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BILL OF COMPLAINT.

Filed February 16, 1934.

In Chancery of New Jersey

100/615.

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

The complainant, Antonio De Corso, residing at 1620 Boulevard, in the City of Jersey City, County of Hudson and State of New Jersey, says that:

1. On or about November 1, 1931, the Concordia Fire Insurance Company of Milwaukee, issued to your complainant, through its duly authorized agent, its policy of insurance No. X-1939, under the terms of which the defendant, Concordia Fire Insurance Company of Milwaukee, agreed to indemnify or pay to the complainant any damages caused by fire to the building or buildings on the premises known as 1614-1616 Boulevard, Jersey City, New Jersey, owned by complainant to the extent of Two thousand dollars ($2,000.00) on each building, which policy of insurance covered said risk for a period of three years from the said date and for which the complainant paid a premium of Thirty-seven Dollars and fifty cents ($37.50).

2. Thereafter by endorsement dated January 13, 1932, the amount of insurance under said policy on said buildings was increased to Three thousand dollars ($3,000.00) for each of the said buildings.

3. At the time of the issuance of the said policy of insurance and at all times thereafter, it was agreed between the complainant and the said defendant that loss, if any, on the buildings are payable to the Magnetic Building and Loan Association, mortgagee, for and on behalf of the complainant as the said mortgagees' interest may appear.

4. On or about March 21, 1933, the said buildings then owned by complainant and said policy of insurance in full force and effect, were damaged by fire and the complainant duly notified the Concordia Fire Insurance Company and entered negotiations stipulating the amount of loss by agreement, and subsequently thereto, on or about October 18, 1933, the Concordia Fire Insurance Company paid to the Magnetic Building and Loan Association, mortgagee, the sum of Three thousand three hundred and fifty dollars ($3,350.00) and caused the said Magnetic Building and Loan Association to enter into an agreement under the terms of which the Concordia Fire Insurance Company became legally subrogated to the extent of the said payment to the rights of the Magnetic Building and Loan Association, as mortgagee, and under the further terms of which the Magnetic Building and Loan Association assigned to the Concordia Fire Insurance Company, an interest in the said mortgage to the extent of the payment of the sum of Three thousand three hundred and fifty dollars ($3,350.00), a copy of which agreement is attached hereto and made part hereof with the same force and effect as if the contents thereof were fully set forth herein.

5. Thereafter, upon demand of the Concordia Fire Insurance Company to recognize the rights

of the complainant and to surrender any and all rights under the said agreement of subrogation or assignment, the Concordia Fire Insurance Company refused so to do denying any liability to the complainant.

6. Complainant shows and charges that he is entitled to the cancellation or rescission of the subrogation agreement made and entered into between the Magnetic Building and Loan Association and the Concordia Fire Insurance Company, dated on or about October 18, 1933, and is further entitled to a credit in said amount on account of and in reduction of the amount due upon the mortgage of the Magnetic Building and Loan Association for the reason that the said policy of insurance was for the benefit of the complainant and the payment was made to the said mortgagee.

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

1. That the Concordia Fire Insurance Company of Milwaukee, a foreign corporation authorized to do business in the State of New Jersey, and the Magnetic Building and Loan Association, a corporation of the State of New Jersey, may answer this bill of complaint and each statement therein made.

2. That the defendant, Concordia Fire Insurance Company of Milwaukee may be ordered and decreed to make a full and true discovery and disclosure of the amount of money paid to the Magnetic Building and Loan Association on or about October 18, 1933, with reference to damage caused by fire to the premises 1614-1616 Boulevard, Jersey City, under its policy of in-

surance No. X-1939 under which complainant, Antonio De Corso, was the assured.

3. That the defendant, Concordia Fire Insurance Company may be ordered and decreed to cancel and surrender to the complainant, the subrogation agreement dated on or about October 18, 1933 entered into with the Magnetic Building and Loan Association.

4. That the Magnetic Building and Loan Association may be ordered and decreed to credit the complainant with a reduction of the mortgage made to it by complainant in the amount of and for all sums received from the Concordia Fire Insurance Company under Policy No. X-1939.

5. That the complainant have such other and further relief as may be equitable and just in the premises.

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

McCARTHY & McTAGUE,
Solicitors for Complainant.

FRANK P. McCARTHY,
Of Counsel.

THIS AGREEMENT made this eighteenth day of October, in the year of our Lord One Thousand Nine Hundred and Thirty-three, by and between Magnetic Building and Loan Association, a corporation organized and existing under and by virtue of the laws of the State of New Jersey and having an office in the City of Jersey City,

in the County of Hudson and State of New Jersey, hereinafter sometime referred to as the Party of the First Part, and Concordia Fire Insurance Company, a corporation authorized to do business in the State of New Jersey, hereinafter sometime referred to as the Party of the Second Part,

WITNESSETH:

WHEREAS the Concordia Fire Insurance Company has heretofore caused to be issued its certain policy of insurance bearing number X-1939 on certain premises situate in the City of Jersey City, in the County of Hudson and State of New Jersey, commonly known as No. 1614-1616 Boulevard, and owned by Antonio De Corso; and

WHEREAS the party of the first part is the holder of two certain concurrent mortgages on said premises, one given to secure the sum of $9,800.00 and the other given to secure the sum of $2,400.00 upon which said mortgages the sum of $9,473.91 is now due and owing; and

WHEREAS the policy aforesaid issued by the said party of the second part has annexed thereto a mortgage clause insuring said party of the first part against loss or damage by fire to the said buildings in the policy described as will more fully appear by reference to the said policy; and

WHEREAS on the 21st day of March, 1933, the premises in said policy of insurance described were damaged by fire, and whereas under the terms of the said policy of insurance the party of the second part has paid to the said party of the first part the sum of $3,350.00 and now claims that as to the mortgagor no liability exists under the terms of the said policy and now claims that upon making the payment above stated that it,

the said party of the second part, is entitled to be legally subrogated to the extent of such payment to the rights of the said party of the first part as original mortgagee; to the extent of the amount so paid subject, however, to the priority of the first party for the unpaid balance due on its mortgages and to any sums that it may advance to protect its liens;

Now, Therefore, the said party of the first part, for and in consideration of the sum of $3,350.00 to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has agreed and does hereby agree as follows:

1. The party of the first part does hereby recognize the rights of the party of the second part to the extent only that such rights are acquired by the policy aforesaid, to be subrogated to the rights of the party of the first part under its said mortgages to the extent of the payment so made by the party of the second part, subject to the priority rights of the first party to the extent of the unpaid balances due on its mortgages and to any further sums that it may advance to protect its lien.

2. The rights of the party of the second part to be so subrogated to the extent that such rights are claimed by the terms of its policy shall not impair in any way the rights of the party of the first part as mortgagee to recover the full amount due upon its mortgages together with interest and premiums to accrue and all sums advanced to protect its liens, after crediting thereon the monies paid thereon by the said party of the second part in accordance with this agreement together with interest and costs pursuant to the terms of said policy.

3. The party of the first part further agrees that it shall institute an action to foreclose its said mortgages, but nothing herein contained shall be construed to compel it to take such action, that it will, before filing its bill to foreclose, notify the said party of the second part in writing at least five (5) days prior to the time upon which the said bill shall be filed, and shall thereupon, at the request of the said party of the second part, make the said party of the second part a party to its foreclosure action either as a party complainant or as a party defendant as said party of the second part may direct, and upon failure to make election within five days to join said party of the second part as a party defendant.

4. The party of the first part further agrees that if it shall, as the result of any foreclosure, acquire title to the premises and shall subsequently resell the said premises and realize any surplus over and above the cost of it thereon, that it will pay or cause to be paid to the said party of the second part out of the said surplus the *pro rata* share of such monies paid to the party of the first part by virtue of this agreement; it being mutually understood and agreed, however, that said party of the first part shall first be entitled to receive from said purchase price, in the event of any resale, the full amount due it under the terms of its mortgages with all interest and premiums to accrue and any sums advanced to protect its lien after crediting thereon the monies paid by the said party of the second part in accordance with this agreement and said party of the first part shall also first receive the amount of any taxes or other carrying charges, costs and expense, which it shall have

paid on account of or in acquiring its ownership of the premises prior to said resale.

5. The party of the first part further agrees that in the event of such resale it will give five (5) days' notice in writing to the said party of the second part at its principal office in the City of Newark, New Jersey, and that said party of the second part shall have the privilege of purchasing the said premises at the same place and upon the same terms and conditions as provided for in the proposed sale of which notice is given, provided it shall and must exercise such privilege on or before the expiration of the fifth day from the date of such notice.

6. Nothing herein contained shall be construed as in any way granting or giving to the party of the second part any greater or further rights than what it may have under the terms and conditions of its aforesaid policy and of the mortgagee clause attached thereto; and to the extent that the said party of the second part may have herein waived any such rights this agreement shall prevail; nothing herein shall be construed as in any way obligating the first party to institute any proceedings to foreclose its mortgages for any existing defaults or for any future defaults in the terms and conditions of its mortgages; nothing herein shall be construed to compel the party of the first part to apply the sum paid to it as aforesaid on account of the shares assigned as collateral security for its mortgages and it is distinctly understood and agreed that said sum may be applied to either principal and/or interest and/or premium, and/or taxes and other municipal liens; nothing herein shall be construed as giving or granting to the party of the second part any priority over the

first party in and to the moneys secured to be paid by said mortgages.

It is expressly understood and agreed by and between the parties hereto that if any court of competent jurisdiction shall adjudge or decree that the party of the second part it not entitled at law or in equity to request and/or to demand to be subrogated to the extent of the loss paid that this agreement shall cease to be binding upon the party of the first part and from thence forth it shall be and is hereby released, relieved and discharged from the terms and conditions hereof.

In Witness Whereof, the parties hereto have caused these presents to be signed by their respective presidents, attested by their respective secretaries and their respective corporate seals to be hereunto affixed the day and year first above written.

MAGNETIC BUILDING AND
LOAN ASSOCIATION,

By.....
President.

Attest:

.....
Secretary.

CONCORDIA FIRE INSURANCE CO.

By.....
President.

Attest:

.....
Secretary.

Notice.

NOTICE.

Filed April 9, 1934.

IN CHANCERY OF NEW JERSEY.

100/615.

Between ANTONIO DE CORSO, *Complainant,* *and* CONCORDIA FIRE INSURANCE COMPANY OF MILWAUKEE, *Defendant.*	*On Bill, &c.* *Notice.*

To McCarthy & McTague, Esqs., solicitors for complainant, 921 Bergen avenue, Jersey City, N. J.

SIRS:

PLEASE TAKE NOTICE that on Monday, March 12th, 1934, at 10 o'clock in the forenoon or as soon thereafter as counsel may be heard thereon, we shall apply to the Chancellor at the Chancery Chambers, No. 1 Exchange Place, in the City of Jersey City, Hudson County, New Jersey, for an order to strike out the bill of complaint heretofore filed in the above entitled matter on the following grounds:

1. That said bill of complaint does not set forth any equitable cause of action.

2. That the complainant herein has a full, complete and adequate remedy at law.

Yours, &c.

LUM, TAMBLYN & COLYER,
Solicitors for Defendant.

Dated: Newark, N. J., March 2, 1934.

MEMORANDUM OF VICE-CHANCELLOR.

Filed April 4, 1934.

(Not to be Printed in any Report.)

IN CHANCERY OF NEW JERSEY.

100/615.

Between

ANTONIO DE CORSO,
Complainant,

and

CONCORDIA FIRE INSURANCE COMPANY OF MILWAUKEE, *et al.*
Defendants.

On Bill, &c.

April 3, 1934.

Messrs. McCarthy & McTague, for the complainant.

Messrs. Lum, Tamblyn & Colyer, for the defendants.

MEMORANDUM.

BIGELOW, *V.-C.*

Complainant is the owner of real estate encumbered by a mortgage held by defendant Magnetic Building and Loan Association. As additional security for the mortgage loan, complainant furnished a fire policy issued by the defendant Concordia Fire Insurance Company on which was endorsed the usual mortgagee clause in favor of the Building and Loan Association. A fire

occurred and the Insurance Company paid to the Building and Loan Association in settlement of the loss $3,350, and took from the Association an agreement subrogating the Insurance Company to the rights of the Association under its mortgage to the extent of the payment so made. Complainant prays, among other things, that he may be credited on the mortgage with the amount of the payment by the Insurance Company in settlement of the loss.

The Insurance Company moves to strike the bill on the ground that it does not set forth an equitable cause of action and that the complainant has an adequate remedy at law. On the argument, defendant's counsel assumed that complainant has presented for determination an action for breach of contract, cognizable at law. But the bill of complaint does not attempt to present such a case. The insurance, by force of the mortgagee clause, was payable to the mortgagee and not to complainant, and it was paid accordingly. There is no allegation that a greater sum than $3,350 should have been paid. Complainant has no remedy at law.

It appears from the subrogation agreement, a copy of which it attached to the bill, that the insurer "claims that as to the mortgagor no liability exists under the terms of the said policy," and hence, its right of subrogation. Complainant disputes this claim. If complainant is correct, then the insurance money must be applied in reduction of the mortgage. Otherwise, not. *Palmer* v. *McFadden,* 86 N. J. Eq. 373, 98 A. 462, 87 N. J. Eq. 347, 100 A. 225; *Selray Investment Co.* v. *Massimino,* 110 N. J. Eq. 300, 160 A. 323. Complainant may assume, contrary to the assertion of defendants, that the mortgage is reduced

$3,350 and may refuse to pay interest except on the reduced sum. This would provoke a foreclosure of the mortgage, and in that suit the controversy could be litigated. If complainant should succeed, very well; if not, his mistake will have caused an acceleration of the mortgage and perhaps bring about his losing the property. In his dilemma, he has filed his bill *quia timet.* This, I take it, he is clearly entitled to do. The bill presents an equitable cause of action and the motion to strike will be denied.

Order Denying Motion.

ORDER DENYING MOTION TO STRIKE OUT BILL OF COMPLAINT.

Filed March 23, 1934.

IN CHANCERY OF NEW JERSEY.

100/615.

Between

ANTONIO DE CORSO,
Complainant,

and

CONCORDIA FIRE INSURANCE COMPANY OF MILWAUKEE, *et al.*
Defendants.

On Bill, &c.

Order Denying Motion to Strike Out Bill of Complaint, Etc.

Application having been made to this court upon due notice by Lum, Tamblyn & Colyer, solicitors for the defendant in the presence of McCarthy & McTague, solicitors of the complainant, for an order to strike out the bill of complaint filed herein on the grounds that the said bill of complaint does not set forth any equitable cause of action, and on the further grounds that the complainant has a full, complete and adequate remedy at law, and the court having heard and considered the arguments of the respective solicitors and being of the opinion that the said bill of complaint does set forth an equitable cause of action, and that the complainant herein has not a full, complete and adequate remedy at law;

It is on this 23rd day of March, 1934, ORDERED, that the application of the defendant, Concordia

Order Denying Motion.

Fire Insurance Company of Milwaukee, for an order to strike out the bill of complaint filed herein on the grounds that the said bill of complaint does not set forth any equitable cause of action, and on the further grounds that the complainant has a full, complete and adequate remedy at law, be, and the same is hereby denied with costs.

LUTHER A. CAMPBELL,
C.

Respectfully advised,

JOHN O. BIGELOW,
V.-C.

NOTICE OF APPEAL.

Filed April 9, 1934.

IN CHANCERY OF NEW JERSEY.

100/615.

Between

ANTONIO DE CORSO,
Complainant,

and

CONCORDIA FIRE INSURANCE COMPANY OF MILWAUKEE,
Defendant.

On Bill, &c.

Notice of Appeal.

To McCarthy & McTague, Esqs., solicitors of complainant.

Defendant, Concordia Fire Insurance Company of Milwaukee, hereby appeals from the order entered in the above-entitled matter on the 23rd day of March, 1934, by his Honor, Luther A. Campbell, Chancellor of the State of New Jersey (advised by Vice-Chancellor John O. Bigelow) denying this defendant's motion to strike out the bill of complaint filed herein, and from the whole and every part thereof, to the Court of Errors and Appeals, the court of last resort in all causes.

LUM, TAMBLYN & COLYER,
Solicitors for and of Counsel with Defendant.

Dated: Newark, N. J., March 26th, 1934.

PETITION OF APPEAL.

Filed April 11, 1934.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ANTONIO DE CORSO, *Complainant-Respondent,* *and* CONCORDIA FIRE INSURANCE COMPANY OF MILWAUKEE, *Defendant-Appellant.*	*On Bill, &c.* *Petition.*

Sat below Hon. Luther A. Campbell, Chancellor of the State of New Jersey (advised by Vice-Chancellor John O. Bigelow).

To the Honorable the Court of Errors and Appeals, the last resort in all causes.

The petition of the Concordia Fire Insurance Company of Milwaukee, defendant-appellant in above-entitled cause, respectfully shows:

That your petitioner finds itself aggrieved by an order made in Chancery by the Hon. Luther A. Campbell, Chancellor of the State of New Jersey (advised by Vice-Chancellor John O. Bigelow), bearing date the 23rd day of March, 1934, in a certain cause in said Court of Chancery wherein Antonio De Corso is the complainant and the Concordia Fire Insurance Company and others are defendants, which said order denied the motion of the defendants to strike out the bill of complaint filed in this cause.

And your petitioner appeals from the said order and the whole thereof and every part thereof on the ground that the Court erred in finding that the complainant had no remedy at law; that the Court erred in finding an equitable cause of action, and that the Court erred therefore in denying the motion of the defendant to strike the bill of complaint.

Your petitioner therefore prays that said order of said Chancellor may be wholly reversed, set aside and for nothing holden and that your petitioner may have such other relief in the premises as this Honorable Court may deem proper.

LUM, TAMBLYN & COLYER,
Solicitors for and of Counsel
with Defendant-Appellant.

JOHN S. FOSTER,
Of Counsel.

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

New Jersey Court of Errors and Appeals

ANTONIO DE CORSO, *Complainant-Respondent,* *and* CONCORDIA FIRE INSURANCE COMPANY OF MILWAUKEE, *Defendant-Appellant.*	*On Appeal from the Court of Chancery.*

BRIEF ON BEHALF OF DEFENDANT-APPELLANT.

There is before this court for consideration the sufficiency of the bill of complaint. The appellant, Concordia Fire Insurance Company, on notice (State of Case p. 10) moved to strike out the bill of complaint in question on the grounds that it did not set forth any equitable cause of action (State of Case p. 10, ll. 34-35) and upon the further grounds that the complainant had a full, complete and adequate remedy at law (State of Case p. 10, ll. 36-37).

The opinion advised by Vice-Chancellor Bigelow (State of Case pp. 11, 12 and 13) finds that the complainant has no remedy at law (State of Case p. 12, l. 27) and that the bill does present an equitable cause of action (State of Case p. 13, l. 13).

From the order (State of Case pp. 14 and 15) denying defendant's motion defendant appeals.

ARGUMENT.

The bill of complaint is short and may readily be paraphrased to determine what are essentially the allegations therein made. The charging por-

tion of the bill is divided into six paragraphs, each of which may be briefly analyzed and summarized as follows:

1. The making of a contract of insurance between complainant and this defendant (State of Case p. 1, ll. 18-33).
2. The modification of this contract (State of Case p. 1, ll. 34-40).
3. The annexation to the contract of insurance of standard mortgagee clause (State of Case p. 2, ll. 1-11).
4. The occurrence of a fire, the ascertainment of loss thereby and the payment of the sum so ascertained to the mortgagee by virtue of the contract embodied in the mortgagee clause (State of Case p. 2, ll. 12-38).
5. The denial of liability as to the contract between plaintiff and defendant by the defendant (State of Case p. 2, l. 39 to p. 3, l. 9).
6. That the complainant is entitled to cancellation and rescission of the agreement between the parties defendant to this suit and that the complainant is entitled to a credit on his mortgage to the extent of the payment made by this defendant because the contract was for the benefit of the complainant (State of Case p. 3, ll. 10-21).

The prayers are also six in number and may be summarized as follows:

1. That the defendant answer (State of Case p. 3, ll. 26-32).
2. That the defendant make discovery of the monies paid (State of Case p. 3, l. 33 to p. 4, l. 2).

3. That the defendant may be ordered to cancel and surrender the agreement entered into with the Magnetic Building & Loan Association (State of Case p. 4, ll. 3-12).
4. That the Magnetic Building & Loan Association may be ordered to credit on account of the mortgage the money by it received from this defendant (State of Case p. 4, ll. 13-18).
5. That the complainant have such other relief as is equitable (State of Case p. 4, ll. 19-21).
6. That subpoena issue (State of Case p. 4, ll. 23-26).

All the facts necessary to be considered are found in the bill of complaint itself and the defendant proposes to show that this bill does not set forth an equitable cause of action and that the complainant has a full, complete and adequate remedy at law.

POINT I.

The bill does not set forth an equitable cause of action.

In an effort to discover what equitable right complainant is endeavoring to enforce, it becomes necessary to work backwards from the prayers of the bill. Manifestly it will not be necessary to consider the first, fifth or sixth prayers. It will be necessary, however, to inspect and consider the remaining three prayers, two of which seek relief from this defendant.

The second prayer seeks discovery of the monies paid by defendant (State of Case p. 3, ll. 32-40 and p. 4, ll. 1-2) and is palpably included

by the complainant in the fond hope that the miraculous and mysterious words "make a full and true discovery and disclosure" will be the "Open Sesame" to the locked doors of this court. The bill, however, leads to the natural question: What does this complainant wish to discover?

In the fourth paragraph of complainant's bill it is alleged that the loss by fire was ascertained to have been $3,350 (State of Case p. 2, l. 23) and in the fourth paragraph of complainant's bill is alleged the payment of this sum (State of Case p. 2, ll. 31-36) and (State of Case p. 6, l. 14). What does complainant wish to discover since complainant admits that the payment of the ascertained loss was made and more particularly since this defendant by addressing its motion to complainant's bill has admitted the truthfulness of the allegations made by the complainant.

The third prayer (State of Case p. 4, ll. 1-12) seeks the surrender and cancellation of an agreement (State of Case pp. 4, 5, 6, 7, 8 and 9) to which this complainant is not a party. It is axiomatical that there must be some allegations of a bill to support the prayers of that bill and for this reason it is important to ascertain what allegations are required to sustain a bill for cancellation or rescission and then to ascertain whether such allegations are found in the bill under consideration. Defendant does not ask of a solicitor preparing a bill that there be exercised care and diction as becomes a grammarian but defendant does contend that there must be alleged, however inartistically the allegations may be worded, those prerequisite and necessary facts to support a bill for rescission or cancellation.

This court in the case of *Snider* v. *Freehold Theatre Co.,* 9 N. J. Misc. Reports 85, has succinctly and clearly declared what are the essential basic facts necessary to enable the Court of Chancery to assume jurisdiction.

> "The jurisdiction (of the Court of Chancery) for rescission and cancellation (of contracts) arises where a transaction is vitiated by illegality or fraud, or by reason of its having been carried on in ignorance or mistake of facts material to its operation. * * * A contract can never be rescinded except in case of fraud or palpable mistake."

Vice-Chancellor Lewis, speaking for the Court of Chancery, in the case of *United Wool Dyeing Co.* v. *Werner & Co.,* 102 N. J. Eq. 322, has said:

> "Allegations of fraud, mistake or of a future menace are necessary allegations in a bill for cancellation and rescission."

Having in mind then what are the necessary allegations to support a bill for rescission or cancellation, let us microscopically inspect the paragraphs in the charging portion of the bill in an endeavor to find a single allegation setting up fraud or mistake or any of the necessary allegations to support a bill of this nature. There is not the slightest suggestion of fraud, duress or mistake in complainant's entire bill, and this in spite of the fact that our Court of Chancery has held:

> "It is an elementary rule of pleading that a bill must state all the facts on which the complainant's right to relief rests, with certainty and clearness, and positively." *Brokaw* v. *Brokaw,* 41 N. J. Eq. 215.

When an endeavor is made to analyze the second and third prayers of this bill and correlate them or substantiate them with the allegations of the

bill it becomes apparent immediately that there is nothing set forth in this bill to enable the Court of Chancery to assume jurisdiction.

This leaves for attention the fourth prayer, and defendant desires to stress most vigorously the point that no relief is sought against this defendant by this prayer. It is, however, this prayer that apparently receives the most consideration from the learned Vice-Chancellor who heard the motion for in the court's opinion below we find the following:

> "If complainant is correct, then the insurance money must be applied in reduction of the mortgage. Otherwise not. *Palmer* v. *McFadden,* 86 N. J. Eq. 373, 98 A. 462, 87 N. J. Eq. 347, 100 A. 225; *Selray Investment Co.* v. *Massimino,* 110 N. J. Eq. 300, 160 A. 323." (State of Case p. 12, ll. 33-38).

It will be interesting to briefly review the cases cited in the court's opinion. *Palmer* v. *McFadden,* 86 N. J. Eq. 373 (and the defendant assumes that the court in citing this case had in mind this case as it had been modified by *Palmer* v. *Niagara Fire Ins. Co.,* 87 N. J. Eq. 347, the same case before the Court of Errors and Appeals) may be dismissed with the remark that it is the leading case holding that upon payment of monies by an insurance company to a mortgagee by virtue of a standard mortgagee clause when no liability exists to the assured, the company so paying is entitled to be subrogated to the lien of the mortgagee to the extent of the payment made for which it was not liable to the assured.

The case of *Selray Investment Co.* v. *Massimino,* 110 N. J. Eq. 300, is more interesting first because the opinion of the court in that case was delivered by Vice-Chancellor Bigelow and

secondly because it seems anomalous that the case can lend support to the position of the court. The facts in the Selray case, *supra,* are briefly as follows: The Home Insurance Company had issued to the defendant Massimino its policy of insurance to which there was annexed a standard mortgagee clause in favor of one Baumann. A fire occurred and the Home Insurance Company denied liability under its contract to its assured, recognizing, however, its liability under the mortgagee clause and furnished the monies for the complainant Selray Investment Company to pay the mortgagee and take an assignment of the mortgage. Thereafter the Selray Investment Company filed a bill in the Court of Chancery to foreclose this mortgage and the assured Massimino answered claiming payment of the mortgage by virtue of the insurance monies paid to Baumann. There is no question raised as to the correctness of the law as stated in this case, to wit, that there must be a credit on the mortgage in an amount equal to the insurer's liability to the assured, but as the court pertinently points out:

> "There remains the questions whether the insurance company was liable to Mrs. Massimino and, if so, what was the amount of the liability."

Thereafter the court, in no uncertain words, holds that an action at law does lie to determine this liability:

> "Or, if both parties prefer, further proceedings in this suit may be stayed until liability to Mrs. Massimino on the policy be determined in the action at law which, I understand, is now pending."

Now between the defense interposed to a bill to foreclose and a bill similar to the one hereunder considered defendant can see no similarity.

Is it necessary to review this bill further? Is it not obvious that there is no allegation anywhere contained in the bill which would justify the Court of Chancery assuming jurisdiction? There is no relief sought as to this defendant which can be substantiated by the fullest proof of every allegation that complainant makes.

Defendant contends, therefore, since the bill has not by the largest stretch of the imagination set forth an equitable cause of action, that it should have been dismissed and that the Court of Chancery was in error in not so doing.

POINT II.

Complainant has a full, complete and adequate remedy at law.

Referring once again to the court's opinion we find:

> "On the argument, defendant's counsel assumed that complainant has presented for determination an action for breach of contract, cognizable at law" (State of Case p. 121, ll. 18-20).

Is this an assumption by the defendant or is it a logical conclusion from allegations of the bill? A re-inspection of the first five paragraphs of the bill will show that by the mere addition thereto of an *ad damnum* clause the complainant would have had a good and sufficient complaint at law. Plaintiff alleges a fire insurance contract, the happening of a fire, an agreement as to damages and the denial of liability on the contract. If these are not essential allegations of an action in contract, what are they? The complainant and the Court of Chancery have both overlooked the fact that the policy of insurance alleged in the complaint was in reality two

contracts; the policy itself formed a contract between the complainant and this defendant, and the mortgagee clause formed a separate and independent contract between the defendant insurer and the mortgagee, the Magnetic Building & Loan Association. *Reed* v. *Firemen's,* 81 N. J. L. 523.

It is admitted that the defendant has performed its contract created by the mortgagee clause and it is undisputed that the defendant has not performed its contract with the assured, the complainant herein, the defendant insisting that it is not liable to this assured and having denied, as is admitted by the complainant, liability to the complainant.

An inspection of the case of *Columbia Ins. Co.* v. *Artale,* 112 N. J. Eq. 505, aff. 114 N. J. Eq. 268, indicates that a very similar situation arose in that case and that the assured Artale successfully maintained his action at law. In that case Vice-Chancellor Backes, delivering the opinion of the Court of Chancery, says:

> "In its sixth separate defense in the law action, the complainant set up the mortgagee clause, that, denying liability to the Artales, it had paid the building and loan association $7,244.67 and took an assignment of the mortgage, and that 'By reason whereof plaintiffs' recovery, if any, is necessarily limited to loss sustained in excess of the sums paid to said mortgagee.' This, it will be observed, was not a plea of payment of the loss to the mortgagee, as appointee (Martin *v.* Franklin Fire Ins. Co., 38 N. J. Law 140, 20 Am. Rep. 372), but a disavowal of liability to the insured, and of payment in discharge of an independent liability to the mortgagee. Reed *v.* Firemen's Ins. Co., 81 N. J. Law 523, 80 A. 462, L. R. A. (N. S.) 343. It was no defense to the Artales' suit

> for the full amount of the loss by fire, and so the trial judge ruled and left to the jury to determine their loss by fire, and it found their loss to be $4,136.63, exactly the loss by fire, exclusive of loss by explosion, as established by the complainant's witness, Thomas."

Can it be said in view of this holding that the complainant has not a full, complete and adequate remedy at law? The court and this complainant apparently felt that the crux of the action at law and the test as to whether an action would lie was the ability of the plaintiff in the action at law to recover damages, but as our Court of Errors and Appeals has pointed out in the case of *New Jersey School and Church Furniture Co.* v. *Board of Education of Somerville,* 58 N. J. Law 646:

> "When we consider that the doctrine of res judicata, or even the title to property, may rest upon a judgment for nominal damages as well as upon a more substantial redress, it is evident that the right to a verdict is not controlled by the incidental question of the amount of damages claimed to be recovered."

It is pertinent to bear this in mind since it is the contention of this defendant that it is entitled to have its rights and obligations under the contract entered into between it and complainant passed upon by a jury, for if it shall be determined in a court of law that this defendant is not liable to the complainant herein it must follow from the very learned words of the Vice-Chancellor who wrote the opinion that the complainant is not entitled to a credit on his mortgage by reason of the monies paid by the defendant to the mortgagee. The defendant admits that if it shall be determined in a proper tribunal, which this defendant contends is a court

at law, that liability exists, it must follow that the defendant is not entitled to its right of subrogation and that the fears expressed by the learned Vice-Chancellor for the complainant's position as mortgagor cannot arise.

IN CONCLUSION.

Defendant respectfully contends, without burdening this court with a further review of the bill of complaint itself or the law pertinent thereto, that since the complainant has not alleged any of the necessary facts to sustain a bill for cancellation or rescission, the bill is without equity and the motion to strike the bill should have been granted, and that since the complainant has a full, complete and adequate remedy at law the Court of Chancery was in error in assuming jurisdiction, and that for the reasons above set forth the order of the said Vice-Chancellor may be wholly reversed, set aside and for nothing holden.

Respectfully submitted,

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Of Counsel.

New Jersey Court of Errors and Appeals

ANTONIO DE CORSO, Complainant-Respondent, *and* CONCORDIA FIRE INSURANCE COMPANY OF MILWAUKEE, Defendant-Appellant.	On Appeal from the Court of Chancery.

BRIEF ON BEHALF OF COMPLAINANT-RESPONDENT.

This question comes before the Court upon appeal by the defendant-appellant. It is their contention that the complainant-respondent has not stated an equitable cause of action in its pleadings (State of Case, p. 10, ll. 34 and 35), and further that complainant-respondent has a full and adequate and complete remedy at law (State of Case, p. 10, ll. 36 and 37).

The opinion as advised by Vice-Chancellor Bigelow (State of Case, pp. 11, 12 and 13) decides that there is an equitable cause of action sufficiently stated (State of Case, p. 13, l. 13), and is further of the opinion that the remedy at law is not full, complete or adequate (State of Case, p. 12, l. 27).

Argument.

The facts of the case are briefly, concisely and sufficiently stated in defendant's brief (pp. 2 and 3), and, therefore, we shall omit them in order that the fatigue of re-reading may be avoided.

The nucleus of complainant's argument settles about the right of subrogation claimed by the defendant-appellant, the nature and the extent of such a right and its application in this case.

POINT I.

The nature and extent of the right of subrogation.

The right of an insurance company to be subrogated as contained in the standard mortgagee clause of a policy is an equitable right (*Selray Investment Co.* v. *Massimino,* 110 Eq. 300, 160 Atl. 323) which rests not in contract but upon the circumstances of the case (*Employers Insurance Co.* v. *Ritter,* 112 Eq. 418, 164 Atl. 426).

It would seem that by the agreement entered into between the defendant-appellant (the insurance company) and the Magnetic Building & Loan Association, a co-defendant, that they are endeavoring to convert the equitable right of subrogation, not founded in contract, into a contract of subrogation.

The equitable right of subrogation may arise on two occasions, depending upon the insurable interest involved (*Palmer* v. *MacFadden,* 86 Eq. 373, 98 Atl. 462):

> "If insurance is taken by a mortgagor for his own benefit or for the benefit of the mortgagee or by the mortgagee in the mortgagor's interest, and at his expense, payment of insurance money to the mortgagee goes to the benefit of the mortgagor in satisfaction *pro tanto* of the mortgage debt; but where the insurance is for the mortgagee's sole protection and the mortgagor has not procured it, or has lost the right to rely upon it, the company, in paying to the mortgagee the insurance money,

> becomes entitled to equitable subrogation *pro tanto* to the security held by the mortgagee."

This decision cites the case of *Mutual Insurance Company* v. *Woodruff*, 26 L. 541. In the *Mutual* case the Court explains the equitable reasons and causes of subrogation on page 555:

> "The principle is certainly well established, that the insurer is entitled to be subrogated to all the rights and remedies of the assured to obtain compensation for his loss from other persons. It is thus stated by the Chancellor who delivered the opinion of the court in the case of the *Aetna Fire Insurance Co.* v. *Tyler*, 16 Wend. 385, 397: 'The principle of equitable subrogation or substitution of the underwriters in the place of the assured, is recognized by every writer on the subject of insurance and is constantly acted upon in the courts of law, as well as in equity; so that when the assured has any claim to indemnity for his loss against a third person, and is primarily liable for the same, if the assured discharges such third person for his liability before the payment of the loss by the underwriters, he discharges his claim against them for such loss *pro tanto*. Or, if he obtains payment from such third person afterwards, it is in the nature of salvage, which he holds as trustee for the underwriters, who had paid his loss'."

The same principle of law may be found in the case of the *Fire Association of Philadelphia* v. *Schellenger*, 83 Eq. 144, 90 Atl. 240, although this case does not involve the question of a mortgagee. Our case centers about the right of subrogation of the insurance company when the insurable interest is that of the mortgagor paid by the mortgagor for his own benefit subject to the rights of the mortgagee.

In policies issued by the insurance companies in such cases there is contained the standard mortgagee clause which recites:

> "Whenever this company shall pay to the mortgagee the amount of the loss and shall claim that as to the mortgagor no liability therefore existed * * *."

This portion of the clause was discussed and decided by the Honorable Vice-Chancellor Bigelow in the case of *Selray Investment Co.* v. *Massimino, supra:*

> "The right to subrogation does not depend upon the CLAIM of no liability, but upon the fact of no liability."

And speaking of the right by mere claim of no liability the Vice-Chancellor said:

> "Obviously, a construction producing or permitting such a result could not be sanctioned. Nor could it have been the contention of the parties."

From the conclusions so reasonably drawn by the Vice-Chancellor, his line of thought is found in practically all of the decisions, from that of *Hare* v. *Headley,* 54 Eq. 545, 35 Atl. 445, to the case of *Selray Investment Co.* v. *Massimino, supra.* In *Hare* v. *Headley, supra,* the mortgagee had a separate agreement with the insurance company to the effect that if the mortgagor forfeited his policy, the insurance company agreed to pay the mortgagee regardless, and for such payment they were to take an assignment of the mortgage money to the amount of the loss. The question arose as to the proof of forfeiture or non-liability to the mortgagor, and in the closing paragraph the Court said:

> "As to the owner in such case subrogation can arise only as a right given by law upon facts proved; and the forfeiture in fact of the policy, as against him, is the legal prerequisite to any independent insurance of the

> mortgagee under this contract, and must be proved as one of the issues in the cause which the owner, and those claiming under him, MAY REQUIRE TO BE PROVED.''

Is it not a fair and reasonable conclusion to state that Vice-Chancellor Bigelow's opinion, and that of Vice-Chancellor Emory in *Hare* v. *Headley, supra,* coincided in principle? Furthermore, in *Hare* v. *Headley,* the court of equity decided the question of non-liability.

Therefore, where agreements are entered into between the insurance company and the mortgagee, they are enforceable at law, but if made by mortgagee in reference to the trust fund already received where the mortgagor has not forfeited his policy, the payment made to the mortgagee by the insurance company is not made under separate agreement, and the owner is entitled to have it credited on the mortgage debt. If the insurance company claims the policy has been forfeited the owner may demand that the insurance company prove it. The mortgagee becomes constructive trustee or appointee of the owner (*Martin* v. *Franklin* v. *Insurance Co.,* 38 Law 140, 20 Rep. 372), unless the insurance company prove in fact that no liability is owed to the mortgagor.

Therefore, from the decisions cited, complainant-respondent contends that the equitable right of subrogation was improperly exercised and by reason of such improper exercise, complainant is entitled to go into the court of Equity and attack such equitable right.

POINT II.

Complainant-respondent's bill does state a good and valid cause of action to enable equity to take jurisdiction.

The second prayer of the bill (State of Case, p. 3, l. 33) seeks a full and true discovery and disclosure of the amount of money paid by the Insurance Company to the defendant Magnetic Building & Loan Association. This true and full discovery includes the inquiry as to the position of the Insurance Company by reason of the agreement entered into between defendants (State of Case, pp. 5, 6, 7, 8 and 9). The complainant-respondent has a right to know this, but from the subrogation agreement, the ambiquity of its language and the uncertainty of its significance, an accounting is necessary.

In the case of the *American Eagle Insurance Co.* v. *Grant Building & Loan Association,* 108 Eq. 83, 154 Atl. 112, affirmed in 160 Atl. 636, the Insurance Company brought suit against a mortgagee for an accounting of a cancellation of a mortgage to which the Insurance Company had been subrogated. Motion was made to dismiss the bill on the grounds that there was an adequate remedy at law and the motion was denied for the reason that the proceeds of the mortgage with which the defendant was charged, the amount whereof was unknown to the complainants, were held in trust. Why should not the same doctrine be extended to include that the mortgagor has a right to an accounting and to know the circumstances and terms under which the insurance company and the mortgagee has paid or received and applied moneys under a subrogation agreement since he is the one who has paid the con-

sideration upon which the contract is founded. He cannot be disregarded and he is entitled to have known and declared to him all of the transaction and equity is the only court in which that may be explained and acted upon.

The subsequent position of the mortgagor after all is of vital importance to him now that fire has destroyed his home and he knows that someone owes him something, but he cannot determine who. For this reason then complainant seeks the aid of the Court to solve his dilemma.

Defendants in their brief purport to enumerate the conditions under which equity may rescind a contract (Brief, p. 5, par. 2, citing the case of *Snyder* v. *Freehold Theatre Co.*, 9 N. J. Misc. 85). It sometimes appears ludicrous that counsel, after having clearly stated a set of facts, will evoke the aid of an irrelevant or extraneous case. This case cited by the defendant applies to contracts as between the parties signatory. The case *sub judice* is not of that nature. Complainant is not a party signatory to the agreement with the defendant-appellant, but his rights are directly involved.

The fifth prayer of complainant's bill (State of Case, p. 4, ll. 19 to 21) seeks general equitable relief, and in the case of *Monmouth County Fire Insurance Co.* v. *Hutchinson*, 21 Eq. 107, at page 117, the Court clearly and succinctly states:

> "But the prayer for general relief will entitle the complainants to any equitable relief warranted by the facts set out in the bill. The settlement by the Railroad Company with Hutchinson after they knew he had received the amount of the insurance was a fraud upon the complainants and the release given to them would be void for the fraud. The courts of equity have, peculiarly cognizance of matters of fraud, and after jurisdiction over instruments effected by fraud, and will declare them void on that account and this, even

> though the fraud is such as might be proved at law, so as to avoid the effect of the instrument."

So that though the liability of the defendants may be determined at law, yet if, as complainant claims, the escape of such may involve fraud, equity will assume jurisdiction. What has the defendant to fear in equity? Is his defense, based on an equitable right, *Selray Investment Co.* v. *Massimino, supra, Hare* v. *Headley, supra,* so inequitable that he fears the sword of equitable justice?

The case cited by defendant in his brief (p. 5, 2nd par.) is a case also involving a dispute between the signatory parties to the agreement, and fraud is the main defense. Complainant-respondent here, as stated before, is not a party signatory and is attacking the equitable right of subrogation of the insurance company. If this Court finds that fraud is the only ground for a rescission, and that it must be specifically alleged in the complaint, the Court may give leave to amend if such is necessary to do justice, *Hoffman* v. *Maloratsky,* 112 Eq. 333; 164 Atl., p. 260. The defendant-appellant in his brief (p. 5, par. 3) cites the case of *Brokaw* v. *Brokaw,* 41 Eq. 215. This case, fortunately, supports complainant in that "all the facts on which the complainant's right to relief rests" are clearly, certainly and positively stated; in our bill of complaint. Therefore, upon the foregoing premises complainant contends that sufficient facts have been stated to spell out an equitable cause of action.

POINT III.

Complainant-respondent has not a full, complete and adequate remedy at law.

The complaint (State of Case, pp. 1, 2, 3 and 4) has set out the facts of the case as they exist. Defendant in his brief (p. 8, par. 1) seems to think that because the addition of an *adamnum* clause might spell out a cause of action at law, is a valid argument that complainant-respondent is endeavoring to worm his way into equity. Is it not true that the bill merely states the facts as they exist, which defendant-appellant, by his motion, admits their truthfulness? The mere fact that contracts are involved in the case does not take it out of the jurisdiction of equity. Contracts, it is true, are enforceable at law; furthermore, it is true that, as decided in *Reed* v. *Firemens Insurance Co.,* 81 L. 523, there are two separate and independent contracts in the fire insurance policies containing the mortgagee clause. Nevertheless, as was already indicated in Point I of our brief, the right of subrogation does not arise out of the contract, but merely out of the circumstances of the case, *Employers Ins. Co.* v. *Ritter,* 112 Eq. 418. So that the right of subrogation depends upon a condition, namely, the proof that someone started the fire and the Insurance Company then has a right of action against them, *Mutual Insurance Co.* v. *Woodruff,* 26 L. 541. The equitable right exists but the enforcement of it from the insurance policy does not come into existence until the Insurance Company or the owner or mortgagee commences an action against the fire bug.

The complainant also wishes to bring to the Court's attention the fact that there is involved

in this case the thorns of a multiplicity of actions. Assume, for example, that the complainant brought an action at law against the insurance company to recover the amount of his loss. The insurance company could, firstly, claim that they have paid the amount of the loss to him or to his appointee or agent, the mortgagee, and then if he succeeded in overcoming this defense and a judgment was entered, he could be restrained from issuing execution thereon if the insurance company set up the same defense. As a practical matter, the judgment obtained could not be a money judgment. The relief that the complainant seeks is a decree holding that moneys already paid should be applied properly to the complainant's credit. Further, if complainants were forced into a law court and secured a judgment, he might have to appeal to equity to compel defendant-appellant to surrender the mortgage assignment and then compel defendant mortgagee to credit the amount of the loss on the mortgage debt. Such was the case in the *Selray Investment Co.* v. *Massimino, supra,* and *Columbia Insurance Co.* v. *Artale,* 112 Eq. 505, cited in defendant-appellant's brief. In both these cases law suits were commenced, then equity was appealed to, to relieve the mortgagor from his confounding position. In the case of *Bryan* v. *Bryan,* 61 Eq. 45, 48 Atl. 341, Vice-Chancellor Pitney said in the closing lines of his decision:

> "The whole subject is discussed with great clearness and learning by Justice Seldon in the case of Ward *vs.* Dewey, 16 N. Y. 519 at p. 525. He there reviews all the authorities, and shows that they clearly hold that, where a deed or mortgage constitutes a cloud upon title, the party affected thereby has a right to come into a court of equity to have it removed, although he has a perfect defense at

law, unless the invalidity of the deed appears upon the face of it."

In the case of *American Mechanical Improvement Co.* v. *DesLauries Aircraft Co.*, 94 Eq. 197, 119 Atl. 179, where a bill for an accounting was filed, the Court decided that although there existed a remedy at law and since equity assumed jurisdiction, equity "has power to give relief to all parties having interest, and thus prevent a multiplicity of suits."

The Vice Chancellor in disposing of this motion in his conclusions has very aptly said that if the complainant is correct, then the insurance money must be applied in reduction of the mortgage. We say there must be some adjudication with reference to this mortgage. The complainant at the present time does not know to whom to pay the interest and how much the building and loan association is entitled to. The Vice Chancellor continues and says (S. C., p. 13, l. 10): *"In his dilemma (complainant) he has filed his bill, quia timet. This I take it he is clearly entitled to do."* We think that the Vice Chancellor has very aptly concluded the whole situation in this expression. The complainant has filed his bill because he fears his inadequacy of relief at law and a multiplicity of suits.

Conclusion.

Complainant-respondent respectfully submits that since the decisions expressed in the cases herein cited, also include opinions founded upon decisions of courts of foreign jurisdiction, and the principle, therefore must be sound, that this court, the court of last resort in all causes, will grant an affirmance of the Honorable Vice Chancellor's decision in denying defendant-appellant's motion; and will

favorably decide that complainant-respondent does state a good and valid equitable cause of action and further, that, the remedy at law is not full, complete nor adequate.

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