

N. J. Court of Errors and Appeals.

Between	}	ON APPEAL
JAMES LLOYD, et al,		FROM
Complainants and Respondents,		THE COURT OF
and		CHANCERY.
PETER HULICK, et als,		BRIEF OF
Defendants and Appellants,	RESPONDENTS.	

The order sought to be reversed in this cause relates to the demurrer filed by the appellants in the Court of Chancery and there are two aspects of the case that require attention.

The first is as to the sufficiency of the demurrer itself and the second is, if the demurrer be considered sufficient in law, whether the respondents' bill sets forth a cause of action.

FIRST:—Section 22 of "An Act respecting the Court of Chancery (Revision of 1902)" on page 518 of the Laws of New Jersey of 1902 provides that "Every plea or demurrer in Chancery shall have annexed thereto the affidavit of the defendant or defendants filing the same, or his or their agent in the suit, &c." The affidavit annexed to defendants' demurrer is made by Peter Hulick; but it fails to show that he is one of the defendants or that he is agent in the suit for the defendants or any of them. The affidavit fails to comply with the requirements of the statute and hence is bad, and for that cause was properly over-ruled. 10

The demurrer is also objectionable under the 209 rule which requires that the particular grounds upon which it rests shall be specified. 20

The grounds taken in the petition of appeal could have been distinctly stated in the demurrer in intelligible propositions as the grounds.

Bishop v. Waldron, 11 Dickenson 484.

(See middle of page 486 and cases cited.)

Essex Paper Co. v. Greacen, et al,

19 Atlantic Reporter, Volume 19, page 466 &c.

"A general demurrer will not lie to a bill which presents a case in which the legitimate proof may be such as to call for a decree in favor of the complainant." 30

Drummond v. Westervelt, IX. C. E. Green 30.

The demurrer was, after argument, over-ruled with costs, and the court granted thirty days' time to the appellants to answer, so that they are not precluded from their opportunity to present by apt and proper pleadings any defence on the merits to which they were entitled.

10 SECOND:—If the court consider the demurrer sufficient in law then must be considered whether the respondents' bill sets forth a cause of action. And in the consideration of this question we will examine in order the reasons alleged by appellants in their petition of appeal wherein respondents' bill fails to set forth a cause of action.

FIRST CAUSE:—The appellants contend that the bill of complaint does not allege and aver facts that make a case in direct terms and with reasonable certainty. By perusal of the bill is shown that the appellant, Peter Hulick, was owner of the lands in question, and made contract to sell to the respondents by a certain kind of deed; that said Peter Hulick conveyed said lands to his daughter; that respondents made tender of the consideration to Peter Hulick; that no changes were made in the contract; that Peter Hulick, his daughter and her husband joined in a deed to respondents for said lands; that said deed contained covenants, agreements, conditions, restrictions and reservations of which respondents were entirely ignorant; that the same were limitations on respondents' title and not according to contract; and that appellants refused to make the title good and according to the contract when demanded and that all of those actions were steps in a conspiracy and desire on the part of the appellants or some or all of them to evade the carrying out of the said contract and to defraud and injure respondents in the premises, and that appellants did suggest and adopt the said plans to defraud and hinder and injure respondents. The above facts as stated in the bill of complaint in the light of the following cases make a good cause of action.

20

30

"Decree for specific performance."

Gough v. Williamson, 50 Atlantic Reporter 323.

"Under an agreement for the sale of lands the purchaser is entitled to a deed describing the land in the words of the agreement without any limitations other than those therein

40

agreed upon."

Waters v. Bew. 52 New Jersey Equity 787.

A person who contracts to prepare a deed with full covenants is guilty of a fraud if he prepares a deed without covenants and delivers it as prepared in accordance with the terms of the preliminary agreement."

Bithell v. Bithell, 92 Indiana 318.

"Where party took deed with covenant of assumption of mortgage without knowledge, under the circumstances he would be entitled to relief against the assumption were he to apply to this court to reform the deed by expunging it." 10

Bull v. Titsworth, 2 Stewart 73.

After seventeen years deed ordered reformed and costs awarded against appellants for their defending in face of the facts.

Dod. v. Paul, 16 Stewart 302.

"To correct deeds for fraud, &c. is one of the ancient and well established heads of equity jurisdiction, and it is the duty of the Court, where such fraud &c. is clearly proved, to correct it by any means in its power to effect the amendment and the object of it." 20

"The defendants having refused to correct, &c. after it was brought to their notice and defended the suit when they knew it was wrong, &c. must pay costs."

Loss v. Obry, VII, C. E. Green 52.

This case comes within the class of frauds; and the fraud is evidenced by the acts of the parties and their subsequent refusal to correct and make their acts conform to the agreement when their attention is called thereto. The introduction of the limitations into the deed was not by mistake, because that would indicate a mutuality of consideration of the subject matters; but in this case the introduction of the limiting clauses into the deed without the knowledge of the respondents is a deceit and a fraud. 30

"Representations may consist of conduct as well as of words and relief may be granted in cases arising out of acts even when no words were employed to deceive."

The general rule is that fraud will not be presumed but must be proved. And the burden of proof therefor is on the party alleging it. A man who alleges fraud must clearly and 40

distinctly prove the fraud he alleges. It is not always necessary however that direct affirmative or positive proof of fraud be given. It may be and usually is proved by circumstantial or presumptive evidence. If the evidence is sufficient to satisfy the mind and conscience of the existence of the fraud, it will suffice, although it does not lead to a conviction of absolute certainty."

Am. & Eng. Encyclopaedia of Law, Volume 8, page 656, 1st Ed.

10 "General certainty is sufficient in pleadings in equity."

Gogherty v. Bennett. 10 Stewart 87.

"If there is in the bill substantial averment or recital of facts which disclose to the defendant generally the grounds of complaint, it will be sufficient on final hearing on pleadings and proofs in a case where the facts cannot be within the knowledge of the acting party, if the grounds of relief are substantially involved in the statements of the bill and sustained by the evidence."

Mott v. Mott, 4 Dickinson 192.

20 "A party who seeks redress on the ground of fraud, must point out, and specify the fraud, &c."

Small v. Boudinot, 1 Stock 381.

SECOND CAUSE:—The intention and supposition of the respondents is that they were receiving such a deed as was contracted to be delivered by the appellants as the appellants are bound to make good title according to the contract.

30 THIRD CAUSE:—The respondents did accept the deed; and the ignorance averred by the appellants was ignorance of the introduction of the limiting clauses complained of; but the respondents sought relief and correction of the appellants at once on discovery thereof, and the appellants cannot set up their own fraudulent actions to the detriment of the respondents.

FOURTH CAUSE:—The delivery and acceptance of the deed are matters of proof, and an allegation that the deed was delivered and accepted is sufficient.

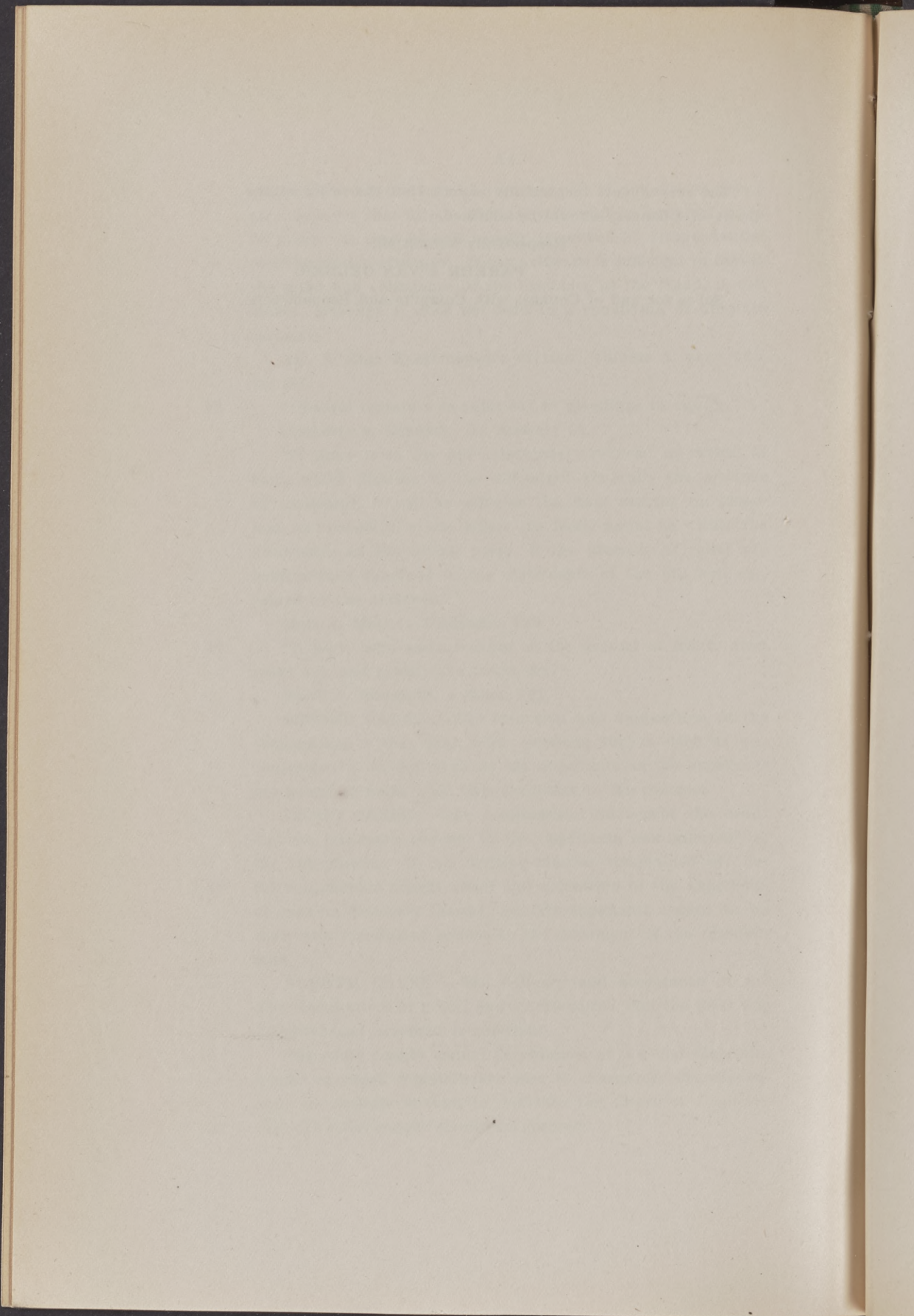
40 The relief sought cannot be obtained at law and the statements on which complainants seek to charge the the defendants are definite enough to convince the Court of Chancery that the relief sought should be granted.

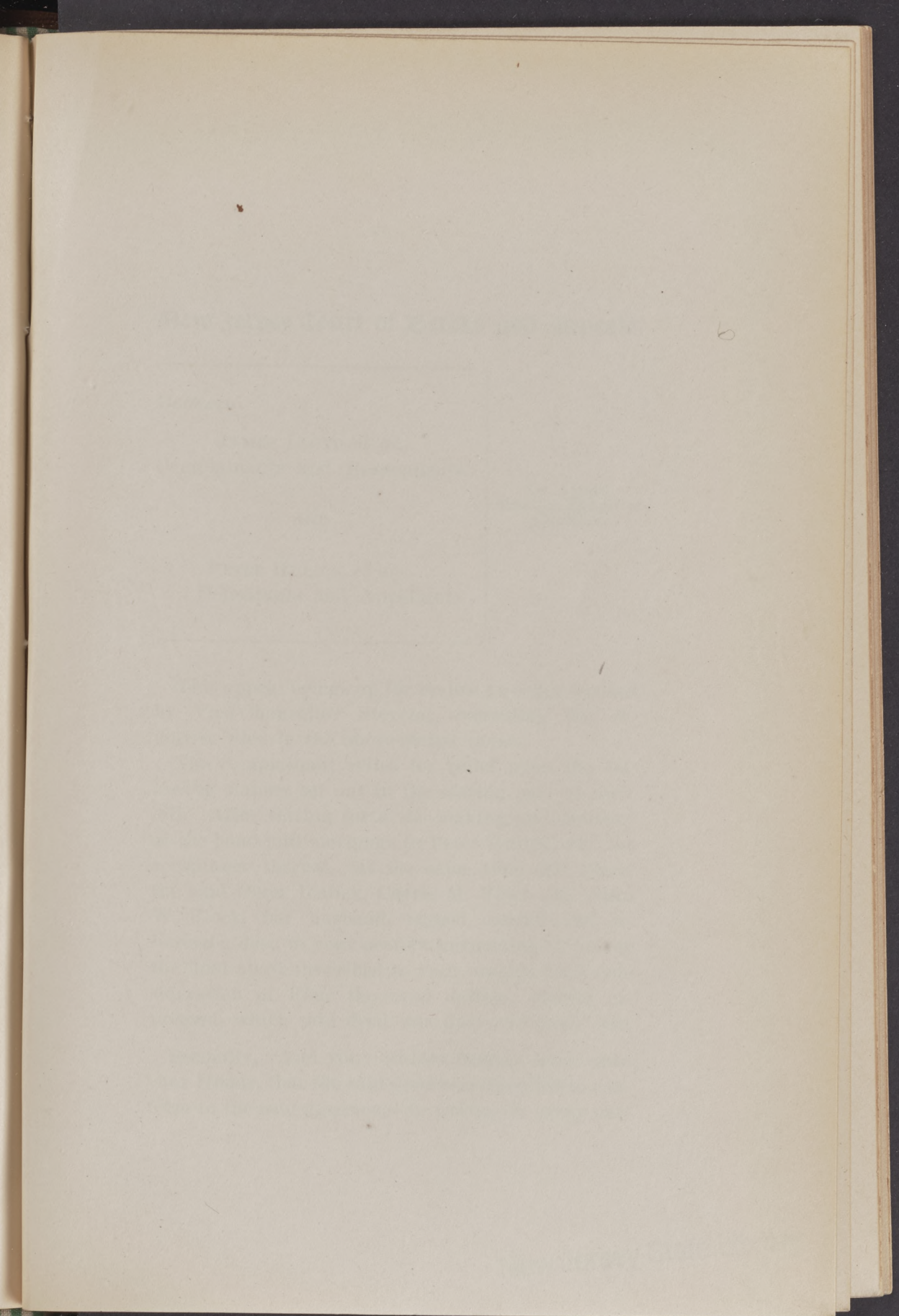
The respondents respectfully submit that the order of the Court of Chancery should be affirmed.

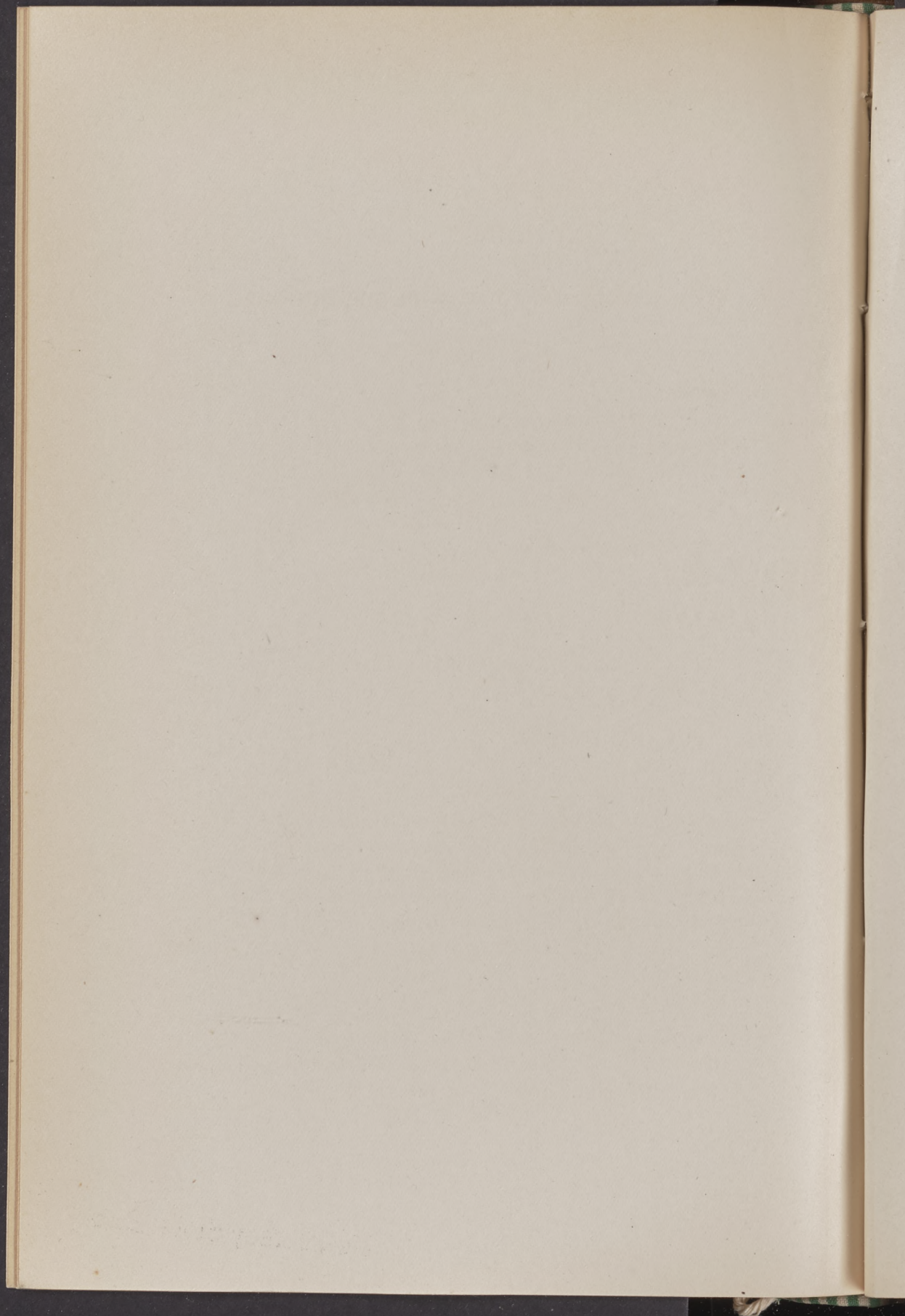
Respectfully submitted,

PARKER & VAN GELDER,

Sol'rs for and of Counsel with Compl'ts and Respondents. 6







New Jersey Court of Errors and Appeals.

Between

JAMES LLOYD *et al.*,
Complainants and Respondents,

AND

PETER HULICK *et als.*,
Defendants and Appellants.

On Appeal.
Brief on Behalf of
Appellants.

This appeal brings up for review an order advised by Vice-Chancellor Stevens, overruling the demurrer filed in the above-stated cause.

The complainant relies for relief upon the following clauses set out in the stating part of their bill. After setting forth the making and delivery of the bond and mortgage to Peter Hulick, and the acceptance thereof, "at the same time and place, the said Peter Hulick, Carrie M. Flock and John W. Flock, her husband, signed, sealed and *delivered* a deed to your orators purporting to convey the land above described to your orators for a consideration of Four thousand dollars, therein expressed, which said deed was duly executed," etc.

Secondly, "And your orators further show unto your Honor, that the said deed was intended to conform to the said agreement in writing in every par-

ticular, and that no modification or changes in the said agreement in writing have ever been proposed or agreed to by or between your orators and the said Peter Hulick, excepting that the said deed was taken by your orators, made by the said Peter Hulick, Carrie M. Flock and John W. Flock, her husband, for the purpose of acquiring the title to said lands by deed warranting the lands to be free and clear of all incumbrances according to the said agreement in writing.

Thirdly, "And your orators further show that at the time they accepted the said deed that they were entirely ignorant of the introduction of the aforesaid clauses in said deed limiting the title of the said lands and always supposed that the said deed conveyed an absolute estate of inheritance warranting the lands to be free and clear of all incumbrances, as it had been intended to do, and as provided by the said agreement in writing."

Fourthly, After setting out certain covenants, agreements, restrictions, reservations, the complainants allege, "which said covenants, agreements, restrictions and reservations and the said clauses containing the same are not in accordance with the said agreement in writing, but that the same are an incumbrance upon the said lands above mentioned, and by the said deed your orators only became seized of a limited title or estate therein, and that the said lands are not conveyed to your orators by the said deed warranting the lands to be free and clear of all incumbrances, according to the terms of said agreement in writing."

Fifthly, That "at the time they *accepted* the said deed they were entirely *ignorant* of the aforesaid clauses in the said deed limiting the title of the lands, and always *supposed* that the said deed

conveyed an absolute estate free and clear of all incumbrances, as it had been intended to do as provided by the said agreement in writing."

In the charging part of the bill, the complainants allege that the deed from Peter Hulick to Carrie M. Flock was executed for the purpose of harrassing your orators, and preventing them from securing a proper deed of conveyance of the said lands according to the terms of the said agreement in writing, and that the introduction of the clauses above-mentioned in the deed from Peter Hulick and Carrie M. Flock and John W. Flock, her husband, to your orators, whereby your orator's title to the said lands was attempted to be restricted, limited and incumbered, contrary to the terms of the said contract in writing, were steps in a conspiracy and desire on the part of the said Peter Hulick, Carrie M. Flock and John W. Flock, her husband, or some or all of them, to evade the carrying out of said contract in writing; that the said Peter Hulick, Carrie M. Flock and John W. Flock, her husband, were each well aware that the said deed above mentioned made to your orators did not conform to the said contract in writing, but contriving and intending to defraud your orators and injure them in the premises, they did suggest and adopt the said plan to defraud and hinder and injure your orators in the premises.

No inference can be drawn from any statement in the bill that the deed from Peter Hulick to Carrie M. Flock in any way had anything to do with the restrictions in the deed made by Peter Hulick, Carrie M. Flock and John W. Flock to James Lloyd and Edward E. Lloyd.

The only allegation in the said bill set out in reference to this deed is that "the said Carrie M. Flock accepted the said deed with full knowledge

of the fact that Peter Hulick has agreed by an agreement in writing above set forth, to sell the said lands to the complainants."

The only inference that can be drawn is that when the complainants accepted the deed as stated in their bill of complaint from Peter Hulick, Carrie M. Flock and John W. Flock, her husband, they accepted the deed as drawn, and that Carrie M. Flock and John W. Flock were not parties to the original agreement in writing, between Peter Hulick and James Lloyd and Edward E. Lloyd.

No inference can be drawn that the deed from Carrie M. Flock and John W. Flock, her husband, was intended to conform to an agreement made between Peter Hulick and James Lloyd and Edward E. Lloyd.

The above statements in the bill are vague and uncertain. They do not state the necessary circumstances, the time, place, manner and other incidents relating to the transfer and delivery and the acceptance of the deed.

"The bill must state the case in direct terms, and with reasonable certainty. The allegations must be positive, and not by way of recital, and must be of facts only, and not of law, and every averment of fact necessary to entitle the complainant to the relief sought must be contained in the stating part of the bill. If every necessary fact for the maintenance of the suit is not distinctly and expressly averred in that part of the bill, the defect cannot be supplied by averments in the other part of the bill." *Mitford's and Tyler's Pleading and Practice in Equity*, page 64.

The second clause of the complainant's bill above quoted, attempts to draw an inference as to the intention of the parties. The bill does not state whether the parties had any conference prior to

or at the time of the delivery of the deed; does not state the circumstances of the delivery of the deed; but does state an exception, and says, "the said deed was taken by your orators made by the said Peter Hulick, Carrie M. Flock and John W. Flock, her husband, for the purpose of acquiring title to said lands, by a deed warranting the lands free and clear of all incumbrances according to said agreement in writing." The exception is indefinite, and the clause warranting the title free and clear from all incumbrances would not relate to any restrictions contained in the deed itself. The covenants of warranty are not set out in the bill. The bill does not contain any allegation that it was the intention of the defendants to have the deed conform to the said agreement stated therein, or that the defendants practiced any fraud upon the complainants; nor does it allege any conduct on the part of the defendants which would lead the complainants to believe that the deed was delivered in conformity to the contract. If any inference can be drawn it must be to the contrary, because a deed was made to Carrie M. Flock, and Carrie M. Flock joined in the deed to the complainants. The only inference that could be drawn would be that there must have been a new agreement to induce Carrie M. Flock to join in the deed to the complainants. The complainants might have set out in the bill the fact that both members of the firm of Parker & Van Gelder, Mr. Winfield, S. B. Parker and Mr. George W. Van Gelder, and both the complainants, Mr. James Lloyd and Mr. Edward E. Lloyd, were present at the time of the delivery of the deed, and that Mr. Winfield S. B. Parker had been acting as counsel for the defendant, Peter Hulick, prior to the making of the deed, and that both Messrs.

Parker & Van Gelder examined the deed, prior to its delivery, and that they read the deed; that they prepared the mortgage. They might have set out what conversations, if any, took place at the time of the delivery of the deed, and who was present, and let the Court gather the intention of the parties from the facts.

In the third clause of the complainants' bill above cited, the complainants state, "that at the time they accepted the said deed they were entirely ignorant of the introduction of the aforesaid clauses." The mere acceptance of the deed would preclude them from offering testimony as to what any prior agreement or understanding or intentions were, whether in writing or not. *Nuremburg v. Young*, 15 *Vroom*, page 331.

The fourth clause above set out merely contains a legal proposition.

The fifth clause above set out, stated that they accepted the deed, that they were ignorant of the clauses, that they *supposed* the said deed conveyed an absolute estate, etc.

The first clause admits that the deed was delivered to them. In the charging part of the bill, they charge that the restrictions complained of were part of a conspiracy which they (defendants) suggested and adopted to defraud and hinder the complainants, but they do not allege any facts from which a fraud could be inferred.

The bill does not allege that any mistake was made; and only inferentially, without stating any facts, that any fraud was perpetrated.

The mere fact that they allege that they were ignorant of the clauses contained in the deed will be no excuse, whether it was ignorance of law or ignorance of fact.

The only redress would be to show that some

fraud had been practiced upon them, or that some mistake had been made. In order for them to do this, it would be necessary for them to state in this part of the bill the facts under which they were induced to accept the deed; whether they were ignorant and unable to read or write, whether some fraudulent statements were made as an inducement; who was present, the circumstances under which the representations were made; the time when the statements were made, if any, the manner, and all other incidents.

"The rights of the several parties, the injury complained of, and every other necessary circumstance, as time, place, manner and other incidents, ought to be plainly or succinctly alleged. Whatever is essential to the rights of the complainants, and is necessarily within their knowledge, ought to be alleged positively and with precision." Mitford's and Tyler's Pleading and Practice in Equity, page 136.

"Where a mortgage debt has been due for more than twenty years, a general allegation that all interest has been paid is not sufficient to support a proof that interest was paid from time to time during the twenty years, so as to prevent the statute of limitations from operating; for, consistently with the truth of this allegation, the interest might have been paid in a lump." *Gregson v. Hindly*, 10 Jur., 383—V. C. E.

"If a bill prays that the trustee of leasehold property may be declared to be a trustee for the plaintiff as claiming through a person to whom it accrued by an intestacy, the bill must state or charge that the intestate did not dispose of or incumber the property, and that it was not applied in or required for the payment of his debts." (See *Stephens v. Frost*, 2 Y. & C. Eq. Ex., 297.)

"An allegation that the defendant is the representative of a firm is not sufficient to admit proof of circumstances which might have made that party not only a representative but actually the party carrying on the business." *Schneider v. Lizardi*, 15 Law J. (N. S.), 435 M. R.

"Where a foreign instrument is intended to operate according to a law which is not known in England, and which, as foreign law, is to be proved as a fact to the cause, an allegation that such instrument is void is too vague." *The Duke of Brunswick v. The King of Hanover*, 6 Beav., 59.

"Where the plaintiff means to rely on an admission made to a person whom he intends to examine as a witness, it is necessary that he should state or charge, not merely that such an admission was made, but that it was made to that person, in order to give the defendant an opportunity of cross-examining such person, or of otherwise meeting the case made upon the evidence." *Austin v. Chambers*, 6 Cl. & Fin., 38. "And where a plaintiff proceeds against a defendant upon the ground of admissions made by the defendant of his having had notice, he ought to mention in the bill the date of such admission, and the names of persons to whom they were made, in order to give the defendant an opportunity of meeting the case." *Earle v. Pickin*, 1 Russ. & M., 547.

"Conversations not put in issue cannot be used in evidence. But when communications are stated in the answer the plaintiff has a right to show the real nature of those communications, although they are not referred to in the bill." *Graham v. Oliver*, 3 Beaver, 124. *Hughes v. Garner*, 2 Y. & S. Eq. Ex., 328.

"Where a bill charges generally that there are errors in an account and that they appear in a

certain report of an accountant in the plaintiff's possession, which the bill calls upon the defendant to inspect, but does not specifically point out the errors, neither that report nor evidence of the errors pointed out in it can be recorded, although the report is stated, and the alleged errors in the account are explained in a cross-bill by the defendant." *Shepherd v. Morris*, 4 Beav., 252.

"A statement that 'the defendant alleges, and the plaintiff believes the fact to be,' is not a sufficient allegation of a material fact." *Egremont v. Colwell*, 5 Beav., 620.

"If a bill insists that a will was a good execution of a power at law, and, if not, in equity, and then prays that the defect, if any, may be supplied against the defendant, the bill is demurrable; for the court cannot act upon an hypothetical bill, desiring relief either at law or in equity according to the result of the argument." *Edwards v. Edwards*, Jac. 335.

"If a bill for relief is so vague that it does not state any certain case upon which a court of equity will grant relief, it will be demurrable for want of equity, although the plaintiff alleges his inability to state circumstances more definitely, and prays a discovery." *Wormald v. De Lisle*, 3 Beav., 18.

"Allegations that an heir was brought up in poverty and without education, and kept in ignorance of his rights, and supplied with small sums of money, are too vague allegations of fraud to support a bill of discovery. A bill so framed is designated a fishing bill." *Munday v. Knight*, 3 Hare, 497.

In the case of *Smith's Administrators vs. Wood*, 15 Stew., page 567, affirmed in this court, 17 Stew., page 703, for the reasons given by the Vice Chan-

cellor, the Vice Chancellor says, "The bill also charges that the sale made by the Sheriff of the lands of the assignor was fraudulent, but the charge is made in language so meagre and vague as to give no indication whatever what facts will be put in evidence to establish the truth of the charge. The bill simply says that if a sale of the lands has been made, it was not made in good faith, nor for an adequate or valuable consideration, but as a step in the execution of a scheme which the assignor had contrived for the purpose of defrauding his creditors. This averment is subject to almost every objection which it is possible to urge against an imperfect pleading."

In the case of *Small vs. Boudinot*, 1 Stock., pages 381-391, in the syllabus it says, "A party who seeks redress on the ground of fraud must point out and specify the fraud. A general charge of fraud is not sufficient."

There is not even a general charge of fraud in the complainants' bill in this case, but only an inferential one, in the charging part of the bill.

The syllabus further says, "That the complainant has understood that a sale was conducted fraudulently, that the defendants and others specified were the wrongdoers, and that they suppressed certain facts which ought to have been made known, is not a sufficient statement of facts which constituted the alleged fraud. It should appear in what respect the sale was fraudulently conducted, or what facts were suppressed to the detriment of the complainant."

It further states in the syllabus in this case, "The complainant should at least have alleged and proved that it was a secret contrivance, without his knowledge or consent." The Chancellor, on pages 390 and 391, after setting out further allegations in the

bill says, "It is apparent that a charge like this is no foundation for relief. A party who seeks redress on the ground of fraud must point out and specify the fraud. A general charge of fraud is not sufficient. The party alleging it, must state the facts which constitute the fraud. A general charge of fraud in a bill, is not sufficient to authorize a decree for the complainant, on demurrer to the bill. *McCaleb v. Perry*, 5 Heyward, 88. How can the defendant meet this charge? How can he answer it? The charge is only this: That the complainant has understood (without even averring his belief of its truth), that the sale was conducted fraudulently—that the committee and Small were the wrongdoers—and that they suppressed certain facts which ought to have been made known. In what respects the sale was fraudulently conducted, or what facts were suppressed, to the detriment of the complainant, we are not told."

Beach's Modern Equity Practice, page 120, Section 95, and note says, "No rule of equity pleading is better settled than that which declares that every material fact which it is necessary for a complainant to prove to establish his right to the relief he asks must be alleged in the premises of his bill with reasonable fullness and particularity." *Smith's Administrator v. Wood*, 42 N. J. Eq., 563, 566; *Philhower v. Todd*, 11 N. J. Eq., 55; *Kip v. Kip*, 33 N. J. Eq., 213; *Search v. Search*, 27 N. J. Eq., 137; *Harding v. Handy*, 11 Wheat., 103p; *Drews v. Beard*, 107 Mass., 64, 73; *Phelps v. Elliott*, 35 Fed. Rep., 455, 461; *St. Louis, etc., Ry. Co. v. Johnston*, 133 U. S., 577; *Shepard v. Shepard*, 6 Conn., 37. "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, 220.

"Uncertainty in material allegations is not fatal to a bill whose object is the discovery of material facts alleged to be entirely in the defendant's knowledge." *Watson v. Murray*, 23 N. J. Eq., 257.

"General allegations will not be sufficient where the bill seeks (1) to attach property, or (2) to have a receiver appointed, or (3) to obtain an injunction, or (4) to set aside a conveyance, a settlement of a contract, or (5) to reform a written instrument, or (6) to sell, re-invest or expend the property of minors, or (7) to set up a resulting or constructive trust, or (8) to have a specific performance of a contract, or (9) to obtain a divorce, or (10) to obtain a new trial at law, or (11) to review a former decree in equity, or (12) where in any case fraud is charged or a trust is set up." *Gibson's Suits in Chancery*, Par. 201.

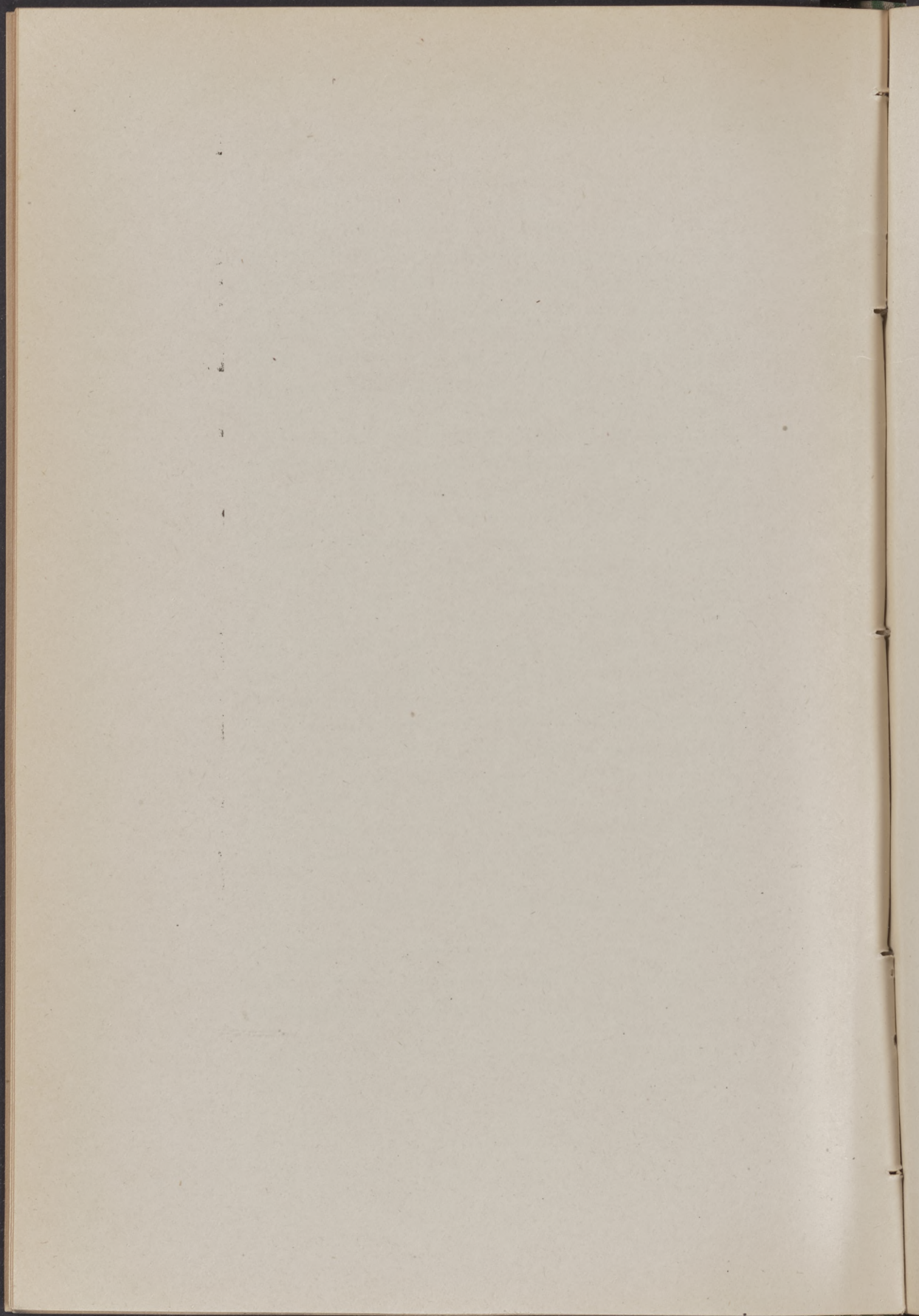
Beach's *Modern Equity Practice*, page 133, Par. 107, says, "A bill for relief on the ground of fraud must be specific in its statements of the facts that constitute the fraud alleged. 'Mere words in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient grounds of equity jurisdiction unless the transactions to which they refer are such as in their essential nature constitute a fraud or breach of trust, for which a Court of Chancery can give relief.' The defendant should not be subjected to being taken by surprise, and enough should be stated to justify the conclusion of law, though without undue minuteness. In a bill to set aside a decree on the ground of fraud, it will not suffice to charge generally that it was fraudulently procured or that the court was imposed upon. A state of facts must be disclosed by the bill from which the court can see that the conclusions stated by the pleader to the effect that the judgment was fraudulently procured, etc., are properly drawn."

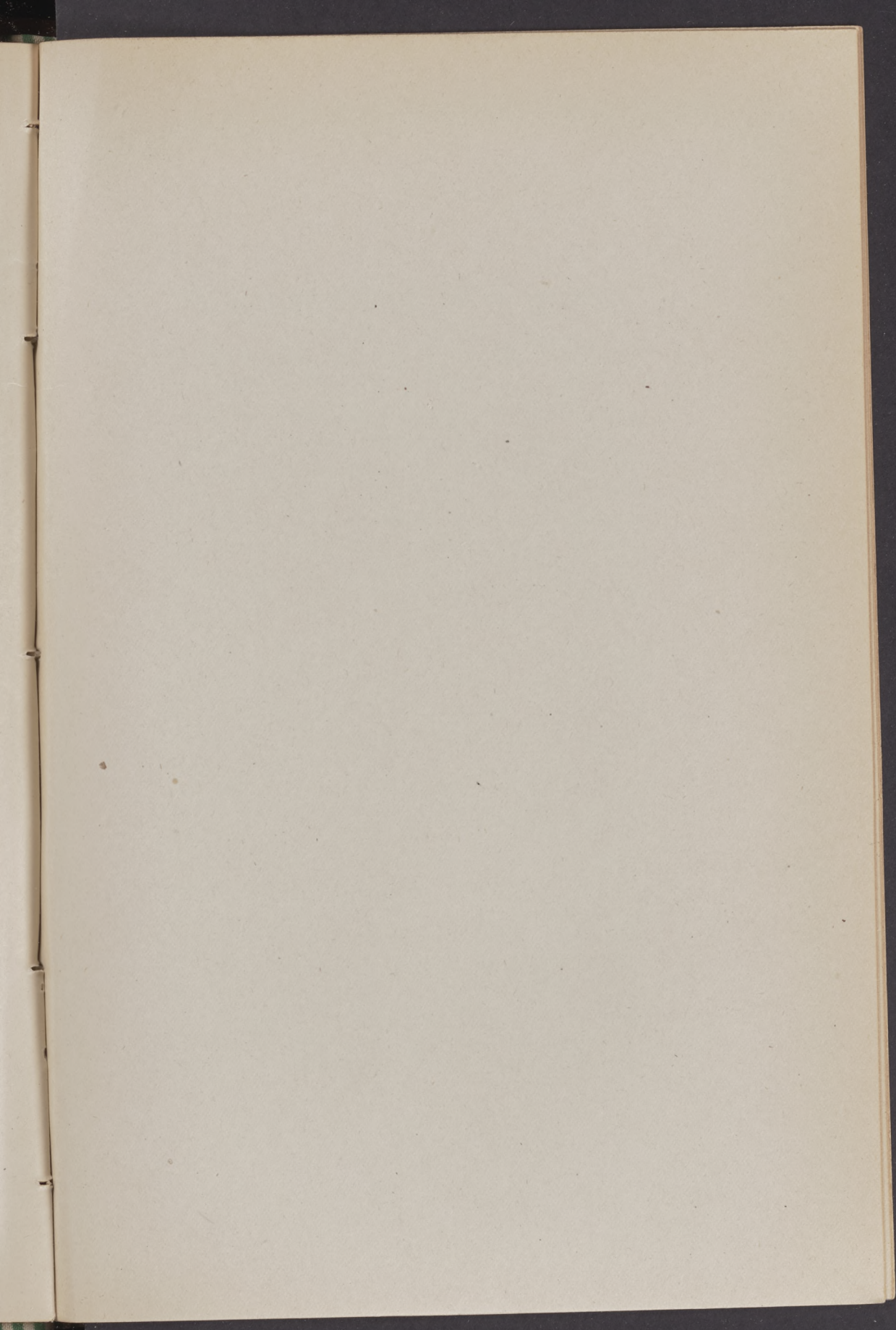
Note 2 says, "St. Louis, etc., Ry. Co. v. Johnston, 133 U. S., 577. When the plaintiff in equity seeks relief from the effects or results of some fraud, accident or mistake, he should in his bill fully and explicitly state the circumstances so as to present a clear picture of the particulars, or how the fraud was committed, and how the plaintiff was misled; of the character and causes of the accident or mistake and how it occurred. *Merrill vs. Washburn*, 83 Me., 189; s. c., 22 Atl. Rep., 118. If the allegation is insufficient, of course a demurrer does not confess the fraud. *Penny v. Jackson*, 85 Ala., 67; s. c., 4 So. Rep., 720. A bill to set aside or annul a patent of the United States for public land on account of fraud or mistake should set out by distinct averments the particulars of the fraud, the names of the parties engaged in it and of the officers imposed on, and the manner in which the mistake occurred. *United States v. Atherton*, 102 U. S., 372. See also *Moore v. Hawkins*, 19 How., 69. An averment that decedent, at a time when he was 'very feeble both in mind and body, was persuaded and induced, through some undue and improper influence unknown to the complainants to execute,' a certain deed is entirely insufficient, in that it does not state the facts constituting such influence. *Jackson v. Rowell*, 87 Ala., 685; s. c., 6 So. Rep., 95."

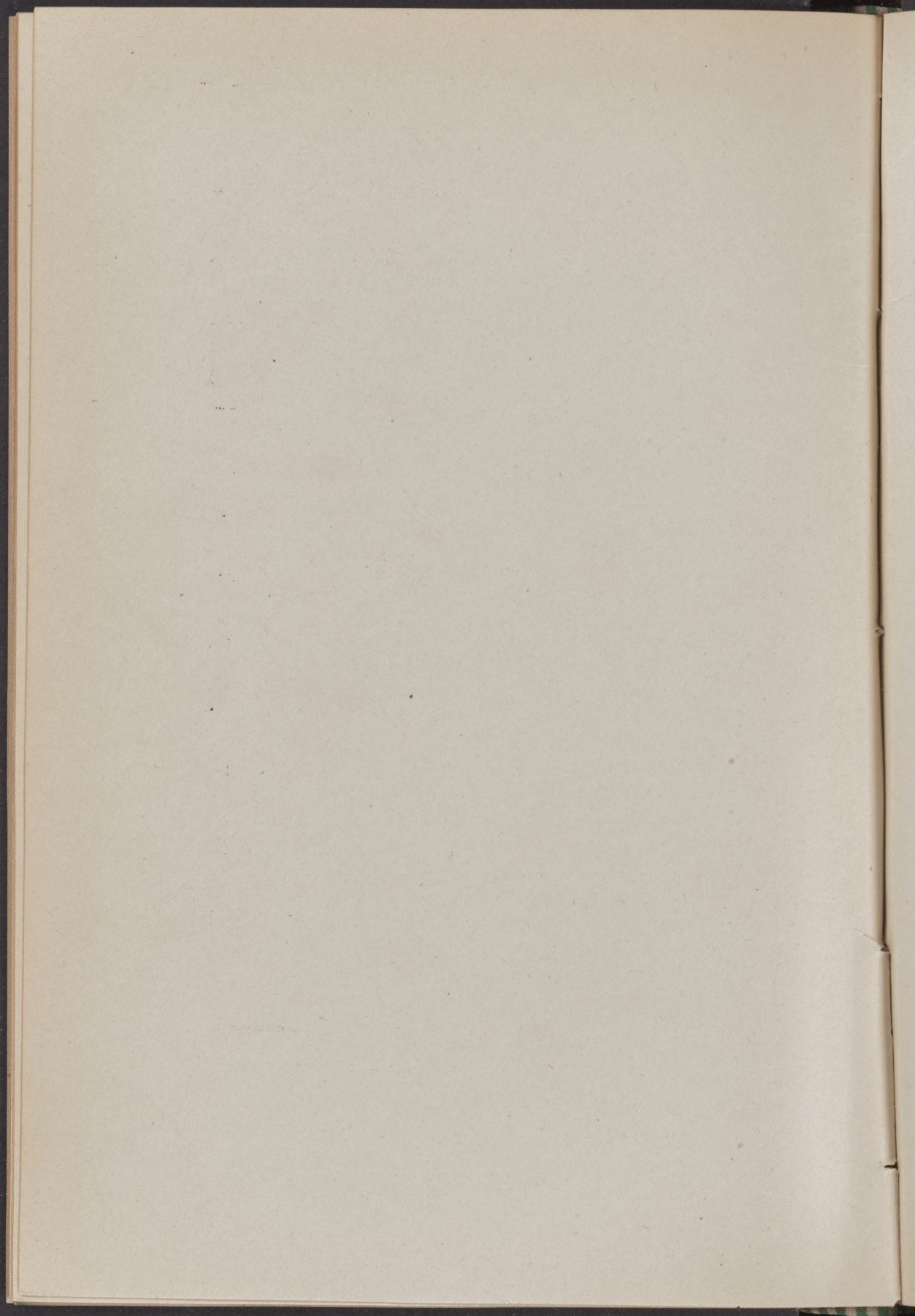
The order overruling the demurrer is erroneous, and should be reversed, and the bill dismissed.

Respectfully submitted,

THOMAS P. FAY,
Solicitor and of Counsel with
Defendants-Appellants.







In Chancery of New Jersey.

TO HIS HONOR, WILLIAM J. MAGIE, CHANCELLOR
OF THE STATE OF NEW JERSEY:

Humbly complaining shows unto your Honor, 20
your orators James Lloyd and Edward E. Lloyd, of
the City of Long Branch, in the County of Mon-
mouth and State of New Jersey, that on or about
the sixteenth day of August, A. D. One thousand
nine hundred and four, Peter Hulick, of the City
of Long Branch, in the County of Monmouth and
State of New Jersey, owned certain lands described
as follows:

All that certain lot, tract or parcel of land and 30
premises, hereinafter particularly described, situ-
ate, lying and being in the Township of Ocean, in
the County of Monmouth and State of New Jersey,
at Long Branch.

Beginning at a stone in the road leading from
Corlies and Lane's Store to Mechanicsville, at the
northeast corner of a lot of land belonging to Ed-
win Dennis, thence (1) along his line south three
degrees and thirty minutes, west eleven chains and
fifty-seven links to a stake on the easterly side of 40
a buttonwood tree; thence (2) south one degree
and thirty minutes, west four chains and twenty-
nine links to the corner of what is called the Murry
Lot; thence (3) along the line thereof, south
seventy-nine degrees and thirty minutes, east four
chains and ninety-seven links; thence (4) north

10 three degrees, east nineteen chains and twenty-one links to a stone in the middle of the aforesaid road; thence (5) along said road south sixty-four degrees and fifteen minutes, west five chains and sixty-seven links to the place of beginning. Containing eight acres and seventy-eight-hundredths of an acre."

And that on the day last aforesaid the said Peter Hulick entered into an agreement in writing with
 20 your orators for the sale and conveyance to your orators of the said lands warranting the land to be free and clear of all encumbrances of tenor and effect following:

"August 16, 1904, received of James Lloyd and Edward E. Lloyd, Two hundred dollars on account of purchase price of a plot of ten acres of ground, more or less, situate in Eatontown Township, Monmouth County, New Jersey. Bounded south by estate of Samuel Woolley, west by lands of Sarah
 30 E. Dennis and estate of Samuel Woolley, north by Wall Street and on the east by lands of Geo. Travers, Willam Woolley, estate of Joseph Brown and John Blakely and lands of one Iden. The purchase price to be Four thousand dollars, payable as follows: Two hundred dollars, for which this receipt is given, eight hundred dollars on October 15th, 1904, when deed is to be given warranting the land to be free and clear of all encumbrances and I am to take a mortgage for the balance of the purchase money of Three thousand dollars, payable one
 40 year after date of same with interest at five per cent., payable semi-annually with privilege to pay off the same at any time before maturity in payments of not less than one thousand dollars, the said James Lloyd and Edward E. Lloyd to pay all taxes assessed against the above premises. (Signed) Peter Hulick."

And your orators further show that after the signing of the aforesaid agreement, to wit: on or about the seventeenth day of August, One thousand nine hundred and four, the said Peter Hulick made, executed and delivered a deed embracing the premises above described, conveying the said premises to Carrie M. Flock, who is the only child of said Peter Hulick, which said deed bears date the fifteenth day of July, A. D. One thousand nine hundred and four, and was acknowledged and recorded on the seventeenth day of August, One thousand nine hundred and four, in the Monmouth County Clerk's Office at Freehold, New Jersey, in Book 735 of Deeds, on page 154, etc., and that the consideration in the said deed expressed was the sum of One dollar and other good and valuable considerations; but your orators charge and insist that the said deed was made, executed and delivered on the said seventeenth day of August, A. D. One thousand nine hundred and four, and that the date mentioned on the said deed was not the true day, month and year when the said deed was signed, sealed and delivered. And that the said deed of conveyance above-mentioned, made by Peter Hulick to Carrie M. Flock was signed, sealed, acknowledged and delivered by the said Peter Hulick to the said Carrie M. Flock and that the said Carrie M. Flock accepted said deed with full knowledge of the fact that the said Peter Hulick had agreed by agreement in writing, above set forth, to sell the said lands and premises to your orators.

And your orators further show that on the sixteenth day of August, One thousand nine hundred and four, your orators, according to the terms of the said agreement in writing, paid to the said Peter Hulick the sum of Two hundred dollars on account of the purchase price for the said lands

10 mentioned in the said agreement in writing, and
 afterwards on or about the fifteenth day of Oc-
 tober, A. D. One thousand nine hundred and four,
 your orators tendered to the said Peter Hulick
 the sum of Eight hundred dollars in cash and a
 mortgage in proper legal form, dated the fifteenth
 day of October, A. D. One thousand nine hundred
 and four, made by your orators and their wives to
 the said Peter Hulick, covering the land above-men-
 20 tioned and given to secure the sum of Three
 thousand dollars, with interest in one year from the
 date thereof, according to the terms of the said
 agreement in writing, which said cash and mort-
 gage was accepted by said Peter Hulick and at
 the same time and place the said Peter Hulick,
 Carrie M. Flock and John W. Flock, her husband,
 signed, sealed and delivered a deed to your orators,
 purporting to convey the lands above described
 to your orators for the consideration of Four
 30 thousand dollars therein expressed, which said deed
 was duly acknowledged by the said Peter Hulick,
 Carrie M. Flock and John W. Flock, her husband,
 on the fifteenth day of October, A. D. One thousand
 nine hundred and four, before Harriet M. Presley,
 a Commissioner of Deeds of New Jersey, and was
 recorded on the twenty-second day of October, A.
 D. One thousand nine hundred and four, at eight
 o'clock in the forenoon, in Book 737 of Deeds for
 Monmouth County, on pages 336, &c., as by the en-
 40 dorsement thereon will more fully and at large
 appear.

And your orators further show unto your Honor,
 that the said deed was intended to conform to the
 said agreement in writing in every particular and
 that no modifications or changes in the said agree-
 ment in writing have ever been proposed or agreed
 to by or between your orators and the said Peter

Hulick, excepting that the said deed was taken by
 your orators, made by the said Peter Hulick, Carrie
 M. Flock and John W. Flock, her husband, for the
 purpose of acquiring the title to said lands by a
 deed warranting the lands to be free and clear of
 all encumbrances according to said agreement in
 writing. 10

And your orators further show that certain cove-
 nants, agreements, conditions, restrictions and
 reservations were made in the said deed in and by
 certain clauses in the said deed, made by Peter 20
 Hulick, Carrie M. Flock and John W. Flock, her
 husband, to your orators of the following tenor and
 effect: "This property is sold on the express con-
 dition, covenant and restriction, that if the said
 party of the second part shall divide the above de-
 scribed property into lots, no lot shall be smaller
 than one hundred by two hundred feet, and that
 no house shall be erected upon any of the said
 premises except it be a cottage with the necessary
 out-buildings to cost at least when completed, the 30
 sum of Five thousand dollars.

The said premises are sold upon the express con-
 dition, covenant, restriction and reservation that
 no part of the said premises shall be sold to any
 person of African descent and it is further cove-
 nanted and agreed by and between the parties here-
 to that if any of the above covenants, conditions,
 restrictions and reservations are violated by the
 party of the second part, the property hereby
 granted shall revert to the party of the first part 40
 or their heirs.

And it is understood and agreed that these cove-
 nants and agreements are attached to and shall be
 construed to be a covenant running with the land.
 Which said covenants, agreements, conditions, re-
 strictions and reservations and the said clauses

10 containing the same are not in accordance with the said agreement in writing, but that the same are encumbrances upon the said lands above-mentioned and by said deed your orators only became seized of a limited title or estate therein and that the said lands were not conveyed to your orators by the said deed warranting the lands to be free and clear of all encumbrances, according to the terms of the said agreement in writing.

20 And your orators further show that at the time they accepted the said deed that they were entirely ignorant of the introduction of the aforesaid clauses in said deed limiting the title of the said lands and always supposed that the said deed conveyed an absolute estate of inheritance warranting the land to be free and clear of all encumbrances as it had been intended to do and as provided by the said agreement in writing.

30 And your orators further show that when your orators discovered the said clauses in said deed, attempting to limit and encumber the said lands, your orators applied to the said Peter Hulick, Carrie M. Flock and John W. Flock, demanding that they correct said deed by striking out the said clauses, and that said deed be made to conform to the terms of said agreement, whereupon said Peter Hulick, Carrie M. Flock and John W. Flock refused to make such correction and refused to make said deed conform to the terms of said agreement in writing.

40 And your orators charge that the said deed from the said Peter Hulick to Carrie M. Flock was executed and delivered for the purpose of harrassing your orators and of preventing them from securing a proper deed of conveyance of the said lands according to the terms of said agreement in writing and that the introduction of the clauses above-mentioned in the deed, made by said Peter Hulick,

Carrie M. Flock and John W. Flock, her husband, 10
 to your orators, whereby your orators' title to the
 said lands was attempted to be restricted, limited
 and encumbered, contrary to the terms of the said
 contract in writing, were steps in a conspiracy and
 desire on the part of the said Peter Hulick, Carrie
 M. Flock and John W. Flock, her husband, or some
 or all of them to evade the carrying out of the said
 contract in writing, and that the said Peter Hulick,
 Carrie M. Flock and John W. Flock, her husband, 20
 were each well aware that the said deed above-
 mentioned made to your orators, did not conform to
 the said contract in writing, but contriving and in-
 tending to defraud your orators and injure them in
 the premises, they did suggest and adopt the said
 plans to defraud and hinder and injure your
 orators in the premises.

And your orators further charge that the said
 covenants, agreements, conditions, restrictions and
 reservations and the said clause containing the
 same, whereby the said Peter Hulick, Carrie M. 30
 Flock and John W. Flock, or some of them, at-
 tempted to limit and encumber the estate and title
 of your orators to said lands are serious and vital
 limitations and encumbrances on said lands di-
 minish the value of said lands to a great extent and
 prevent your orators from improving or selling said
 lands.

And your orators well hoped that the said Peter
 Hulick, Carrie M. Flock and John W. Flock, her 40
 husband, would have signed, sealed, executed and
 delivered a proper deed of conveyance to your ora-
 tors, warranting the land to be free and clear of all
 encumbrances, and when your orators discovered
 that the said deed did not conform to the provisions
 of the said agreement in writing and your orators
 had demanded a proper deed according to the terms

10 of the said agreement in writing from the said Peter
Hulick, Carrie M. Flock and John W. Flock, her
husband, your orators well hoped that the said
Peter Hulick, Carrie M. Flock and John W. Flock,
her husband, would have complied with such rea-
sonable requests of your orators as in equity and
good conscience they ought to have done.

And the said defendants sometimes pretend that
the said deed made by them to your orators, is a
20 deed warranting the land to be free and clear of all
encumbrances to your orators, such as is described
in the said agreement in writing, whereas your ora-
tors charge the contrary thereof to be the truth and
that the said deed is not a deed warranting the said
lands to be free and clear of all encumbrances.

All which actings, doings and pretenses of the
said defendants are contrary to equity and good
conscience and tend to the manifest wrong, injury,
damage and oppression of your orators in the prem-
ises.

30 In consideration whereof, and for as much as
your orators are without adequate remedy in the
premises at and by the strict rules of the common
law and can only obtain relief in this Honorable
Court where matters of this nature are properly
cognizable and relievable.

To the end therefore that the said Peter Hulick,
Carrie M. Flock and John W. Flock, her husband,
may without oath to the best and utmost of their
40 respective knowledge, remembrance, information
and belief, full, true and perfect answer make, as
fully and particularly as if the same were here re-
peated and they and every of them distinctly inter-
rogated thereto and that the said deed dated the
fifteenth day of October, A. D., One thousand nine
hundred and four, made by Peter Hulick, Carrie
M. Flock and John W. Flock, her husband, to your

orators, may by the decree of this Court be reformed and corrected by striking out the clauses heretofore referred to of the tenor and effect as follows: 10

“This property is sold on the express condition, covenant and restriction, that if the said party of the second part shall divide the above described property into lots, no lot shall be smaller than one hundred by two hundred feet, and that no house shall be erected upon any of the said premises except it be a cottage with the necessary outbuildings, to cost at least when completed the sum of Five thousand dollars. 20

The said premises are sold upon the express condition, covenant, restriction and reservation that no part of the said premises shall be sold to any person of African descent and it is further covenanted and agreed by and between the parties hereto that if any of the above covenants, conditions, restrictions and reservations are violated by the party of the second part, the property hereby granted shall revert to the party of the first part or their heirs. 30

And it is understood and agreed that these covenants and agreements are attached to and shall be construed to be a covenant running with the land,” so that an estate in fee simple, warranting the land to be free and clear of all encumbrances may be decreed to have passed thereby in accordance with the intention of the parties and the terms of the said agreement in writing.

And that your orators may have such further or other relief in the premises as the nature of the case may require and as shall be agreeable to equity and good conscience. 40

May it please your Honor, the premises considered to grant unto your orators the States writ or writs of subpoena issuing out of and under the seal of this honorable court, to be directed to the

10 said Peter Hulick, Carrie M. Flock and John W. Flock, commanding them and each of them by a certain day under a certain penalty therein to be expressed to be and appear before your Honor, in this honorable court, then and there to answer all and singular the said premises and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet, and shall be agreeable to equity and good conscience.

20 And your orators as in duty bound, will ever pray, etc.

PARKER & VAN GELDER,
Solicitors and of Counsel with Complainants.

Filed Nov. 3, 1904.

IN CHANCERY OF NEW JERSEY.

30

Between

JAMES LLOYD *et al.*,
Complainants,

and

40

PETER HULICK *et als.*,
Defendants.

On Bill, etc., De-
murrer.

The demurrer of Peter Hulick, Carrie M. Flock and John W. Flock, defendants to the bill of complaint of James Lloyd and Edward Lloyd, complainants. These defendants, by protestation, not

confessing all or any of the things in the complainant's bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged; doth demur thereto, and for cause of demurrer show that the complainants have not in and by their said bill made or stated such a case as entitles them in this honorable court to any relief against them as to the matters contained in said bill or any of such matters. 10

Wherefore, and for divers other good causes of demurrer, appearing in said bill, these defendants do demur thereto and humbly pray the judgment of this honorable court, whether they should be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained. 20

THOMAS P. FAY,
Solr. for Defendants.

I certify that I have perused the complainant's bill in the above stated cause, and that the above demurrer is well founded in point of law. 30

THOMAS P. FAY,
Of Counsel with Defendants.

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

PETER HULICK, of full age, being duly sworn according to law, saith: That the foregoing demurrer is not interposed for delay, but in good faith for the causes therein set forth. 40

PETER HULICK.

Sworn and subscribed before me this }
10th day of December, A. D. 1904. }

HARRIETT M. PRESLEY,

(Seal.) Notary Public of N. J.

Filed Dec. 20, 1904.

10

IN CHANCERY OF NEW JERSEY.

Between

JAMES LLOYD *et al.*,
Complainants,

And

20

PETER HULICK *et als.*,
Defendants.On Bill, etc., Order
Overruling De-
murrer.

30

This matter being opened to the Court, and the defendants having elected to set down the demurrer for argument for the first day of the February Term, 1905, pursuant to order of this Court bearing date the twenty-sixth day of January, A. D. 1905, and the argument on the demurrer proceeding to be heard, and after hearing the argument of counsel:

It is on this seventh day of February, A. D. Nineteen hundred and five, on motion of Parker & Van Gelder, of counsel with the complainants, ordered that the said demurrer be overruled with costs, and that the defendants have thirty days' time in which to answer the complainant's bill of complaint.

40

W. J. MAGIE,
C.

Respectfully advised,

FREDERICK W. STEVENS,
V. C.

A true copy.

VIVIAN M. LEWIS,
Clerk.

Filed Feb. 7th, 1905.

IN CHANCERY OF NEW JERSEY.

10

Between

JAMES LLOYD *et al.*,
Complainants,

and

PETER HULICK *et als.*,
Defendants.On Bill. etc., No-
tice of Appeal.

20

The defendants, Peter Hulick, Carrie M. Flock and John W. Flock, hereby appeal from the order overruling the demurrer, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

30

THOMAS P. FAY,

Solicitor for Defendants and of Counsel.

Dated February 15th, 1905.

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

THOMAS P. FAY,

Of Counsel with Defendants.

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

40

Emma West, being duly sworn according to law, on her oath says that she served the within notice of appeal on Winfield S. B. Parker, of the firm of Parker & Van Gelder, and in the presence of George W. Van Gelder, of said firm, by giving him a copy

10 of the above notice, and requesting him to acknowl-
 edge service on back of said notice on Thursday,
 the sixteenth day of February, A. D. Nineteen hun-
 dred and five, that said Parker refused to acknowl-
 edge service and told this deponent to make an affi-
 davit of service of said notice, that this deponent
 thereupon left the copy of said notice with the said
 Winfield S. B. Parker.

EMMA WEST.

20 Sworn and subscribed before me this }
 17th day of February, A. D. 1905. }
 Harriet M. Presley,
 Notary Public of N. J.
 Filed Feb. 19th, 1905.

NEW JERSEY COURT OF ERRORS AND
 APPEALS.

30 _____ }
 Between
 JAMES LLOYD *et al.*,
 Complainants,
 and
 40 PETER HULICK *et als.*,
 Defendants.
 _____ }

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

The petition of Peter Hulick, Carrie M. Flock and

John W. Flock, the appellants in the above stated cause, respectfully show that your petitioners find themselves aggrieved by the order overruling their demurrer, made in the Court of Chancery by his Honor, William J. Magie, bearing date the seventh day of February, in the year One thousand nine hundred and five, wherein the said James Lloyd and Edward Lloyd were complainants and the said Peter Hulick, Carrie M. Flock and John W. Flock were defendants in this respect, that in the order overruling the said demurrer, it was after argument in the Court of Chancery, ordered that the said demurrer be overruled with costs.

Your petitioners humbly appeal from that part of the order of the Chancellor which orders the overruling of the demurrer with costs as aforesaid, upon the ground that the same is erroneous, for that the said complainants, in and by their said bill have not made or stated such a case as entitles them to any relief as to the matters contained in said bill or any of such matters against the defendants, because the allegations and averments of facts in the bill do not state a case in direct terms and with reasonable certainty.

Second, because the allegations in the bill merely aver the intention and supposition of the complainants, which can in no way bind the defendants.

Third, that the bill acknowledged the acceptance of the deed complained of, by the complainants, but alleges ignorance as an excuse.

Fourth, that the bill does not state with sufficient allegations the circumstances of the delivery and acceptance of the deed.

Your petitioner therefore prays that the said order of the said Chancellor may be in the particu-

10 lars aforesaid reversed, set aside and for nothing
holden, and that your petitioners may have such
relief in the premises as to this honorable Court
shall seem meet.

THOMAS P. FAY,
Solicitor for Appellants.
Of Counsel with Appellants.

Filed March 8, 1905.

20 State of New Jersey, }
Monmouth County, } ss.:

Emma West, being duly sworn according to law,
on her oath says that she served the above petition
on George W. Van Gelder, of the firm of Parker &
Van Gelder, personally, on the eleventh day of
March, A. D. Nineteen hundred and five, by giving
him a true copy thereof, and informing him of the
contents of the same; that she requested the said
Van Gelder to acknowledge service of said petition,
30 but he refused to do so, and requested deponent to
make affidavit of service.

EMMA WEST.

Sworn and subscribed before me this }
11th day of March, A. D. 1905. }

Harriet M. Presley,
(Seal.) Notary Public of N. J.

Filed March 18, 1905.

NEW JERSEY COURT OF ERRORS AND APPEALS. 10

Between

JAMES LLOYD *et als.*,
Complainants and Respondents,

and

PETER HULICK *et als.*,
Defendants and Appellants.

Answer to Petition
of Appeal.

20

The answer of the above-named respondents to the petition of appeal of the above-named appellants.

These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit, that an order was, on the seventh day of February last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe, that the said order is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these respondents. 30 40

PARKER & VAN GELDER,
Solicitors and of Counsel with
Complainants and Respondents.

Filed April 4, 1905.

S. D. DICKINSON,
Clerk.

