? A. You could not. There was nothing but brush —the farm was overrun with brush and stuff, and it took about four years to clear it up. The first four years there was practically no return.

Q. You rented this piece of ground for farming purposes, did you not? A. Yes, sir; and that is why I asked for the ten years.

Q. After the four years expired, the land belonged to the Browns, did it not? A. Yes, sir.

Q. Did you make any return to them? A. What?

Q. Did you make any return to them? A. A. No, sir; I did not.

Q. But the farm was a paying proposition at that time, was it not? A. But they put a dam up there and dammed the water off from a brook that flooded part of the farm, and as long as that dam was on there I did not pay any returns.

Q. Did you raise any crops? A. Yes, sir.

Q. You raised a lot of crops, did you not? A. Yes, sir.

Q. And you did not give them anything? A. No, sir; not while the dam was on there.

Q. This piece of property was over forty acres, was it not? A. Forty acres.

Q. His dam only ran over or along on that land about twenty-five feet, did it not? A. Well, it occupied part of it anyway.

Q. You never went into court to seek the removal of this encroachment? A. No, sir; I was advised by Mr. Strong not to pay any more rent while that dam was there, was still there.

Q. You were then the interested party, were you not? A. Sir?

Q. You were then the interested party, were you not? A. Yes, sir.

Q. Who built that dam? A. Why, George Brown and George Marbe.

Q. You testified on direct-examination, Mr. Carpenter, that you were always in possession of this land. What do you mean by possession? A. Sir?

Q. You testified that you were always in possession of this land—

The Court: I don't think he did.

Mr. Lowenkopf: You remember, if your Honor please—

The Court: He said he was in possession all but one year.

Mr. Lowenkopf: Well, then, I modify my question that way. I did not take that into consideration.

Q. You testified that you were in possession of this land with the exception of one year during the leasehold period. What do you mean by pos-

session? A. What is the definition of possession?

Q. I asked you, please. What do you mean by "possession"? A. I have it, I am in possession of it—I have the use of it.

Q. You have the use of it? A. Yes, sir.

Q. Isn't it a fact, Mr. Carpenter, that you were only out of possession of that land a day or two in the year of 1908? A. No, sir.

Q. And that you really went back the day after you and your men were arrested by Brown? A. No, sir.

Q. Isn't that so? A. No, sir.

Q. You say you were off a whole year? A. Yes, sir. The rest of that year, anyhow.

Q. When did this arrest take place; what part of the year? A. In May.

Q. In May? A. Yes, sir.

Q. And you went back when? A. The next year.

Q. Who made the hay on the property that year? A. Why, they put a fellow on there by the name of Peter Scully.

Q. Was he your agent or servant? A. What?

Q. Was he acting or working for you? A. No, sir. The Browns put him there.

Q. You testified on direct-examination, Mr. Carpenter, that this property in 1897, when it was conveyed to the Browns was worth nine or ten thousand dollars? A. Yes, sir; in my estimation.

Q. And you also testified that a Committee was appointed by the Township of Woodbridge and they assessed it at $10,000? A. Well, I did not say what time, what date.

Q. No, you did not say what date? A. No, sir.

Q. The fact is that this Committee assessed this property at $10,000 in 1917? A. Well, the Committee I referred to, then—

Q. Twenty-four years after this conveyance? A. Twenty-four?

Q. That is right, sir. 1897. Or twenty years? A. Yes, sir.

Q. It is twenty years? A. That is right. Those things prove themselves.

Q. When we know of them? A. What?

Q. When we know of them? A. Yes, sir.

Q. What was this property worth in 1897, when it was conveyed to the Browns? A. In my estimation, it was worth—

Q. I don't hear you, sir. A. In my estimation, I should say it was worth anywhere from nine to ten thousand dollars.

Q. In 1897? A. Yes, sir.

Q. Isn't it a fact that this land at that time was not worth more than twenty-five dollars an acre? A. Maybe that is according to Mr. Brown's—

Q. I am asking you, sir. A. No, sir. I tell you, mine was ten or nine thousand dollars.

Q. This piece of land had no frontage on any road, did it? A. It has not got any yet.

Q. It has not got any frontage on any road yet? A. Yes, sir.

Q. And it is a back lot? A. No.

Q. And it depends upon a right-of-way for cars and cross to the main road? A. Yes, sir.

Q. And you still maintain that the property was worth at that time nine or ten thousand dollars? A. Yes, sir.

Q. Twenty-one acres in front of that piece of property, between that piece of property and the road, is there not? A. Twenty-one?

Q. Yes. A. I could not say. There is a piece of ground; I don't know just the number of acres.

Q. Quite a substantial piece of ground, at any rate? A. Yes, sir. I think Mr. Brown sold it for $18,000, or around that.

Q. You contend now, and you contended at that time that this conveyance from Gardner to Brown was fraudulent? A. Yes, sir.

Q. Did you as a party in interest at that time bring any action to have this conveyance set aside on the ground of fraud? A. No.

Q. You did not? A. No. Mr. Brown ordered me off—

Q. Just a minute. I asked no question. You contend now and you contended at that time that this $3,500 mortgage which was executed to you and under which you claim title to that property today was a bona fide one? A. Yes, sir.

Q. And isn't it a fact, Mr. Carpenter, that when the Browns went into Chancery to have that mortgage cancelled that you or your attorneys came into court and admitted that this mortgage was given in order to protect Mr. Gardner and the court held that this was a fraudulent mortgage? A. It did not sound much like it.

Q. It did not sound like it to you? A. No, sir. And the record does not show it at all.

Q. You are satisfied that the court vindicated you at that time? A. Yes, sir.

Q. You never attempted to foreclose this mortgage, did you? A. No, sir.

Q. Acting under the advice of counsel? A. Well, I left it with my counsel.

Q. Now, isn't it a fact, Mr. Carpenter, that shortly before the expiration of this lease in 1903 that the Browns met you and told you that you could stay in possession if you paid taxes? A. No, sir.

Q. You are positive about that? A. Yes, sir.

Q. Did you ever meet the Browns and have any conversation whatsoever concerning this land at or about 1903? A. No, sir.

Q. You are positive about that? A. Yes, sir; I am.

Q. You sued Charley Gardner? A. Charles Gardner.

Q. Charles Gardner, rather, and got a judgment for $400, did you not? A. $411.17.

Q. And that was the amount that you figured into this $3,500 mortgage; is that right? A. Sir?

Q. And that was the amount that you figured in this mortgage as part of the $600 in the mortgage? A. No, sir.

Q. When was that judgment obtained? A. That judgment was obtained on the sixth of January, 1898.

Q. 1898? A. Yes, sir.

Q. And who did you sue at that time? Who did you get the judgment against? A. Charles H. Gardner.

Q. Now, Mr. Carpenter, you also stated under direct examination that you bought in this Hirner mortgage for $800? A. Yes, sir.

Q. Now, isn't it a fact that this was a mortgage that had been assigned to Hirner by the Perth

Amboy Savings Institution and foreclosed by Hirner; is that right? A. Yes, sir.

Q. You were made a party then? A. Yes, sir; on three separate counts.

Q. Yes. You were made a party then and the foreclosure went to an official decree? A. Yes, sir.

Q. And then you, in the presence of your attorney, Allan Strong, made a tender to the attorney for Martin? And the amount of this decree, which they refused to accept; isn't that so? A. I made the tender to Mr. Martin and he refused to accept it; yes, sir.

Q. He refused to accept your money? A. Sir?

Q. He refused to accept your money? A. Yes, sir; but he acknowledged that I made the tender.

Q. So you never paid this money direct to either Thayer Martin, the attorney for Mr. Hirner, or Mr. Hirner? A. I paid it into the Clerk of the Court of Chancery.

Q. But you did not put it in this foreclosure action, did you? A. It was after the decision.

Q. After the decree and the foreclosure had been entered? A. Yes, sir.

Q. Now, isn't it a fact that you had to start another suit before that money was paid either to Hirner or his attorney? A. Not that I know anything about.

Q. You don't know anything about it? A. No, sir.

Q. But that might be the fact? A. I left that all with my attorney, Mr. Strong. The record will show that.

Q. It is a fact, is it not, Mr. Carpenter, that you have already leased this land to this Speedway proposition out there in Woodbridge?

The Court: It is already admitted.

Mr. Lowenkopf: I just want to get some of the details in there.

Q. Now, we are tying it up. Do you remember, Mr. Carpenter, when the Tidewater Pipe Company got a right-of-way through that land in 1914? A. From whom?

Q. From the Browns? A. No, sir. Never knew anything about it.

Q. Do you know, as a matter of record, that there was such a right-of-way given? A. I don't know.

Q. You don't know? A. No, sir.

Q. Well, if I were to tell you that in October 2, 1914, the Browns gave a right-of-way to the Tidewater Pipe Company, which is recorded in the County Clerk's office here, what would you say about that—or, sold it to them, rather? A. I think perhaps it is sold, if it is on the record there.

Q. You know anything about it? A. I think it was sold. Did you ask me what I think about it?

Q. Yes. A. I suppose it was sold if it was on the record.

Mr. Lowenkopf: That is all.

Mr. Richardson: That is all, Mr. Carpenter.

Mr. Lowenkopf: Just a question, please.

By Mr. Lowenkopf:

Q. When you first went on that property, you cut down a number of trees, did you not? A. I cut all of the bushes and trees and whatever was on there.

Q. I am talking about trees—full-grown trees. A. There were some there; yes, sir.

Q. How many cords of wood did you get out of those trees? A. I never measured it.

Q. How many trees did you cut down? A. I don't know; I didn't count them.

Q. Did you cut down 100 trees? A. I don't know; I didn't count them.

Q. Was it 100? A. I don't know.

Q. Approximately how many, do you know? A. I don't know.

Q. You remember everything else so certainly and clearly. Don't you know this? A. No.

Q. You don't know this? A. No.

The Court: What is the relevancy of this?

Mr. Lowenkopf: About this indebtedness of Gardner.

STEPHEN STRONG, called as a witness, on behalf of the defendant, being first duly sworn, testified as follows:

Direct-examination by Mr. Richardson:

Q. Mr. Strong, you caused an examination to be made of the records in the Chancery office in relation to the foreclosure suit, the Hirner foreclosure suit? A. I did; yes, sir.

Q. You made that examination personally? A. Yes, sir.

Q. What did you find after the final decree in the Hirner foreclosure; what was the other proceedings of record? A. The final decree in the Hirner foreclosure—

Mr. Lowenkopf: Just a minute. I object to that. I think the records speak for themselves.

Mr. Richardson: We have the records here, if there is any objection to the testimony, and we will withdraw the witness. Do you object to the clearing up of that point?

Mr. Lowenkopf: I object to anything except if it is a record of the Court.

(Witness excused.)

JOHN LEASEN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct-examination by Mr. Richardson:

Q. Mr. Leasen, you live in this county? A. I do.

Q. And Woodbridge Township? A. Yes, sir.

Q. And have lived there all your life? A. No, sir; since 1867.

Q. 1867. Do you know the location of the so-called Van Sickel tract? A. I do.

Q. Were you familiar in 1897 with the value of property in that locality? A. Well, I could give

you what I consider the valuation of the property in 1900, from the time I was assessor until 1907, I think it was, when I started in there. The change on those farm values may differ.

Q. Was it approximately the same in 1897 as in 1900? A. Yes, sir; I should judge it was.

Q. What, in your opinion, was the valuation, the property value of the Van Sickel farm? A. The actual value?

Q. In 1900? A. The actual value?

Mr. Lowenkopf: Just a minute. I don't think he is qualified as an expert, in the first place, and, in the second place, I don't think it is material.

The Court: I will permit him to answer.

Mr. Lowenkopf: And, in the third place, if your Honor please—

The Court (Interposing): You asked Mr. Carpenter what his opinion was as to the value.

Mr. Lowenkopf: That was cross-examination because he had given his information on direct.

The Court: I will permit this witness to answer. The Court has his own idea about the whole situation, anyway, which may be more relied upon than the opinion of the witness, strange as that may seem.

Q. What value would you set on it? A. About $150 an acre.

Q. There were forty acres in this tract, was there not? A. I don't remember what the tract was, Mr. Richardson.

Mr. Richardson: That is all.
Mr. Lowenkopf: No questions.
Mr. Richardson: We rest, your Honor.

Defendant rests.

Mr. Lowenkopf: If your Honor please, before going into rebuttal, I would like to make a motion for a direction, if your Honor thinks it will be all right; otherwise, I will go ahead with my rebuttal.

The Court: You better go ahead with your rebuttal because I am going to hear everything pro and con and backwards and forwards in this case.

REBUTTAL.

DAVID A. BROWN, called a a witness on behalf of the plaintiffs, in rebuttal, being first duly sworn, testified as follows:

Direct-examination by Mr. Lowenkopf:

Q. Mr. Brown, you are one of the plaintiffs in this action? A. I am.

Q. And you are the David A. Brown to whom Charles H. Gardner conveyed this Van Sickel tract in 1897? A. Yes, sir.

Q. At the time that this tract was conveyed to you, there was a tenant on that land, was there not? A. There was.

Q. And that was whom? A. William V. Carpenter.

Q. Mr. Carpenter's lease expired when?

Mr. Richardson: I object to this examination, as it is not proper rebuttal.

The Court: I presume these questions are merely preliminary to whatever Mr. Lowenkopf has in mind in calling Mr. Brown, because all of these matters have been admitted, so far as I understand it, by both sides.

Mr. Richardson: Yes, sir.

The Court: Supposing you get right down to the real milk in the coconut, so we can dispose of it.

Q. Mr. Brown, at or before the expiration of the lease which Mr. Carpenter held on this tract of land in 1903, did you at any time have any conversation with him in regard to the lease? A. Yes, sir; we had some.

Q. When? Before or after the expiration? A. Well, after the expiration. After the expiration —after the lease had expired.

Q. And then what transpired? A. Well, he had that lease, and he was not paying us anything, and we had plenty of farms, and as long as he wanted to pay the taxes, why, we didn't care anything about it—we let it run along, as long as he paid the taxes.

The Court: The question, Mr. Brown, was: What was your conversation with Mr. Carpenter? I am not sure from your answer whether that is intended to be your views or whether that is intended to be a conversation that you had with Mr. Carpenter.

The Witness: My conversation with him was, as long as he paid the taxes, why, we would not bother with them.

Q. What did he say or do? A. He did not say anything.

Q. Did he stay in possession? A. He stayed in possession.

Q. Did he farm the land? A. He did.

Q. Did he at any time tell you, either alone or in the presence of your brother, that he was no longer a tenant of yours but that he claimed the fee? A. No, sir; not to my knowledge.

Mr. Richardson: I object to that; it is not proper rebuttal.

The Court: I will permit it, I think. Question permitted.

(Answer of witness read.)

Q. Mr. Brown, Mr. Carpenter claims to have purchased a tax title, the one that had been sold by Drummond to the inhabitants of the Township of Woodbridge in 1899, and which title Mr. Carpenter purchased in 1912. Were you ever given notice of that tax sale? A. No, sir.

Q. Did you know Mr. Drummond? A. I did.

Q. Did he ever send you any formal notice or notification in this— A. Never send any kind of notice at all, nor he never put it on the records of the Township of Woodbridge. He sells off here unknown to me; I did not know it was on.

Q. Mr. Brown, during the years 1897 to 1900, you owned extensive farm lands in Woodbridge Township? A. I owned considerable; yes, sir.

Q. And this Van Sickel tract, in your estimation, what was the value of that in 1897, when you purchased it from Mr. Gardner? A. Why, I don't think it was worth—about $75 an acre—something of that kind; and the year we sold all the front, the water front, for pretty near a half a mile along the road, where all the front part of this place was, with only a ditch between, for—

Q. How much? A. I think there were nearly twenty acres, for $1,000. We bought it in at auction, after this—after Mr. Gardner owned it, we bought all that front, nearly twenty acres, extending twenty miles along the highway, water, gas and everything—$1,000 for twenty acres. Now, the back part of that place could not have been worth so much.

Q. When did you sell this? A. What?

Q. When did you make this sale?

Mr. Richardson: He said he bought the tract.

The Witness: We bought that in from the Van Sickel Estate, settling up the Van Sickel Estate. I could not tell you just how many acres there were.

The Court: 21 acres, wasn't it?

The Witness: I could not tell you exactly.

The Court: That is the figure that was mentioned.

The Witness: We paid $1,000—just a matter of record.

The Court: $50 an acre?

The Witness: Yes, sir. But the back was certainly not worth any more. What

I speak of is a matter of record, price of—

The Court: Anything further?

Mr. Lowenkopf: I don't think there is.

CROSS-EXAMINATION by Mr. Richardson:

Q. Mr. Brown, who was present at this conversation that you allege you had with Mr. Carpenter after 1903? A. I don't know as there was anybody. I met him casually and he had had the place and the lease had run out, and I said, "As long as you continue under the same plan, paying the taxes, go ahead," and so I supposed he accepted it because he said nothing and he went on to the farm and we said nothing more.

Q. He said nothing about accepting it? A. No, but he went right on, and as long as—

Q. The other lease was in writing, was it not, Mr. Brown? A. I believe it was.

Q. And after this, would you say the feeling between you and Carpenter was rather bitter and a little sacrimonious, in the discussions that you had every time you met? A. We had a talk every little while.

Q. You were not the best of friends, were you? A. Sometimes we were and sometimes we were not. It depended upon the nature and the time when we hit each other. Sometimes we were good friends and laughed and talked.

Q. Notwithstanding this friendliness that was between you, you were willing to accept that agreement that you had with him—you said, "You can stay there if you pay the taxes," and he said nothing and walked off? A. Yes, sir.

Q. And it was the same as an agreement? A. The same as he had been doing.

Q. He had not been paying you anything under this lease, had he? A. No, but I supposed he had been paying the taxes; that was all that was necessary.

Q. You supposed he had been? A. Yes, sir.

Q. Didn't you know? A. I could not tell you, according to this. He slid in through this man Drummond. You know him very well. He was indicted there. I think he was indicted for robbing the township for some twenty or thirty thousand dollars, and I didn't know anything about it—there was no records made in Woodbridge; they were careful to keep it out of the Woodbridge records, and there was nothing there.

Q. Did you read the Woodbridge papers in 1898? A. To tell you the truth, I have so much to do I seldom read them. I take them to help the town along, but I don't know that I bother reading them carefully.

Q. Did you bother following up the land that you owned at that time for taxes? A. We always paid them.

Q. But this tract you did not pay any attention to? A. No, sir; because we thought it was going along the same as it had under the old lease.

Mr. Richardson: That is all, I guess.

RE-DIRECT EXAMINATION by Mr. Lowenkopf:

Q. Mr. Brown, all litigation that was had between you and Carpenter was between the years

1897, when you took title, and the year 1900, is that not so? A. I could not tell you the dates. I think that is all.

Q. And there was no litigation between you and Carpenter, or you and your brother, and Carpenter, since 1900? A. No.

Q. And then possibly two or three years before the expiration of the lease there had been no litigation between you and Carpenter? A. No.

Mr. Lowenkopf: That is all.

The Court: I think the Court has got the facts pretty thoroughly in mind as they have been testified to on behalf of the plaintiff and also on behalf of the defendant. There seems to me to be very little dispute as to the fundamental and basic facts upon which the decision will have to rest.

The only facts that I recollect here that there is any very sharply drawn issue on is the question of whether or not after 1903 there was an extension by mutual consent between the defendant and the plaintiffs of the lease. That is the only issue of fact that I remember here that there is any very substantial dispute about, and if you analyze that situation, as I view it, there is no very substantial dispute about that, because, while it is true that both Mr. George Brown and Mr. David Brown testified that they had a conversation with Mr. Carpenter with reference to the continuation of that lease, with the understanding that Mr. Carpenter was to pay the taxes upon the property, certainly Mr. George Brown's testimony would be—it would be hard to construe

it as evidencing consent on Mr. Carpenter's part to that proposition. Mr. David Brown's testimony is that Mr. Carpenter made no reply but continued in possession of the property. If there were no other side issues in this case, then Mr. Carpenter's continuation of the possession of the property would probably be considered as a consent to the terms of the proposition made to him by Mr. Brown, but in view of Mr. George Brown's testimony and in view of the facts generally surrounding this case, I doubt if that would be—the mere fact that he stayed there—could be considered as a continuation or an acceptance of the proposition as made to him by Mr. Brown. It appears to me that this case must turn upon the question of Mr. Carpenter's right or lack of right to possession of the premises by virtue of the $3,500 mortgage and by virtue of whatever legal claim, if any, he may have had in the Savings Bank mortgage, after having made the payment that he made to the Clerk in Chancery. There is no proof before this Court to show that the money ever left the Court of Chancery. The only thing is that there is some evidence before the Court that the money was paid by Mr. Carpenter to Mr. Allan Strong and by Mr. Strong paid over to Mr. Thompson, who was at that time Clerk in the Court of Chancery.

Mr. Lowenkopf: There is no evidence before the Court in what action it was paid.

The Court: There is some evidence before the Court. You cannot say there is no evidence, because we have the letter of the Clerk.

Here is the letter from the Clerk with reference to that letter of the Clerk (reading).

That is some evidence.

Discussion

What I was going to suggest to counsel is that counsel submit to the Court briefs which will call the Court's attention to any question of fact which either counsel may consider as left open after this trial, with such arguments as you may want to submit in support of the testimony on either side, on the questions of fact. I have a pretty definite idea about the questions of fact in the case, but I should be glad to have counsel's opinion, and then a brief upon the law.

It appears to me that the legal points that you may find to be important in this case will be the defendant's right, so far as this case is concerned, to possession under the $3,500 mortgage and under the other mortgage, if any; and the other question which I am not sure may not be an equiable question rather than a legal question, whether the money paid by him, although it did actually bring about the assignment to him of the mortgage, that is, of the Trust Company mortgage, whether that would not be considered as a debt which might be secured under the $3,500 mortgage. Do you get the point that I mean?

Mr. Lowenkopf: Yes, sir.

The Court: I am not announcing that as my decision at all. I am just raising that question which is running around in my mind. And then the right of possession under it by virtue of the tax title is another question which I should like to have an expression of opinion on from counsel.

Mr. Lowenkopf: If your Honor is prepared, perhaps at this time we might narrow the scope of our briefs considerable. On reading over that

decree of Chancellor McGill in reference to the $3,500 mortgage, I think we might narrow the scope considerably by that, and I am willing to argue on the merits of the application that the Court hold now that under the $3,500 mortgage he took nothing—it has been decreed once by a Court of Equity to be a fraudulent mortgage.

The Court: The difficulty about that is, Mr. Lowenkopf, that the Court of Chancery did not make any such conclusion. What the Court of Chancery did was to say that "We will grant to these applicants no relief against the defendant, because under the charge of their bill, under the allegations of their bill, it would appear that if the mortgage is fraudulent that they were as deeply in the mire as the defendant was, and we will leave them all just where we found them." The legal effect of that is—I am speaking now about the legal effect; not the equitable effect—the legal effect of that is to leave the situation just exactly the way it was, which leaves it with the mortgage open of record. That is my present view of it. Don't think I am foreclosing you from any argument you wish to make on that aspect of the case, but I would like to have you include that in your briefs, because my present view—just looking at it off-hand, is just as I have expressed it.

INDEX

	PAGE
[illegible]	1
[illegible]	5
[illegible]	6
[illegible]ment of Complaint	6
[illegible] to Amendment	8
[illegible]	9
[illegible] for Nonsuit	12
[illegible] for Direction of Verdict	134
[illegible]ort's Charge	135
[illegible]ant's Requests to Charge	150
[illegible] Judgment	161
[illegible]	162
[illegible] of Appeal	163
[illegible] of Appeal	164

[illegible]ITAL PAPERS TO COURT OF ERRORS AND APPEALS.

[illegible] of Supreme Court	171
[illegible] of Affirmance of Judgment	180
[illegible] and Grounds of Appeal	181

TESTIMONY FOR PLAINTIFFS.

[illegible] Saudler:	
[illegible]irect	13
[illegible]ross	22
[illegible]direct	38
[illegible] Cooney:	
[illegible]irect	41
[illegible]ross	48
[illegible]direct	55, 73
[illegible]ecross	76