

In Chancery of New Jersey.

BETWEEN
WILLIAM W. HULLFISH,
Complainant,
and
CORNELIUS O'BRIEN, ET ALS.,
Defendants.

On Bill
to foreclose, &c.

C. L. C. GIFFORD, Solicitor of Complainant.

THOMAS G. LYTLE, Solicitor of Defendants.

*To his honor, Abraham O. Zabriskie, Esq., Chancellor of the
State of New Jersey.*

Humbly complaining, showeth unto your Honor, your orator, William W. Hulfish, of the city of Newark, in the county of Essex, State of New Jersey, that on or about the fourth day of April, in the year of our Lord one thousand eight hundred and sixty-six, one Cornelius O'Brien, of the township of Princeton, in the county of Mercer, and State of New Jersey, became and was justly indebted unto your orator in the sum of six hundred dollars, and being so indebted, the said Cornelius O'Brien, 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 your orator, a certain bond or obligation, bearing date the same day and year aforesaid, in the penal sum of one thousand two hundred dollars, lawful money of the United States of America, with a condition thereunder written, that if the said Cornelius O'Brien or his heirs, executors or administrators, should well and truly pay, or cause to be paid unto your orator, or to his executors, administrators or as- 20
signs, the just and full sum of six hundred dollars, law-

ful money as aforesaid, in two years from the date of said bond or obligation, together with lawful interest for the same, payable semi-annually without any fraud or other delay, then the said obligation to be void, otherwise to 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 unto your Honor, that the said Cornelius O'Brien, in order to secure the payment of
10 the said sum of money above mentioned, together with the interest which should accrue or become due thereon, executed and delivered unto your orator, a certain indenture of mortgage, bearing date the same day and year last aforesaid, made by the said Cornelius O'Brien and Matilda his wife, of the the first part, and your orator, William W. Hulfish 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
20 your orator, the said party of the second part, and to his heirs and assigns forever, all that certain lot, tract or parcel of land and premises, thereafter and hereinafter particularly described, situate, lying and being in the township of Princeton, in the county of Mercer, and State of New Jersey, butted and bounded as follows, to wit: Beginning on the west side of Witherspoon street at the southeast corner of John Fenning's lot, and running thence along his line a westerly course one hundred and twenty feet to land of John McGregory, thence a southerly course along his line and land of John Haffey one hundred and twenty-
30 two feet more or less, to a corner of Cornelius O'Brien's lot, thence an easterly course along his line one hundred and twenty feet to the west line of Witherspoon street, aforesaid, thence a northerly course along the line of said street one hundred and twenty-two feet more or less to the place of beginning, being the same premises conveyed to the said Cornelius O'Brien, by said William W. Hulfish, your orator, together with his wife, by deed bearing even date with said indenture of mortgage, said indenture of mort-

gage being given to secure a part of the consideration money thereof, together with all and singular the profits, privileges and advantages with the appurtenances to the same belonging or in any wise appertaining, and also all the estate, right, title, interest, property, claim and demand, whatsoever of the said parties 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 described tract or parcel of land and premises, with the appurtenances, unto your orator, the said party of the second 10 part, his heirs and assigns, to the only proper use, benefit and behoof of your orator, the said party of the second part, his heirs and assigns for ever. Provided always and the said indenture of mortgage was therein declared to be upon this expressed condition, that if the said Cornelius O'Brien, or his heirs, executors, or administrators, did and should well and truly pay or cause to be paid to your orator, or to his certain attorney or attorneys, executors, administrators, or assigns, the said sum of six hundred dollars, in two years from the date of said indenture of mort- 20 gage, together with lawful interest on the same, payable semi-annually, according to the condition of the aforesaid bond or obligation, without any deduction or defalcation for taxes, assessments, or any imposition whatsoever, that then and from thenceforth, said indenture of mortgage, and said bond or obligation, and everything therein contained should cease and be void, anything in said indenture and said bond or obligation contained to the contrary, notwithstanding.

And your orator further shows unto your Honor, that 30 after the execution of the said indenture of mortgage, the same was in due form of law acknowledged by the said Cornelius O'Brien and Matilda his wife, on the fourth day of April in the year last aforesaid, before Hezekiah Mount, esquire, one of the commissioners appointed to take the acknowledgment and proof of deeds for said county of Mercer, and duly registered in the office of the clerk of said county of Mercer, in Book R of mortgages for Mercer

county, page 8, on the ninth day of April, in the year last aforesaid, as by the certificate of the clerk aforesaid of said county of Mercer, endorsed on the said indenture of mortgage more fully appears, to which registry and certificate thereof, so as aforesaid endorsed on the said indenture of mortgage, your orator for greater certainty begs leave to refer, if it be necessary so to do. And your orator further shows unto your Honor, that on or about the fourth day of May, in the year of our Lord eighteen hundred and sixty-seven, 10 the said Cornelius O'Brien and his wife, executed a mortgage on the same premises, together with other premises to one Charles S. Cook, to secure the sum of five hundred dollars, or some other sum, by virtue of which said mortgage, the said Charles S. Cook claims to have some lien upon the said premises, so as aforesaid mortgaged to your orator, but your orator charges that the last mentioned mortgage was executed and recorded subsequent to your orator's said mortgage, and with full notice thereof, and if an incumbrance at all upon the said premises, is subsequent to the 20 mortgage of your orator.

And your orator further shows, that on or about the fourth day of December, in the year of our Lord eighteen hundred and fifty-five, Milton Stamp, Jacob R. Cowell and Wm. Gondon, recovered a judgment against the said Cornelius O'Brien, in the Circuit Court of said county of Mercer, for the sum of one hundred and sixty-six dollars and thirty-two cents, or some other sum, and which judgment remains unsatisfied of record. That on or about the sixteenth day of March, in the year of our Lord eighteen hundred and 30 fifty-four, one Edward Holcombe caused to be docketed in the office of the clerk of said county of Mercer, a judgment obtained against said Cornelius O'Brien, in the court for the trial of small causes, before David Thorn, Esq., a justice of the peace, in and for said county of Mercer, for the sum of thirty-seven dollars and eighty-six cents, or some other sum, and which judgment still remains unsatisfied of record. That on or about the sixteenth day of November, in the year of our Lord eighteen hundred and fifty-four,

one John Scollard, caused to be docketed in the office of the clerk of said county of Mercer, a judgment obtained by him against said Cornelius O'Brien, in the court for the trial of small causes before said David Thorn, Esq., justice, for the sum of sixty-seven dollars and four cents, or for some other sum, and which said judgment still remains unsatisfied of record; and your orator charges and insists that the said judgment above mentioned as recovered in the said Circuit Court of the county of Mercer, by the said Milton Stamp, Jacob R. Cowell and William Gondon, and the said 10 judgments, docketed as above mentioned by the said Edward Holcombe and John Scollard, respectively, though recovered and docketed prior to the execution and registry of your orator's said mortgage; yet inasmuch as your orator's said mortgage was given to secure a part of the consideration money to be paid to your orator by the said Cornelius O'Brien for the premises described in your orator's said mortgage, and is so expressly declared and set forth to be in said indenture of mortgage; that the said judgments respectively, if liens at all upon said mortgaged 20 premises, are subsequent to the lien of your orator's said mortgage, and should be declared so to be.

And your orator further shows that all of the principal money mentioned in the said bond or obligation and secured thereby and by the said deed of mortgage, with large arrears of interest, still remains due and owing to your orator—no part thereof having been paid to your orator—so that your orator is greatly delayed and disappointed in the receipt of the said moneys; by means of which said several premises, the said deed of mortgage, and the estate thereby mortgaged 30 as aforesaid, have become absolute in your orator and his heirs. And your orator further shows, that the said defendants or some one of them since the execution of your orator's said mortgage have possessed and enjoyed, and that they do still 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 principal and interest moneys so due to your orator as aforesaid, and that he or some other person or persons for him, have frequently and in a friendly manner applied to the said defendants or one of them, and requested them or one of them, to pay and discharge the said principal and interest moneys so due to your orator on the said bond or obligation and deed of mortgage herein before mentioned and set
10 forth; and your orator well hoped that they would have complied with such reasonable requests of your orator and would have paid to him the said principal and interest moneys so as aforesaid due to your orator on the said bond or obligation and deed of mortgage, as in equity and good conscience they ought to have done. But now so it is, may it please your Honor, that the said Cornelius O'Brien and Matilda O'Brien his wife, Charles S. Cook, Milton Stamp, Jacob R. Cowell and William Gondon, Edward Holcombe, and John Scollard, combining and confederating together,
20 and to and with divers other persons at present unknown to your orator, but whose names, when discovered, he prays may be inserted herein, with proper and apt words to charge them as parties defendant hereto, and contriving how to injure and aggrieve your orator in the premises, and to defraud him of the said principal and interest moneys, so as aforesaid due to your orator on the said bond or obligation and deed of mortgage herein before mentioned, sometimes give out and pretend, that although your orator's estate in the said mortgaged premises may have become absolute
30 at law, yet that your orator cannot dispose of the same to any purchaser in any manner, and that the same will be subject to an equity of redemption; and at other times the said confederates pretend that the said mortgaged premises are charged or chargeable with other encumbrances prior to your orator's said mortgage, but when and to whom given, and for what consideration, they refuse to discover; whereas your orator charges and insists that if any such pretended encumbrances do exist, they are fraudulent and void, and

given for no good or valuable consideration, or are paid and satisfied, and kept on foot by fraud, to injure and aggrieve your orator, and ought to be delivered up to be cancelled, or declared to be of no effect against your orator who had no notice of any such pretended encumbrances, or else are subsequent to the lien of your orator's said mortgage which was given to secure part of the consideration money to be paid for said premises. All which actings and doings of the said defendants and their confederates are contrary to equity and good conscience, and tend to the manifest wrong, 10 injury, and oppression of your orator. In tender consideration whereof, and for as much as your orator has not a complete and safe remedy in the premises at 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 principal and interest moneys so as aforesaid due to your orator on said bond and obligation and deed of mortgage, without the aid and decree of this honorable Court.

To the end, therefore, that the said Cornelius O'Brien 20 and Matilda his wife, Charles S. Cook, Milton Stamp, Jacob R. Cowell, and William Gondon, Edward Holcombe, and John Scollard and their confederates, when discovered, may, upon their several and respective corporal oaths, true, full, and perfect answers 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 one of them, may be decreed to 30 pay to your orator the said principal sum so due to him on the said bond or obligation and deed of mortgage herein before mentioned and set forth, and all the interest money now due and to grow due 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 from all equity of redemption, or claim of, in, and to the said mortgaged premises, and every part and parcel thereof, with the appurtenances, and may deliver over unto your orator all deeds, demises, and writings whatever, 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 from the sale thereof, your orator may be
10 paid, prior to any other encumbrance, if any such exist and are a lien on said premises, the full amount of the said principal sum of money so due to your orator on the said bond or obligation and deed of mortgage as aforesaid, and all the interest now due and 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
20 unto your orator a writ or writs of subpoena, issuing out of and under the seal of this honorable Court, to be directed to the said Cornelius O'Brien and Matilda O'Brien his wife, Charles S. Cook, Milton Stamp, Jacob R. Cowell, and William Gondon, Edward Holcombe, and John Scollard, therein and thereby 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 said premises, and to stand to, abide by, and perform such order
30 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, &c.

CHARLES L. C. GIFFORD,
Solicitor, and of counsel with complainant.

ANSWER.

The answer of Cornelius O'Brien, one of the defendants to the Bill of Complaint of William W. Hulfish, Complainant.

This defendant now, and at all times hereafter, saving and reserving unto himself, all benefit and advantage of exception, which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said Complainant's said bill of complaint, contained, for answer, thereunto, or unto so much and such parts thereof, as this defendant is advised, is, or are material or necessary for him to make answer unto. This defendant answering, saith, that he admits the execution by himself and wife in complainant's bill named, of the indenture of mortgage, of such date, and of such purport and effect, as in the complainant's said bill, mentioned and set forth, and this defendant also admits the execution of the bond in the said complainant's bill mentioned and set forth; and this defendant further answering saith, that, on or about the fourth day of April, Eighteen hundred and sixty-six, one Hezekiah Mount, a Real Estate agent in the Borough of Princeton, in the county of Mercer, represented to this defendant, in substance, and to the effect, that he was the duly authorized agent of William W. Hulfish, the complainant in the bill of complaint named, to bargain and sell, and to contract for the bargain and sale, of all that lot, tract, or parcel of land and premises described in the complainant's bill of complaint, as the mortgaged premises, and that the said William W. Hulfish had full right, title and power, as the sole owner of the said premises, to sell and convey the same; and that this defendant wholly relying upon the information received from, and the representations made by, the said Hezekiah Mount, agent of the said complainant, in that behalf, this defendant, was induced to bargain, and on or about the said fourth day of April, eighteen hundred and sixty-six, actually did bargain with the said Hezekiah Mount, as the duly authorized agent of the said William W. Hulfish, com-

plainant, in the said bill of complaint, for that purpose, for the purchase in fee simple from the said complainant of the said mortgaged premises, in the complainant's said bill of complaint mentioned and described, for the consideration of the sum of twelve hundred dollars, one half of which said purchase money, to be paid upon the delivery of the deed from the complainant to this defendant, and the balance of the purchase money to be secured by bond, secured by mortgage upon the purchased premises, payable as described and set
10 forth in the complainant's bill of complaint; and that on or about the fourth day of April, eighteen hundred and sixty-six, this defendant, in pursuance of the said agreement, was called to the office of the said Hezekiah Mount, in Princeton, for the purpose of perfecting the bargain, so made with said Mount, for the purchase of said premises, and that he then and there met the said Mount, and the said William W. Hulfish, the complainant, and that to his further inquiries in reference to the title of the said premises in the said complainant, the said Mount and Hulfish informed and represented to this
20 defendant, that the title of the said Hulfish, complainant, was good; and that this defendant at the same time informed the said Mount and Hulfish that he knew nothing about the title to the said premises and would have to take their word for it; and that they, then and there, represented and induced this defendant to believe, that the said complainant possessed within himself, the absolute legal title to the entire lot of land and premises hereinbefore mentioned, and at the same time presented a quit claim deed bearing date the fifteenth day of May, eighteen hundred and sixty-five,
30 and purporting to have been executed by Charles W. Rankin, and Margaretta M. his wife, John N. W. Hulfish, and Emma his wife, and Catherine K. Hulfish, widow, to the said William W. Hulfish, and thereby conveying all their right, title, interest, claim and demand, of, in, and to the said lot of land and premises to him; and further representing to this defendant, that it included all persons, other than the said William W. Hulfish, who had had, or were entitled to any interest, part or share, of or in the said premises, and

that upon the strength of the representations before then made by the said Hezekiah Mount, agent, as hereinbefore mentioned, and at that time by the said Mount, and Hulfish, complainant, this defendant was induced to assent to the said contract of sale hereinbefore set forth, and to purchase the said premises. And this defendant further answering, saith, that the said William W. Hulfish, then and there, on or about the said fourth day of April, eighteen hundred and sixty-six, in pursuance of said agreement, made as hereinbefore mentioned, delivered or caused to be delivered to this defendant, a deed of conveyance, bearing date the fourth day of April, eighteen hundred and sixty-six, executed by the said William W. Hulfish, complainant, together with Mary Louisa his wife, whereby the said complainant, for the consideration of the sum of twelve hundred dollars, therein mentioned, conveyed, or professed to convey the absolute fee simple to the entire premises in the said deed of conveyance described to this defendant, his heirs and assigns, as if he were the sole and separate owner thereof, and covenanting in the said deed of conveyance, to and with this defendant, that he was the true and lawful owner of all and singular the premises described in the said deed of conveyance, with every part and parcel thereof, with the appurtenances thereunto belonging; and that he the said William W. Hulfish, complainant, would warrant, secure, and forever defend the said land and premises, in the said deed of conveyance mentioned and described, unto this defendant, his heirs and assigns forever; which deed of conveyance was duly acknowledged by the complainant and wife, on the fourth day of April, eighteen hundred and sixty-six, before Charles L. C. Gifford, Esq., Master in Chancery of New Jersey, and Recorded in Mercer county clerk's office April 30th, 1866, and to which for greater certainty, this defendant begs that reference may be thereunto had.

And this defendant further answering saith, that in pursuance with such agreement of purchase of the said premises, effected and perfected, as hereinbefore mentioned and set forth, this defendant, on or about the said fourth

day of April, eighteen hundred and sixty-six, paid the said Hezekiah Mount, agent of the said William W. Hulfish, complainant, or the said complainant, and who were together at the time, upon the delivery of the said deed of conveyance, from the said William W. Hulfish and wife, to this defendant, the sum of six hundred dollars, and executed the bond, together with the mortgage, by himself and wife, to the said complainant, for the balance of the purchase money upon the said premises, and made pay-
10 able as in the complainant's bill of complaint is mentioned and set forth. And this defendant saith, that the bond and mortgage mentioned and set forth in the complainant's bill of complaint, and the bond and mortgage executed by this defendant, to the said complainant, on the said fourth day of April, eighteen hundred and sixty-six, for the balance of the purchase money of the said premises, are one and the same.

And thus defendant further answering, saith, that wholly relying on the deed of conveyance so made, executed, deliver-
20 ed and accepted, on or about the said fourth day of April, eighteen hundred and sixty-six, by the said complainant and his wife, to this defendant, under the representations and information, as hereinbefore mentioned and set forth, this defendant entered upon, and took possession of the said lot or parcel of land and premises, supposing that by virtue of the said deed of conveyance, he was the sole and absolute owner in fee simple, of the entire interest in the said premises, this defendant proceeded to improve the same by raising the ground, and fencing the said premises, and by
30 the erection of a house and barn upon the said premises, at a cost to this defendant, of not less than eighteen hundred and eighty dollars.

And this defendant further answering saith, that after the execution of the said deed of conveyance by the said complainant, in the bill of complaint, to this defendant, and after this defendant had taken possession of, and improved the said premises, as hereinbefore mentioned, this defendant received intimation from one of his friends, that his absolute

title to the entire premises, was of a doubtful character, which led this defendant to make diligent inquiry in reference to the title of the said complainant, at the time he conveyed or professed to convey the said mortgaged premises, set forth in the bill of complaint, to this defendant, and that after diligent inquiry he ascertained, as this defendant verily believes to be true, that the said complainant was an heir at law of one David Hulfish, who died intestate, sometime before the sale of the said premises to this defendant, leaving four children living, and one grand-child, representing a deceased 10 son of the said David Hulfish, at the time of his decease, all of whom are now living, namely, William W. Hulfish, the complainant named in the bill of complaint, Margaretta M. wife of Charles W. Rankin, John N. W. Hulfish, Mary Caroline, wife of Edmund H. Sares, and Annie, infant daughter of Howard Hulfish, son of the said David Hulfish, deceased, and Ellen his wife, both of whom are deceased, and who is now an infant of the age of sixteen years, or thereabouts, and that the said premises descended to the said children as heirs at law of David Hulfish, deceased, as 20 tenants in common, share and share alike, subject to the right of dower of Catharine K. Hulfish, widow of said David Hulfish, deceased, also living.

And this defendant further answering saith, that at the time of the delivery to him by the said William W. Hulfish, complainant, or by the said Hezekiah Mount, his agent, who was present at the same time, of the said deed of conveyance from the said William W. Hulfish, complainant, of the said premises, there was also delivered to him, the deed purporting to be a deed of quit claim, bearing date on the fifteenth 30 day of May, eighteen hundred and fifty-five, and executed by Charles W. Rankin and Margaretta M., his wife, John N. W. Hulfish and Emma, his wife, and Catharine K. Hulfish, widow, to the said William W. Hulfish, complainant, whereby they conveyed or professed to convey for the consideration of one dollar, all their right, title and interest, of, in and to, all the premises in said deed of conveyance described, being the same premises in the said conveyance

mentioned, conveyed by the complainant to this defendant on the fourth of April, eighteen hundred and sixty-six, and mentioned, described and set forth in the complainant's bill of complaint, and which this defendant relying upon the representations and information made by and received from the said William W. Hulfish, complainant, and Hezekiah Mount his agent, supposed, and was led to believe, had been executed by, and contained the names of all and every person or persons who held any interest, claim, title or demand, of,
 10 in or to the said lot or parcel of land and premises.

And this defendant further answering saith, that he has received no release, or quit claim, or other conveyance from ^{Mary} ~~Catharine~~ Sares, and Annie, the daughter of Howard Hulfish, deceased, and grand-child of David Hulfish, deceased, of their right, title, claim, interest and demand, as heirs at law of the said David Hulfish, deceased, to the said premises; and that he verily believes that no conveyance has been executed by the said ^{Mary} ~~Catharine~~ Sares and her husband, whereby her right, title and interest of, in and to the un-
 20 divided one-fifth part of the inheritance descending from her father, David Hulfish, deceased, and which is the same lot and parcel of land and premises conveyed by the complainant in the bill of complaint named, to this defendant, as hereinbefore mentioned, on the fourth day of April, eighteen hundred and sixty-six, was conveyed either to the said William W. Hulfish, complainant, or to this defendant, and that he has caused the records of deeds, &c., to be searched in the Mercer County Clerk's office, and that no
 30 such conveyance has been recorded, and that if any such conveyance has been made by the said ^{Mary} ~~Catharine~~ Sares, this defendant is wholly ignorant of the fact. And this defendant further answering saith, that Annie, the daughter of Howard Hulfish, deceased, and grand child of David Hulfish, deceased, who is entitled to the undivided fifth part of the premises, hereinbefore mentioned and described, as an heir at law, is an infant under the age of twenty-one years, and incapable of conveying her right, title and in-

terest to the same, until she shall obtain her majority, which will be several years hence. And this defendant further answering saith, that one undivided fifth part of all the tract of land and premises conveyed by said complainant to this defendant, and mortgaged by this defendant to secure the balance of the purchase money thereof, now belongs to the said Annie, the only child of Howard Hulfish and Ellen his wife, both deceased, as hereinbefore mentioned; and that this defendant has good cause to believe, and verily doth believe, that the said ^{Mary} Catharine Sares, wife of Edward H. Sares, 10 is also entitled to another undivided fifth part of all the land and premises so sold by the complainant, and mortgaged by the defendant as hereinbefore described, and that the said complainant at the time of the execution and delivery of the deed of conveyance for the said premises, on or about the fourth day of April, eighteen hundred and sixty-six, for the consideration therein mentioned, to this defendant, as sole owner of the entire premises, that the said complainant in the bill of complaint named, only owned, and had right and title to convey right and title to three-20 fifths of the said inheritance, together with the widow's right of dower therein, and that by the said conveyance, the said complainant conveyed, and professed to have right, title and power to convey, two-fifths of the said inheritance, without any lawful right, title, power, or authority, whatever.

And this defendant further answering saith, that at the time of the purchase by him of the said premises in the said bill of complaint mentioned and described, the sum of twelve hundred dollars was the full value of the same, and 30 that at the present time, with the improvements placed upon the said premises by this defendant, the value of the same is nearly, if not fully, three times that amount, and to which, ^{Mary} Catharine Sares and Annie Hulfish are entitled in law to the undivided two-fifths of the said lot of land and premises, in the said bill of complaint described, with the improvements, and to which the complainant neither had, nor has had, any right, title, or claim whatever.

And this defendant further answering saith, that he verily believes that the said Hezekiah Mount, Agent of the said complainant as hereinbefore mentioned, at the time of the representations made by him to this defendant, by which this defendant was induced to bargain for, and at the time of the consummation of the contract of purchase, on or about the said fourth day of April, eighteen hundred and sixty-six, when this defendant perfected the said bargain by the acceptance of the deed of conveyance from the said
10 complainant, and the payment to him by this defendant of the said sum of six hundred dollars, and of giving to the said complainant by this defendant of the bond and mortgage in the complainant's bill mentioned and set forth, as hereinbefore mentioned; the said Hezekiah Mount was fully informed of the existence of the said ^{"Prayer"} Catharine Sares, and of her right, title and interest to the undivided one-fifth part of the said mortgaged premises, and the absence of any right, title and power in the said complainant to convey her right, title and interest of, in and to the same
20 as hereinbefore mentioned to this defendant, and that the said Mount, entirely misrepresented and deceived this defendant in reference thereto; and also, that the said Complainant at the time of the representations made by him, to this defendant, in reference to his title to the said premises, and the inclusion of all persons entitled to any interest in the said premises, in the said quit claim as hereinbefore mentioned, well knew and was fully cognizant of the fact that ^{"Prayer"} Catharine Sares was not included in the said deed of quit claim, and that the said ^{"Prayer"} Catharine Sares had not at
30 any time before then, released, conveyed, or quit claimed her right, title and interest, of, in and to the undivided one-fifth part, or share, belonging to her in the said premises. And that the said Annie, daughter of the said Howard Hulfish, and grand-child of David Hulfish, neither had nor could remise, release, or convey her right, share and interest to the undivided one-fifth part of the said inheritance descending to her, being the said mortgaged premises, as hereinbefore mentioned; and that the said complainant then

and there well knew he had no right, title, or interest to two-fifths of the said inheritance, estate and premises, or power to convey the same, at the time that he, together with his agent, was leading, and led this defendant, to believe he had full right and title to, and power in himself to convey an absolute fee simple to this defendant, in the entire lot of land and premises in the complainant's bill of complaint mentioned and set forth. And this defendant further answering saith, that up to the time of his receiving intimation from a friend, of the doubtful character of his title to the entire lot of land and premises, and in making diligent inquiry in reference thereto, he was wholly ignorant of the existence of the said ^{Mary}~~Catharine~~ Sares, and the said Annie, grand-daughter of the said David Hulfish, as hereinbefore mentioned, and of their several interest in the said lot of land and premises, which, had he been informed thereof, he would not have purchased the said premises, for any consideration whatever; but that wholly relying upon the information, representations, and impressions, received from the said complainant and his said agent as hereinbefore mentioned, this defendant was imposed upon, and verily believes that he was grievously deceived by the said complainant and his said agent into the purchase of the said lot of land and premises, and the payment of the said sum of six hundred dollars, with the execution of the bond and mortgage, as hereinbefore mentioned. And that the said complainant then and there well knew and fully understood that the defendant relied solely upon the representations made by, and the information received from the said complainant and his said agent, in reference to the lawful title of the said complainant and his right and power to convey a clear and perfect title to the entire premises, hereinbefore mentioned and described, and to invest the absolute fee simple thereof in this defendant. And this defendant further answering saith, that he verily believes, that his remedy at law against the said William W. Hulfish, complainant, named in the bill of complaint, upon his covenant of warranty contained in the said conveyance from him to this

defendant, as hereinbefore mentioned and set forth, is wholly inadequate and insufficient to secure this defendant against the claims of the outstanding heirs at law, to the said mortgaged premises, inasmuch as the value of the two shares belonging to the two outstanding heirs at the time of the purchase of the said premises by the defendant, of the complainant, was four hundred and eighty dollars or thereabouts. While the value of the said shares, with the permanent improvement, made by this defendant, 10 with the improved value of the same, at the present time, is from twelve to thirteen hundred dollars or thereabouts, and that this defendant has no promise, security, or indemnity, from any person whatever, that Mary C. Sares and her husband, at the present, or any future time, or Annie Hulfish, when she arrives at full age, will not insist upon and claim their actual proportion of the said premises, or their proportion of the purchase money given by the defendant to the complainant, the one half of which is secured by the bond and mortgage set forth and described in 20 the bill of complaint, or that they will not insist upon and demand the full and improved value of their respective parts and share in the premises, at the present or any future time.

And this defendant further answering saith, that if liable at all, the said premises are not a scanty security for the mortgage money claimed thereon, as this defendant has hereinbefore shown. And this defendant submits to this honorable Court, that under the circumstances hereinbefore mentioned, that the said complainant is not entitled to any 30 such relief as is prayed by the said bill against this defendant.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is any other matter, cause, or thing, in the said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or

denied, is true, to the knowledge or belief of this defendant : All which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable Court shall decree, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

THOMAS G. LYTLE,

Sol. for, and of counsel with the defendant.

NEW JERSEY, ss :

Cornelius O'Brien, the above named defendant, being 10
duly sworn, on his oath saith, that the matters and things set forth in the above answer, so far as relates to his own acts, are true; and so far as relates to the acts of others, he believes them to be true.

Sworn and Subscribed, }
This Seventeenth day }
of October, A. D. 1868, }
Before me.

CORNELIUS O'BRIEN.

ISAAC STRYKER, JUSTICE OF THE PEACE.

EXCEPTIONS TO ANSWER.

Exceptions taken by the complainant in the above stated 20
cause to the answer of the defendant, Cornelius O'Brien, for impertinence therein.

First, the said complainant excepts to all that part of the said answer of the said defendant, Cornelius O'Brien, which begins on the first line of the second page of said answer, with the words, "and this defendant further answering saith, that on or about the fourth day of April," and ending on the eighteenth page of said answer, with the words, "or that they will not insist upon and demand the full and improved value of their respective parts and shares in the premises, at the 30
present or any future time." Second, the said complainant also except to all that part of the said answer of the said defendant, Cornelius O'Brien, on the eighteenth page thereof, which states "and this defendant submits to this honorable Court, that under the circumstances hereinbefore mentioned, that the said complainant is not entitled to any such re-

lief as is prayed by the said bill against this defendant." In all of which particulars the said complainant excepts to the answer of the said defendant, Cornelius O'Brien, as impertinent, and humbly prays that the said matters hereinbefore excepted to, as being impertinent, may be expunged from the said record.

CHARLES L. C. GIFFORD.

Sol. for, and of counsel with the said complainant.

RULE REFERRING EXCEPTIONS.

10 The complainant having filed exceptions to the answer put in by the defendant, Cornelius O'Brien, to the complainant's bill in this cause, it is ordered, that it be referred to Algernon S. Hubbell, Esq., one of the masters of this court, to look into the complainant's bill, the answer thereto, and the said exceptions, and examine and report to this court, with all convenient speed, whether the said exceptions be well taken or not. Entered by Charles L. C. Gifford, Solicitor of the complainant.

By the Court.

BARKER GUMMERE, CLERK.

MASTER'S REPORT ON EXCEPTIONS.

20 In pursuance of an order in the above cause made by this court, bearing date the twentieth day of January, eighteen hundred and sixty-nine, by which it was referred to the subscriber, one of the Masters of this Court, to look into the complainant's bill of complaint, and to the answer thereto, and into exceptions to said answer, and whether the said exceptions be well taken, I do respectfully report, that I have been attended by the solicitor of the complainant, and of the defendant, and I have examined the matters referred to me, and that it appears that the complainant's bill was filed to
30 foreclose a mortgage made by the defendant to the complainant, that the answer admits the giving of the same, and that it was made to secure part of the purchase money, for land conveyed by the complainant to the defendant, and it alleges and sets up as a defence to said suit, that there is a defect in the title to said land, and that, from information and ex-

amination, that the defendant discovered that the complainant in fact *owned* and conveyed only the undivided three-fifth parts of said land. The complainant excepts, as impertinent, to so much of said answer as begins on the first line of the second page with the words, "and this defendant further answering saith, that on or about the fourth day of April," and ending on the 18th page, with the words, "or that they will not insist upon and demand the full and improved value of their respective parts and shares in the premises at the present or any future time." 10

Also, to all that part of said answer on the 18th page, which states "and this defendant submits to this honorable Court, that under the circumstances hereinbefore mentioned, that the said complainant is not entitled to any such relief as is prayed by the said bill against this defendant." 10

And I report that all that part excepted to and which I have marked in the copy of the answer produced before me, as beginning at "A" and ending at "B," and so much as begins at the point marked "C" and ending at "D," is impertinent, because, 20

1. There is no allegation of a failure or disturbance of title, or that the defendant has suffered any injury.

2. The defendant admits that three-fifths of said land has been conveyed to him by the complainant with a good title, and said mortgage was given to secure part of the purchase money for the same.

3. And principally because the subject of the allegation could not be put in issue in this suit, and would not be proper to be given in evidence between the parties.

FEBY. 23d, 1869.

30

A. S. HUBBELL,
Master in Chancery.

EXCEPTIONS TO MASTER'S REPORT.

Exception taken by defendant O'Brien, in this cause, to the report made therein, on the twenty-third day of February, eighteen hundred and sixty-nine, by A. S. Hubbell, Esq., one of the Masters of this Court, to whom the exceptions

by the complainant, to the answer of said O'Brien, to the complainant's bill of complaint, was referred, by the order of this court, bearing date, the nineteenth day of January, eighteen hundred and sixty-nine—touching the matters therein referred to him.

Exception: For that the said Master has by his said report, reported, that so much of the said answer by the said O'Brien, as begins on the first line of the second page, with the words, "and this defendant further answering
10 saith, that on or about the fourth day of April," and ending on the eighteenth page with the words, "or that they will not insist upon and demand the full and improved value of their respective parts and shares in the premises, at the present or any future time;" also, all that part of said answer, on the eighteenth page, which states, "and this defendant submits to this honorable Court, that under the circumstances, hereinbefore mentioned, that the said complainant is not entitled to any such relief as is prayed by the said Bill, against this defendant," excepted to, by
20 the said complainant, for impertinency, to be impertinent, with his reasons, therefore; whereas, the matters contained and excepted to as impertinent in the said answer and so reported impertinent, are not impertinent, according to the principles of equity recognized in this honorable court, and should have been so reported.

To which report as hereinbefore set forth, and therein fully appears, this exceptant, excepts, and humbly conceives that the said Master hath erred, and that the said report is wrong, unjust, and unequitable, and therefore prays that the
30 said report may be disallowed, rejected, and set aside, and a new report ordered to be taken, or that the said report may be corrected; and prays the judgment of this honorable court thereupon.

THOMAS G. LYTLE,
Sol. and counsel with Deft., O'Brien.

DECREE, AND ORDER OF REFERENCE.

This cause, being opened to the Court by Charles L. C. Gifford, of counsel with the complainant, and it appearing that the complainant's bill has been heretofore taken as confessed against all the defendants, except, the defendant, Cornelius O'Brien, who filed an answer thereto, and the exceptions filed by the complainant to the said answer of the said defendant, Cornelius O'Brien, coming on to be heard, and the arguments of the respective counsel having been heard and considered.

It is thereupon, on this twentieth day of October in the 10 year of our Lord one thousand eight hundred and sixty-nine, ordered, adjudged, and decreed, that the said exceptions to said answer be sustained; and that the said complainant is entitled to the relief in foreclosure, prayed in his said bill, and that it be referred to Staats S. Morris, Esq, one of the Masters of this Court, to ascertain and report the amount due to the said complainant, for principal and interest upon the mortgage held by him upon the premises mentioned and described in the said bill of complaint, and also the amount due, if anything, to the said defendant, 20 Charles S. Cook, upon his mortgage, and to the defendants, Milton Stamp, Jacob R. Cowell and William Gonden, and Edward Holcombe, and John Scollard, upon their respective judgments, and to report accordingly; and also to ascertain and report the order and priority of the said several mortgages and judgments, respectively, and whether they all embrace the same premises; and whether the said mortgaged premises should be sold together or in parcels, and if in parcels, in what order, and that the said Master do make his report thereon with all convenient speed. And all 30 further equity is reserved until the coming in of the said report.

A. O. ZABRISKIE, C.

NOTICE OF APPEAL FROM INTERLOCUTORY DECREE.

The defendant, hereby, appeals from the Interlocutory Decree made in this court, in the above stated cause, declaring certain excepted parts of this defendant's answer to complainant's bill, to be impertinent, to the Court of Appeals as the last resort, in all causes of law.

Dated, Nov. 26, A. D. 1869.

THOMAS G. LYTLE,

Sol. and of counsel of Deft., O'Brien.

I conceive there is good cause of appeal in the above
10 stated cause.

THOMAS G. LYTLE,

Of counsel with Deft., O'Brien.

MASTER'S REPORT.

In pursuance of an Interlocutory Decree and order, in the above stated cause, made by his Honor, the Chancellor, bearing date the twentieth day of October, in the year of our Lord one thousand eight hundred and sixty-nine, whereby it was ordered that it be referred to the subscriber, one of the Masters of said court, to ascertain and report the amount due to the said complainant, for principal and
20 ses mentioned and described in the said bill of Complaint, and also the amount due, if any thing, to the defendants named therein, and other matters. I, Staats S. Morris, one of the masters of the court of Chancery, of New Jersey, do hereby report to his Honor, the Chancellor, that I have examined the matters referred to me by the said order, so far as the same have been brought before me, that the Solicitor of the complainant, produced before me, the mortgage in his bill of complaint mentioned, bearing date the
30 dred and sixty-six, and made and executed by Cornelius O'Brien and Matilda his wife, to the complainant, and which said mortgage was duly acknowledged, according to law, by the said Cornelius O'Brien and wife, and registered, as in the said bill mentioned, as appears by endorsements thereon, and the said complainant's Solicitor also produced

to me, the bond referred to in and intended to be secured by the said mortgage, and which said bond and mortgage are marked, exhibits, 1 and 2, on the part of the complainant, and I find there is due to the complainant on his said mortgage, for principal and interest, on this day, the sum of seven hundred and eight dollars and fifty-one cents; and I do certify and report, that the schedule hereto annexed marked "A," and making a part of this, my report, contains a statement and account of the principal and interest money due to the complainant, on his said mortgage, and 10 to which, for greater certainty, I refer; and I do certify and report, that no person appeared before me, on behalf of the defendants, Charles S. Cook, Milton Stamp, Jacob R. Cowell, William Gonden, and Edward Holcombe, and John Scollard, due notice of this accounting having been given to them, as appears by the summons hereto annexed.

And I do further report, that upon inspection of said mortgage, I find said mortgaged premises to comprise but one lot or tract of land, and that said mortgage was given to secure a part of the purchase money, and would recom-20 mend that the said premises be sold together, and not in parcels.

All which is respectfully submitted, this fifth day of November, A. D. 1869.

S. S. MORRIS,
Master in Chancery.

SCHEDULE "A."

Exhibit 1. Bond, bearing date the 4th day of April, A. D. 1866, in the penal sum of \$1200; conditioned for the payment of the sum of \$600 in two years from date, with lawful interest for the same, payable semi-annually, secured by the mortgage, Exhibit 2, in the complainant's bill mentioned,	30 \$600 00
Interest thereon, from date of Bond to Nov. 5, 1869, 3 years, 7 months, 1 day,	\$156 61
Less, one year's interest paid,	42 00
	<u>108 61</u>
Amount due complainant, Nov. 5, 1869,	\$708 61

S. S. MORRIS, Master in Chancery.

FINAL DECREE.

This cause coming on to be heard in the presence of Charles L. C. Gifford, solicitor and of counsel with the complainant, and the exceptions in the answer of the defendant, Cornelius O'Brien, having been sustained, and by order made on the twentieth day of October last, past, it having been ordered, adjudged and decreed, that the complainant is entitled to the relief, on foreclosure, prayed in the bill of complaint filed in this cause, and the complainant's bill having been heretofore taken as confessed against all the
10 other defendants; whereupon, and upon reading a report upon file, made by Staats S. Morris, Esq., one of the Masters of this Court, bearing date on the fifth day of November, in the year of our Lord one thousand eight hundred and sixty-nine, from all which it appears that there was due to the complainant on the day of the making of the said report, for principal and interest on his mortgage, the sum of seven hundred and eight dollars and sixty one cents, and that it is necessary and advisable that the whole of the mortgaged
30 premises should be sold to raise and pay the money so due as aforesaid, and no cause being shown or appearing to the contrary—

It is thereupon, on this fifth day of November, in the year of our Lord one thousand eight hundred and sixty-nine, by Abraham O. Zabriskie, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor doth, by virtue of the power and authority of this Court, hereby order, adjudge and decree that the said report, and all the matters and things therein contained, do stand ratified and confirmed, and that the said mortgaged
30 premises be sold to raise and satisfy the money due to the said complainant, that is to say, the sum of seven hundred and eight dollars and sixty-one cents, together with lawful interest thereon, to be computed from the fifth day of November, in the year of our Lord one thousand eight hundred and sixty-nine, being the date of the Master's report, with the complainant's costs in this cause to be taxed; and

that a writ of *feri facias* do issue for that purpose out of this Court, directed to the Sheriff of the county of Mercer, 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 complainant or to his solicitor, his said debt, interest, and costs; and in case more money should be raised by the said sale than shall be sufficient to answer such payments, 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, 10 and that the said Sheriff make return without delay of his proceedings by virtue of the said writ.

And it is further ordered, adjudged and decreed, that the defendants 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.

A. O. ZABRISKIE, C.

NOTICE OF APPEAL FROM FINAL DECREE.

The defendant, O'Brien hereby appeals from the final decree made in this Court, in the above stated cause, made 20 November fifth, A. D. eighteen hundred and sixty-nine, to the Court of Errors and Appeals in the last resort, in all causes as heretofore.

DATED, Nov. 27th, A. D. 1869.

THOMAS G. LYTLE.

Sol., of Deft., O'Brien.

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

THOMAS G. LYTLE.

of Counsel with Deft.. O'Brien.

Court of Errors and Appeals.

BETWEEN
CORNELIUS O'BRIEN,
Appellant,
and
WILLIAM W. HULLFISH,
Appellee.

} *On Appeal from*
} *Int. & Final Decrees.*

THOMAS G. LYTLE, Solicitor of Appellant.

C. L. C. GIFFORD, Solicitor of Appellee.

PETITION OF APPEAL FROM INTERLOCUTORY DECREE.

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

The humble petition of Cornelius O'Brien, the appellant, in the above stated cause, respectfully shows to your honorable Court, that your petitioner feels himself aggrieved by an interlocutory decree or order made in the Court of Chancery by the Honorable Abraham O. Zabriskie, Chancellor of New Jersey, filed October twentieth, A. D. eighteen hundred and sixty-nine, upon certain matters of exception to certain parts of appellant's answer to a bill of complaint filed against him by the appellee, in said Court of Chancery, for impertinency, upon an appeal from a master's report concerning the same, sustaining the exceptions, to the said Chancellor, as by the said decree, Master's report, and other papers on file in this cause, in the clerk in Chancery's office, fully appears; in respect, that the said decree sustained the Master's report, and decreed the said answer in all things excepted to for impertinency, to be impertinent.

10
30 And your petitioner humbly appeals from the said decree or order of the chancellor, upon the ground, that the same

is inequitable and erroneous; and that the said excepted parts of the answer so decreed to be impertinent, are not impertinent, and that his Honor, the Chancellor, should have so decreed.

Your petitioner, therefore, prays that the decree or order of the said Chancellor may be reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises, as to this honorable Court shall seem meet. Dated November the twenty-sixth, A. D. eighteen hundred and sixty nine.

10

THOMAS G. LYTLE,

Sol. of, and of counsel with the Appellant.

ANSWER.

This Appellee, not confessing all, or any, of the matters to be true, as in and by the said petition are contained and set forth; For answer thereunto says, that he believes it to be true that such order and decree, as is complained of by the Appellant, was made by the Court of Chancery, as in the said petition of appeal is set forth, but as to the date, substance and contents thereof, this Appellee prays leave to refer thereto, when the same shall be produced, and this Appellee is advised and believes, that the said decree is agreeable to equity and justice; and he humbly prays that the same may be affirmed, and that the said appeal may be dismissed with costs.

20

C. L. C. GIFFORD,

Solicitor of Appellee.

PETITION OF APPEAL FROM FINAL DECREE.

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

The humble petition of Cornelius O'Brien, the Appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree, made in the Court of Chancery, by the Honorable Abraham O. Zabriskie, Chancellor of New Jersey, filed November the fifth, one thousand eight hundred and sixty-nine, in a suit,

wherein the said William W. Hulfish, was complainant, and the said Cornelius O'Brien, et. al., were defendants, in respect that the said decree adjudged and ordered the equity of redemption to the mortgaged premises, mentioned in the complainant's bill of complaint, to be foreclosed, and the said premises to be sold to make the mortgaged debt mentioned in the condition of the mortgage, which was according to the condition of a certain bond bearing even date therewith, and described in the said bill of complaint.

- 10 And your petitioner humbly appeals from the said decree of the Chancellor, upon the ground, that the same is inequitable and erroneous; for that the Appellant, in his answer to the Appellee's bill of complaint, set up, showed and proved, that the said Appellee had obtained the said bond and mortgage from this Appellant by misrepresentation, deceit and fraud, as by said answer fully appears, and which answer in this respect, was by the said Chancellor, in his said decree, wholly ignored, and the prayer, in the Appellee's bill of complaint, granted, when the said bill
20 ought to have been dismissed, according to the prayer of the said answer.

Your petitioner, therefore prays, that the said decree of the Chancellor be reversed, set aside, and for nothing holden; and that your petitioner may have such relief, as to this Honorable Court shall seem meet.

Dated, November 27, A. D., 1869.

THOMAS G. LYTLE,
Attorney, and of counsel with the Appellant.

ANSWER.

This appellee not confessing all, or any of the matters
30 to be true, as in and by the said petition are contained, and set forth, for answer thereunto says, that he believes it to be true that such order and decree as is complained of by the appellant, was made by the Court of Chancery as in the said petition of appeal is set forth, but as to the date, substance, and contents thereof, this appellee prays leave to

refer thereto, when the same shall be produced; and this appellee is advised and believes, that the said decree is agreeable to equity and justice, and he humbly prays that the same may be affirmed, and that said appeal may be dismissed with costs.

C. L. C. GIFFORD.
Solicitor of Appellee.

CHANCELLOR'S OPINION ON EXCEPTIONS.

OCTOBER TERM, 1869.

This cause came on, upon exceptions to the report of a Master which sustained exceptions taken to the answer of 10 the defendant. The bill was to foreclose a mortgage, the answer stated, that the mortgage was given at the purchase of the mortgaged premises, which were conveyed by deed, with full covenants, and was for part of the consideration money, and that the title conveyed was defective, that the complainant only owned and conveyed three-fifths of the premises; to this part of the answer, exceptions were filed, as being impertinent, the bill did not allege any eviction, or suit, under the adverse title.

Mr. Gifford, for complainant.

20

Mr. T. G. Lytle, for defendant.

THE CHANCELLOR :

It has been decided in this Court repeatedly, by three of my predecessors, that a defect of title to mortgaged premises, conveyed by the mortgage, is no defence in a suit for the foreclosure of a mortgage, for part of the consideration.

Chancellor Vroom so held in *Harrison v. Merseles*,—Saxt. 426. Chancellor Pennington, in *Van Wagner v. McEwen*. 1 Gr. Ch. R. 412, and Chancellor Green in *Glen's adm'r, v. Whipple*. 1 Beas. 50; such has been the uniform doctrine of this court, and it is in accord with the decisions of other States.

Davison v. De. Friest, 3, Sandf. Ch. 356 Miller v. Avery 2, Barb. ch. 582, Bumpus v. Platner, 1 J—, C. R. 218, Withers v. Morrell, 3. Edw. 560, Talmage v. Wallace, 25, Wend. 107, and it is fully adopted by the Court of Errors in New York, in Edwards v. Bodine, 26, Wend 109, on an appeal, in a foreclosure case,

The exceptions to the Master's Report must be overruled.

In the Court of Errors and Appeals in the
Last Resort.

BETWEEN

CORNELIUS O'BRIEN,
Appellant,

and

WILLIAM W. HULLFISH,
Appellee.

On Appeal from

Int. & Final Decrees.

Points to be relied on in the argument of the above Appeals on the part of the Appellant:

1. That a defective title may be set up in a class of cases to a Bill filed for the Foreclosure and sale of mortgaged premises, without alleging fraud or eviction, and that this case falls under that class.

2. That fraud may be set up in all cases.

3. That failure of consideration in the Bond or other instrument for securing the payment of money, may be set up in all cases in Equity.

4. That as between vender and vendee, (when a Bond and Mortgage have been given to secure the purchase money,) failure of title in vender to mortgaged premises may be set up to a Bill in Equity for the Foreclosure and sale of said premises.

5. That the answer in this cause sets out a good and sufficient defence.

6. That the parts of the answer excepted to constitutes the defence of the defendant, and if insufficient, was subject to demurrer, but not to exception for impertinence.

7. That the complainant entered his final Decree without a rule *nisi* to confirm the master's report.

8. That both decrees were contrary to Justice and Equity.

THOMAS G. LYTTLE,
P. D. VROOM,
Counsel for Appellant.

New Jersey Court of Errors and Appeals.

WILLIAM W. HULLFISH, Appellee, }
 Adsm., } *On Appeal.*
 CORNELIUS O'BRIEN, Appellant. }
 Points for Appellee.

I The answer excepted to contains no allegation or pretense of disturbance of title by eviction or otherwise, and unless there is an eviction or suit brought on such title, mere defect of title is no defence to a bill for foreclosure of the mortgage, giving for the purchase money.

Shannon <i>v.</i> Marcellis and al.....	Saxton p 426
Carter <i>v.</i> Monroe, muf. Co..	1 Green, C. R. 467
Van Wagner <i>v.</i> McEwen....	“ “ 412
Glens, Exr., <i>v.</i> Whipple.....	1 Beasley 50
Bumpus <i>v.</i> Platner.....	1 John's C. R. 213
Abbott <i>v.</i> Allen, Exr.....	2 “ “ 519
Johnson <i>v.</i> Geer....	2 “ “ 566
Leggett <i>v.</i> McCarty & ux.	3 Edwards C. R. 124
Withers <i>v.</i> Morrell.....	3 “ “ 560
Davidson <i>v.</i> DeFreest.....	3 San'd C. R. 456
Edwards <i>v.</i> Bodine	25 Wen'd 109
Farnham <i>v.</i> Hotchkiss...2	Keys (N.Y.C.A) p 9

II The appellant having taken possession under a deed containing full covenants of seizin and warranty, his remedy is upon those covenants at law, or for relief by bill in equity—to have the contract rescinded or other relief—and this, whether or not fraudulent representation as to the title, is alleged or proved. The appellant keeps the land undisturbed; he cannot likewise keep the money he agreed to pay for it.

Banks, Exr. v. Walker.....	2	Sandford	344
Abbott v. Allen.....	2	John (Chy)	519
Bradley v. Bosley.....	1	Barbour (Chy)	125
“ “	1	“	128, 129
Miller v. Avery.....	2	“	582, 595
Hardwick v. Forbes, admr.....	1	Bibb (Kt)	212
Tallmadge v. Wallis	25	Wend	107
Edwards and ux v. Bodine.....	26	Wend	1098

III No relief is prayed for in the answer, except that the bill may be dismissed and no relief other than that prayed can be granted.

3 Daniels Chy. Practice	p	1742
Miller v. Gregory.....	1	C. E. Green 274
Graham v. Berryman and ux	4	“ “ “ 29
Leddels Ex. v. Starr & ux & al.	4	C.E. Green 159
Eddleston v. Collins 3 DeGex McN. & Gordon, p. 1 & 16		
Edwards v. McLeary & al.....		Coopers Chy R 308
Denston v. Morris.....	2	Sandford 37
Bumpus v. Platner.....	1	Johns Chy. 213
Bradley v. Bosley.....	1	Barbour Chy 125
Talmadge v. Wallace	25	Wend 107, 115