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New Jersey
Court of Errors and Appeals

AMENDED BILL OF COMPLAINT.

(Filed Oct. 1, 1927)

IN CHANCERY OF NEW JERSEY

STUYVESANT SECURITY Co., a corporation, Complainant, vs. JOHN DREYER, *et als.*, Defendants.	On Bill &c.

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

The Complainant having heretofore filed its Bill of Complaint and an Order having been entered permitting amendment of the Bill, the said Bill of Complaint of the Complainant is hereby amended to read as follows:

1. On the 16th day of January, 1907, the complainant was the owner of several certain tracts of land in the City of Newark, Essex County, New Jersey, described as follows:

BEGINNING at the Southeast corner of land belonging lately to the estate of Jonathan Lindsley

and in the middle of the road leading from John S. Taylor's to said Lindsley's; thence along the line of said estate North sixty-two degrees west twelve chains thirty-nine links; thence still in line of said estate and the line of David Jaggers South twenty-two degrees West three chains sixteen and one-half inches to a corner; thence South seventeen degrees thirty minutes West thirty-three and one-half links to the line of land of Charles Belcher; thence with the line of said Belcher eighty-eight links to the middle of the above mentioned road; thence in the middle of said road North thirty degrees East three chains forty and one-half links to the BEGINNING. Containing four acres, eighteen and one-tenth hundredths of an acre.

BEGINNING at the South corner of a lot of land belonging to Leonard and in the middle of the road leading from John S. Taylor's to Jonathan Lindsley's; thence along the middle of said road South thirty degrees West twenty-five to the line of land belonging to Daniel Hedden; thence along the line of said Hedden North sixty-two degrees ten minutes West eleven chains eighty links to the line of David Jaggers; thence along the line of David Jaggers, North seventeen degrees thirty minutes East twenty-five and one-half feet to the line of Leonard Ward; thence along the line of said Ward South sixty-two degrees ten minutes East eleven chains eighty-eight links to the place of BEGINNING. Containing forty-four hundredths acres, strict measure.

BEGINNING on the East Side of the road leading from John S. Taylor's to Jonathan Lindsley's; thence along the line of said Lindsley South seventy-four degrees thirty minutes East seventy links to a corner; thence along the line of said Lindsley North thirty-five degrees East one chain to a corner; thence along the line of said Lindsley North fifty-nine degrees thirty minutes West seventy links to the east side of the above mentioned road; thence along the East side of the road South thirty degrees West one chain and twenty links to the place of BEGINNING.

2. By a mortgage bearing date January 16th, 1907, complainant mortgaged said lands to Joseph C. Lindsley, to secure the sum of Fifty-four Hundred Dollars ($5400) in ten years, interest at five per cent per annum, which mortgage is recorded in the Register's Office of Essex County in Book V 20 of Deeds for said county on pages 245 &c.

3. On or about the 10th day of September, 1908, the said Joseph C. Lindsley died, leaving a last Will and Testament, and on the 17th day of October, 1908, the Fidelity Trust Company, a corporation, was appointed Administrator with the Will annexed of the estate of Joseph C. Lindsley.

4. On the 12th day of November, 1909, the said Fidelity Trust Company, Administrator, etc., assigned said mortgage in the sum of Fifty-four Hundred Dollars ($5400.00) above referred to, to Martha O. Mattice.

5. On the 1st day of November, 1916, the said Martha O. Mattice released part of the said mortgaged premises from the lien of the mortgage, and received as consideration therefor the sum of One Thousand Dollars on account of the principal sum of mortgage.

6. On the 20th day of November, 1918, the said Martha O. Mattice died, and Harry T. Mattice was appointed executor of her estate.

7. On the 9th day of September, 1919, Harry T. Mattice, Executor of the Last Will and Testament of Martha O. Mattice, released another part of said premises from the lien of the mortgage to the Stuyvesant Security Co. and received Twenty-one Hundred Dollars ($2,100.00) on account of the principal of said mortgage.

8. On the 9th day of September, 1919, the complainant conveyed to Harry T. Mattice, the husband of Martha O. Mattice, by deed dated September 9th, 1919, and recorded on July 2d, 1920, in Book W 63 of Deeds for Essex County on pages 381 &c., the following described premises; Situate, lying and being in the City of Newark, Essex County, N. J.

Beginning at the Southeast corner of land belonging to the estate of Jonathan Lindsley as described in deed from Joseph C. Lindsley to Stuyvesant Security Co., by deed dated January 16, 1907, and recorded in Book F 41 of Deeds for Essex County on pages 483 &c., and in the middle of the road leading from John S. Taylor's to said Lindsley's; thence along that line of said es-

tate North sixty-two degrees West four hundred fifteen feet and six one-hundredths of a foot; thence South thirty degrees West two hundred fifty-one feet and fifty-nine one-hundredths of a foot more or less to the line of lands belonging to Daniel Hedden; thence along his line South sixty-two degrees ten minutes East one hundred ninety feet and six one-hundredths of a foot; thence North thirty degrees East seventy-five feet; thence South sixty-two degrees ten minutes East two hundred twenty-five feet to the middle of the above mentioned road; thence in the middle of said road North thirty degrees East one hundred seventy-five feet and thirty-nine one-hundredths of a foot to the place of BEGINNING.

The above conveyance comprised all of the premises included in the mortgage bearing date the 16th day of January, 1907, in the sum of $5400.00, referred to above, excepting those parts of the premises which were released, and a small portion of the premises retained by the mortgagor.

The said deed contained the provision "that the above mentioned premises are conveyed subject to whatever mortgage liens, taxes, and assessments there may be thereon."

The said deed was delivered to the said Harry T. Mattice under an agreement that the mortgage given to Joseph C. Lindsley and above referred to would be paid by the said Harry T. Mattice and that the land conveyed to him would stand as security for the payment of the entire balance of the mortgage indebtedness, and the part of the

premises retained by the mortgagor would be discharged from the mortgage.

9. On the 5th day of January, 1921, the said Harry T. Mattice conveyed part of said premises to John Dreyer and Augusta Dreyer, his wife, which part embraced all of the premises contained in the mortgage described in Book V 20 of Mortgages for Essex County on pages 245 &c, excepting the two parcels released, above referred to, and the part retained by the mortgagor, the complainant herein. The deed from the said Harry T. Mattice to the said John Dreyer and Augusta Dreyer, contained the provision that "said premises are conveyed expressly subject to taxes for 1920, assessment for Vailsburg Drainage Sewer, the Vailsburg Sewer, Southwesterly section, the house sewer connection and also assessments for the water service connection and also subject to the lien of mortgage given by Stuyvesant Security Co. to Joseph C. Lindsley recorded in Book V. 20-245 on which there is now due the sum of $2300 principal."

10. On the 5th day of January, 1921, Harry T. Mattice, Executor of the Last Will and Testament of Martha O. Mattice, by deed of Assignment bearing date January 5th, 1921, and recorded that day, assigned said mortgage recorded in Book V 20-245 to John Dreyer and Augusta Dreyer, his wife, by assignment recorded in Book 150 of assignments on page 259, this bringing the ownership of the mortgage in the said John Dreyer and Augusta Dreyer, his wife.

11. On the 12th day of July, 1921, the said John Dreyer and August Dreyer executed and delivered a Warranty deed to a portion of said premises to one William Hoermann and Christine C. Hoermann, his wife.

12. On the 12th day of July, 1921, John Dreyer and Augusta Dreyer, his wife, executed and delivered to Charles H. Fuhrmeister and Dora Fuhrmeister and Dora Fuhrmeister, his wife by Assignment 150-259.

13. On the 8th day of June, 1922, said John Dreyer and Augusta Dreyer, his wife, executed and delivered to J. George Reichsetter, Jr., and Bertha C. Reichsetter, his wife, a deed to part of said premises, which deed contained the express provision "that this conveyance being expressly made subject to assessment for the recent paving, curbing, etc., of Stuyvesant Avenue. The parties of the first part does herewith remise, release, and forever discharge a mortgage held by John Dreyer by virtue of a certain assignment as to the above described premises."

14. On the 8th day of December, 1924, the said August Dreyer died intestate, leaving her surviving her husband, John Dreyer, and five children, to wit: Gustav Dreyer, age 17; William Dreyer, age 16; Walter Dreyer, age 14; Edward Dreyer, age 13; and Theodore Dreyer, age 12, all infants under the age of twenty-one years.

15. The said John Dreyer and Augusta Dreyer entered into the possession of said premises from the date of the conveyance to them and the trans-

fer of the mortgage to them, and received the rents thereof and still retain the same.

16. On the 28th day of May, 1925, John Dreyer executed and delivered to the Vailsburg Trust Co. a postponement of the mortgage recorded in V 20-245 above referred to in favor of a mortgage given to the Vailsburg Trust Co. for $2500.00.

17. The said John Dreyer, since he took possession of the said tract has conveyed large parts thereof and received large sums of money therefor.

18. The defendants have personally occupied the premises and still occupy considerable portions thereof and derived the benefit of the use and occupation thereof.

19. Complainant has frequently applied to the said John Dreyer and Augusta Dreyer and requested them to render a just and true account of the said rents and profits and moneys received on account of the mortgage debt, upon the conveyance of portions of said premises, and has offered to pay them any balance that may be justly due on said mortgage, after making deductions and allowances for the proportionate value of the premises conveyed subject to the mortgage liens in the deed dated September 9th, 1919, above referred to, and in the deed dated January 5, 1921, above referred to, and has requested them to deliver up the said bond and mortgage, securing the indebtedness or the remainder thereof, and the defendants refuse so to do.

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

1. That John Dreyer, Gustav Dreyer, William Dreyer, Walter Dreyer, Edward Dreyer, and Theodore Dreyer, who are the defendants to this suit, may answer this amended bill of complaint, and each statement therein made.

2. That an account be taken of the sums which have been received by the said John Dreyer and Augusta Dreyer as payments made toward the mortgage debts.

3. That the complainant be credited on the mortgage with the moneys received by the defendants upon the release of the lots heretofore released by them.

4. That the complainant be credited on the mortgage with the proportionate value of the lots released, from the mortgage.

5. That the part of the mortgaged premises conveyed subject to the mortgage be declared to be subject to its proper proportion of the encumbrance so as to relieve, to the extent of the relative value of the portion conveyed, that portion of the mortgaged premises retained by the mortgagor, the complainant herein.

6. That the mortgage be declared to have been merged in the legal estate of the defendants when the legal and equitable estate united in the defendants, by the conveyance to them of the legal estate and the transfer to them of mortgage.

7. That the complainant may be declared entitled to redeem said mortgaged premises or the part retained by them from the mortgage, upon the payment of what, if any, shall be found remaining due to the defendants in respect of said principal and interest on said mortgage; and that the defendants may be ordered by a decree of this court upon said payment being made to the defendants, or into the hands of the Clerk of this court to surrender and deliver up the said bond and mortgage.

8. That the complainant may have such further or other relief as the nature of the case may require.

9. That a writ of subpoena may issue commanding the said defendants to answer this Amended Bill of Complaint and to abide by such decree at this court may make in the premises.

ADAM J. ROSSBACH,
Solicitor of Complainant.

FINAL DECREE.

(Filed Nov. 7, 1928)

IN CHANCERY OF NEW JERSEY

Between, STUYVESANT SECURITY Co., a corporation, Complainant, and JOHN DREYER, *et als.*, Defendants.	On Bill &c.

This cause coming on to be heard before the Chancellor upon bill, answer, replication, and proofs, in the presence of A. J. Rossbach of counsel with the complainant, Stuyvesant Security Co., a corporation, Meeker and Headley, of counsel with the defendant John Dreyer, and Anthony R. Finelli, of counsel with the defendants, Gustav Dreyer, William Dreyer, Walter Dreyer, Edward Dreyer and Theodore Dreyer, and pleadings and proofs having been read and the arguments of counsel heard and considered, and the Chancellor being of the opinion that the complainant is entitled to relief and to redeem said mortgaged premises retained by it and not included in the deed of conveyance from the complainant to Harry T. Mattice, which deed is dated September 9, 1919, and recorded on July 2, 1920, in Book W 63 of Deeds for Essex County on page 381 &c. in the office of the Register of the County of Essex, and which premises so retained and not included in

the deed to Harry T. Mattice are described as follows:

ALL that certain tract, or parcel of land and premises situate, lying, and being in the City of Newark, in the County of Essex, and State of New Jersey:

BEGINNING on the East side of the road leading from John S. Taylor's to Johathan Lindsley's; thence along the line of said Lindsley South seventy-four degrees thirty minutes East seventy links to a corner; thence along the line of said Lindsley North thirty-five degrees East one chain to a corner; thence along the line of said Lindsley North fifty-nine degrees thirty minutes West seventy links to the East side of the above mentioned road; thence along the East side of the road South thirty degrees West one chain and twenty links to the place of BEGINNING.

It is thereupon on this 27th day of November, Nineteen Hundred and Twenty-eight, by his Honor EDWIN ROBERT WALKER, Chancellor of the State of New Jersey, ORDERED, ADJUDGED, and DECREED, that the complainant be entitled to redeem said mortgaged premises described above and in the bill of complaint of the complainant from the lien of the mortgage given by the complainant, Stuyvesant Security Co., a corporation, to Joseph C. Lindsley, to secure the payment of the sum of $5,400.00, and recorded in the Register's Office of Essex County in Book V-20 of Mortgages for said county, on page 245 &c., upon the payment of the sum of one-forty-sixth (1/46) of $2,300.00, namely $50.00, into the hands of the Clerk of this Court,

or upon payment to the defendant of said sum of $50.00 upon the delivery of a properly executed release of the mortgage by the defendants or their legally constituted representatives as to the premises described in the bill of complaint and above referred to, or upon the delivery to the complainant of a properly executed receipt and cancellation of the mortgage, and upon such payment into the hands of the Clerk of this Court of said sum of $50.00, said premises retained by the complainant, described in the bill of complaint and referred to above, shall be discharged from the lien of the mortgage referred to above, and that said mortgage be no longer a lien upon the said premises therein described, against the said complainant or any person or persons claiming by, from, or under them or either of them, and that the said defendants and all persons claiming by, from, or under them, or either of them, be enjoined from collecting any money upon the said deed of mortgage, insofar as it affects the premises referred to above, and from setting up the same against the premises so described,

And it is further Ordered, that the costs of the complainant be, and the same are hereby ordered to be paid by the said defendant, John Dreyer,

And it is further Ordered, that the said defendant, John Dreyer, pay to the counsel of the complainant a counsel fee of $100.

E. R. WALKER,
C.

Respectfully advised,
Maja Leon Berry,
V. C.

A True Copy.
Thomas Barber,
Clerk.

ANSWER OF DEFENDANT JOHN DREYER.

IN CHANCERY OF NEW JERSEY

STUYVESANT SECURITY CO., a corporation, Complainant, and JOHN DREYER, *et als.*, Defendants.	On Bill of Complaint. On Amended Bill of Complaint.

The defendants John Dreyer, answers the bill of Complaint of said complainant and says:

1. That he admits paragraphs 1, 2, 3, 4, 5, 6, of said bill of complaint of complainant as amended.

2. As to paragraph 7 of said bill of complaint defendant admits same except he has no information of the receipt of $2100 or any other sum by the holder of said mortgage.

3. As to paragraph 8 of said complaint, defendant admits lands and premises described were conveyed to him but has no information of any portion retained by said mortgagor being clear of said mortgage but defendant says that parts of said lands and premises retained by said mortgagor were held by said mortgagor expressly subject to the said mortgage bought by said John Dreyer and Augusta Dreyer his wife, which were so purchased by them under compulsion to protect their holdings which complainant sold them or their grantors free and clear of the said mort-

gage given by complainant to Joseph C. Lindsley recorded in Book V 20 pages 245 &c. on which is now due $2300 principal, besides interest thereto to be added, and which was and is remaining a lien and encumbrance on the said part of said property which said mortgagor and complainant still at the time of the commencement of this suit owned expressly subject to said bond and mortgage, and it having been expressly understood and agreed at all times heretofore and at this time that all parts of said property sold by complainant to others and all said parts of said property so released were free and clear of said mortgage and said mortgage was and is a lien only on the part complainant retained, and owned.

This defendant denies said deed was delivered to the said Harry T. Mattice under an agreement that the mortgage given to Joseph C. Lindsley and above referred to or any part thereof would be paid by the Harry T. Mattice or his grantors or any person for him or them or that said lands conveyed to him would stand as security for the payment of said entire balance of said mortgage indebtedness, or any part thereof, and the part of the premises retained by the mortgagor would be discharged from the mortgage; but on the contrary it was expressly agreed in consideration of the premises that the lands retained by said mortgagor and the premises should stand solely as security of the entire balance of said mortgage indebtedness same to be paid by said mortgagor in accordance with the condition of said bond given by it or them with said mortgage.

Answer of Defendant John Dreyer

4. This defendant admits paragraphs 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, except that he avers that said lands deeded to him by complainant or by mesne conveyances were all free, clear and discharged from any obligation to pay said mortgage and it was so intended by complainant and that at all times the lands and premises retained and owned by complainant are solely liable to pay the entire balance due on said bond and mortgage with the interest accrued and payable thereon.

5. This defendant denies paragraph 19.

6. This defendant says that said mortgage given by complainant to Joseph C. Lindsley dated January 16, 1907, recorded in Book V 20 pages 245 to 251 of Essex County mortgages is still unpaid and in full force and effect against the property, lands and premises owned by complainant at the time of this suit part of said mortgaged property and there is due $2300 of principal money with interest from July 16, 1918, to this date due and owing to defendants thereon.

7. This defendant, John Dreyer, says that said Complainant Stuyvesant Security Company agreed with the said Joseph C. Lindsley and said estate of Joseph C. Lindsley that whereas the lands under said mortgage recorded in Book V 20 pages 245 &c. of Essex County mortgages to secure the said sum of $5400 were of doubtful security that said complainant should sell parcels of said lands and all of the said lands sold by complainant would be free and clear of said mortgage and in that way complainants would settle the

amount due and all balances due would be paid by the lands remaining in the hands of complainant.

That Stuyvesant Security Company complainant, agreed with Harry T. Mattice when he acquired lands under the deed recorded in Book W 63 pages 381 &c. that said lands so acquired by him should be free and clear of said mortgage and the moneys due on said mortgage with the interest be a lien only on the said part of said lands retained by said complainant. That upon sale of said lands to said John Dreyer and Augusta Dreyer his wife, recorded in Book U. 64 pages 161 &c. complainant agreed in consideration of the several conveyances that said lands acquired by said John Dreyer and Augusta Dreyer should be free and clear and discharged of said mortgage and said mortgage be made of the lands of complainant so retained by it and said balance due on said mortgage with the accrued interest would be paid by complainant. That the same agreement bound complainant when said mortgage was assigned to Martha O. Mattice and said John Dreyer and Augusta Dreyer purchased their said lands for a full *bona fide* consideration paying a just and full price under the same agreement with complainant, and contracted to buy same free and clear of said mortgage and they so purchased and took title thereto.

8. This defendant says that he has always been willing and desired said complainant to pay and satisfy said mortgage and pay said amount due thereon as was also his said wife while living and

said other defendants and they were willing to accept payment of said bond and mortgage and do any and all proper or necessary things to accept the payment thereof and discharge complainant's lands upon payment of said bond and mortgage.

This defendant therefore prays;

1. That said bill of complaint of complainant be dismissed.

2. Or that if complainant wishes said mortgage cancelled that it be decreed to pay to defendants the sum of $2300 with the accrued interest or pay same into Court for defendants or pay same to this defendant and proper guardians of the other defendants who are infant defendants upon proper discharge, release, satisfaction or cancellation receipt being ready and offered to said complainant.

3. Or that defendants have such other relief in the premises as may be according to equity.

MEEKER & HEADLEY,
Solicitors for Defendant John Dreyer.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY

(Filed April 1, 1929)

Between, STUYVESANT SECURITY CO., a corporation, Complainant, and JOHN DREYER, *et al.*, Defendants.	On Bill etc.

John Dreyer, individually and as guardian *ad litem* of Gustave Dreyer, William Dreyer, Walter Dreyer, Edward Dreyer, and Theodore Dreyer, infants, all defendants affected by the decree made in the above entitled cause, dated November 27th, 1928, do hereby appeal to the Court of Errors and Appeals in the last resort in all causes from the decree made by the Chancellor, on the advice of Vice Chancellor Berry, and from every part thereof.

Dated, March 25th, 1929.

ANTHONY R. FINELLI,
Solicitor for and of
Counsel with Defendants.

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

ANTHONY R. FINELLI,
Of Counsel with Defendants.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS

Between, STUYVESANT SECURITY COMPANY, a corporation, Complainant-Respondent, and JOHN DREYER, *et al.*, Defendants-Appellants,	On Appeal from the Court of Chancery.

To the Honorable Court of Errors & Appeals, in the Last Resort of all Causes:

The petition of John Dreyer, individually and as guardian *ad litem* of Gustave Dreyer, William Dreyer, Walter Dreyer, Edward Dreyer and Theodore Dreyer, infants, the appellants in the above entitled cause, respectfully shows:

1. Petitioner finds himself aggrieved by a final decree made in the Court of Chancery, by his Honor, Edwin Robert Walker, Chancellor of New Jersey, on the 27th day of November, 1928, in a certain cause in said Court of Chancery, wherein Stuyvesant Security Company, a corporation, is complainant, and John Dreyer, Gustave Dreyer, William Dreyer, Walter Dreyer, Edward Dreyer and Theodore Dreyer, are defendants, in these respects, to-wit:

2. That the said decree adjudges that the complainant is entitled to relief and to redeem the

mortgaged premises from the lien of the mortgage owned by the defendants, upon the payment of the sum of 1/46th part of $2300.00, namely, $50.00.

3. That said decree further adjudges that upon payment of the said sum of $50.00, the said premises shall be discharged from the lien of the above mortgage.

4. The said decree further enjoins the defendants from collecting any money upon the said mortgage exceeding the sum of $50.00.

5. That said decree orders your petitioner to pay the costs of the complainant, including a counsel fee of $100.00.

And petitioner appeals from the decree of the Chancellor which decrees as aforesaid upon the ground that the same is erroneous in the following respects:

(a) The court below erred in finding that the rule where a part of the mortgaged premises has been aliened by the mortgagor and a part retained by him, the part retained as between the mortgagor and his alienee is primarily chargeable with the debt, was not applicable to the facts of the case.

(b) The court below erred in finding that there should be an apportionment of the mortgage debt between the specific parts of the property conveyed and retained by the mortgagor, and that both portions must contribute to the payment of the mortgage in proportion to the relative value as of the date of such conveyance.

(c) The court below erred in holding that the lien of the mortgage encumbrance was a part of the consideration for the lands conveyed, instead of holding that the language of the deed which contained full covenants of warranty was used to except the mortgage from the operation of the covenants for title.

(d) The court below erred in receiving oral testimony to vary, explain and contradict the terms in an absolute deed of conveyance.

(e) The court below erred in refusing to hold that the deed conveyed an unencumbered title, and the consideration paid is presumed to be the full value of the land, clear of encumbrances, and that the defendants were entitled to foreclose the mortgage.

(f) The court below erred in finding that the defendant, John Dreyer, pay to the complainant, or its solicitor the costs of this suit to be taxed, including a counsel fee of $100.00.

(g) The court below erred in failing to hold that the mortgagor filing a bill to redeem, must pay the costs of defendants claiming under the mortgagee.

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

ANTHONY R. FINELLI,
Solicitor for and of
Counsel with Defendants.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS

Between, STUYVESANT SECURITY COMPANY, a corporation, Complainant-Respondent, and JOHN DREYER, *et al.*, Defendants-Appellants,	On Appeal from Court Chancery.

The answer of Stuyvesant Security Company, a corporation, the above named respondent, to the petition of appeal of John Dreyer, individually and as guardian *ad litem* of the infant defendants, Gustave Dreyer, William Dreyer, Walter Dreyer, Edward Dreyer and Theodore Dreyer, the above made appellants.

This respondent, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto, nevertheless admits that a decree was, on November 27th, 1928, made and entered in the Court of Chancery of New Jersey in the above entitled cause, for the purposes in said petition mentioned and as therein set forth, but as to the substance and form of said decree, this respondent begs leave to refer thereto when the same shall be produced.

This respondent is advised and believes that the said decree is agreeable to equity; and it prays

that the same may be affirmed with costs to be taxed in favor of this respondent.

ADAM J. ROSSBACH,
Solicitor for and of
Counsel with Respondent.

ANSWER OF GUARDIAN.

IN CHANCERY OF NEW JERSEY

Between, STUYVESANT SECURITY COMPANY, a corporation, and JOHN DREYER, *et al.*, Defendants.	On Amended Bill of Complaint

The defendants, Gustav Dreyer, William Dreyer, Walter Dreyer, Edward Dreyer and Theodore Dreyer, infants under the age of twenty-one years, by John Dreyer, their respective Guardian, duly appointed herein, answer the bill of complaint and say:

1. They admit paragraphs 1, 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the bill of complaint as amended.

2. They have no information as to the other allegations in the said bill of complaint contained.

3. Any agreement between Harry T. Mattice, and the complainant, having reference to an interest in the land in question is ineffectual and void because not in writing as provided for in "An act for the prevention of frauds and perjuries," (See Statute of N. J. volume 2, page 2609).

4. These defendants allege and say that there is due on the bond, dated January 16, 1907, executed by the complainant in favor of Joseph C. Lindsley, and to secure the principal sum of $5400, and as security for which the mortgage in paragraph 2 in the bill of complaint, was executed and delivered, balance of $4,400 with interest from July 17, 1918.

5. These defendants say that, that portion of the mortgaged premises retained by the complainant, and now still owned by it, is primarily and the only curtilage liable for the payment of the aforesaid mortgage.

6. These defendants by way of cross bill against the complainant pray;

a. That an account may be taken of the amount due on said mortgage.

b. That complainant may be decreed to pay these defendants, the amount so found due, with interest and cost, by a short day to be appointed by this Court; and that in default of such payments, the complainant be debarred and fore-

closed of all equity of redemption in said lands; or

c. That a decree be made for the sale of said premises to raise and pay to the defendants herein the amount so found due on said mortgage with interest and costs.

PETER A. SENA,
Solicitor.

VICE CHANCELLOR'S OPINION.

STUYVESANT SECURITY COMPANY,
Complainant,

v.

JOHN DREYER, *et al.*,
Defendants.

(Decided November 19th, 1928.)

1. The rule "that where a part of the mortgaged premises has been aliened by the mortgagor and a part retained by him, the part retained, as between the mortgagor and his alienee, is primarily chargeable with the debt," is not applicable where it appears that the mortgage debt has been "shifted," either in whole or part, to the lands conveyed by the mortgagor, or where its application would work an injustice.

2. As a general rule, the matter rests wholly in the agreement between the parties.

3. Where it appears, therefore, that the lands conveyed by the mortgagor were conveyed expressly subject to the lien of the mortgage, the assumption of that lien being a part of the consideration for such conveyance, and there being no agreement as to the exact apportionment of the mortgage between the specific portions of the property conveyed and retained by the mortgagor, both portions must contribute to the payment of the mortgage in proportion to their relative value as of the date of such conveyance.

4. The mortgagor may maintain a bill to redeem the retained portion of the mortgaged premises from the lien of the mortgage.

On bill, &c. On final hearing.

Mr. Adam J. Rossbach, for the complainant.

Messrs. Meeker & Headley, for the defendant John Dreyer.

Mr. Anthony R. Finelli, for the other defendants.

Berry, V. C.

This bill is filed to redeem a small tract of land from the lien of a mortgage held by the defendant Dreyer, who, by counter-claim, seeks to foreclose the mortgage against the parcel of land in question. The mortgage was originally in the sum of $5,400, but has been reduced to the sum of

$2,300, certain portions of the mortgaged premises having been released upon such reduction. The mortgage came into the hands of Harry T. Mattice, as his wife's administrator, and he threatened foreclosure. To obviate such proceedings the complainant, the mortgagor, conveyed all of the remaining mortgaged premises except the small parcel, redemption of which is here sought, to Mattice, individually. The deed recited a consideration of one dollar and other good and valuable consideration, and contained this clause:

> "The above-mentioned premises are conveyed subject to whatever mortgage liens, taxes and assessments there may be thereon."

It is obvious that the lien of the mortgage encumbrance was a part of the consideration for the lands thus conveyed and there is nothing in the evidence to indicate that the mortgage was not to remain a common charge on both the land conveyed and that retained by the mortgagor. Mattice conveyed to Dreyer in January, 1921, and the deed to Dreyer contained this clause:

> "Said premises are conveyed expressly subject to * * * the lien of mortgage given by the Stuyvesant Security Company to Joseph C. Lindsey, recorded in book V-20-245, on which there is now due the sum of $2,300 of principal."

At the same time, Mattice, as administrator, assigned the mortgage to Dreyer, who later conveyed three separate parcels out of the premises, still retaining a considerable portion of the lands

conveyed to him by Mattice. The defendants contend that the portion of the mortgaged premises retained by the complainant mortgagor is primarily liable for the amount due on the mortgage, and that foreclosure of the mortgage against this portion should be now permitted, invoking the rule "that where a part of the mortgaged premises has been aliened by the mortgagor and a part retained by him, the part retained as between the mortgagor and his alienee, is primarily chargeable with the debt," and citing in support thereof 3 *Pom. Eq. Jur.* § 1224; *Weatherby* v. *Slack,* 16 N. J. Eq. 493, and *Hoy* v. *Bramhall,* 19 N. J. Eq. 563. The complainant also relies on *Hoy* v. *Bramhall.* In addition to the cases cited by counsel I have carefully examined, among others, the following cases: *Shannon* v. *Marselis,* 1 N. J. Eq. 413; *Wikoff* v. *Davis,* 4 N. J. Eq. 224; *Engle* v. *Haines,* 5 N. J. Eq. 186; affirmed, *Ibid.* 632; *Stillman's Executors* v. *Stillman,* 21 N. J. Eq. 126; *Mount* v. *Potts,* 23 N. J. Eq. 188; *Hills, Administrator* v. *McCarter,* 27 N. J. Eq. 41; *Harrison* v. *Guerin,* 27 N. J. Eq. 219; *Warwick* v. *Ely,* 29 N. J. Eq. 82; *Hills* v. *Coult,* 30 N. J. Eq. 40; *Powell* v. *Griffith,* 37 N. J. Eq. 384; *Gray* v. *Hattersley,* 50 N. J. Eq. 206; *Daly* v. *Ely,* 51 N. J. Eq. 105; *Davis* v. *Piggott,* 56 N. J. Eq. 634; *Thompson* v. *Bird,* 57 N. J. Eq. 175; *Jackson* v. *Condict, Ibid.* 522; *Chancellor* v. *Towell,* 80 N. J. Eq. 223; *Beardsley* v. *Empire Trust Co.,* 96 N. J. Eq. 212.

These cases show clearly that the doctrine invoked by the defendants is never applied where it appears that the mortgage debt has been "shifted," either in whole or in part, to the lands

conveyed by the mortgagor (*Weatherby* v. *Slack, supra*), or where its application would work an injustice. *Chancellor* v. *Towell, supra.* And as a general rule, the matter rests wholly in the agreement between the parties.

More than a century ago it was held that "if, by the terms of the sale, the mortgage is to remain a common charge upon the whole, and to be paid by the mortgagor and purchaser, without any specific agreement as to the proportion which each one is to pay, they must contribute according to the relative value of each one's part." See opinion of Chancellor Williamson in *Mickle* v. *Woodward* (October term, 1822), *Halst. Dig.* 635. And in *Engle* v. *Haines* (1845), *supra,* it was held that "if the purchaser agrees with the mortgagor, that the part he buys shall be subject to the mortgage, and that the amount due on the mortgage shall be a part of the consideration he is to pay, equity will not interpose to subject the part of the mortgaged premises remaining in the mortgagor to be first sold." See, also 3 *Pom. Eq. Jur.* § 1225.

Where it appears, therefore, that the lands conveyed by the mortgagor were conveyed expressly subject to the lien of the mortgage, the assumption of that lien being a part of the consideration for such conveyance and there being no agreement as to the exact apportionment of the mortgage between the specific portions of the property conveyed and retained by the mortgagor, both portions must contribute to the payment of the mortgage in proportion to their relative value as

of the date of such conveyance. The undisputed testimony with respect to the value of the mortgaged premises at the time of the conveyance to Mattice is that the portion conveyed was of the value of from $4,000 to $4,500, and the value of that retained by the complainant mortgagor was $100. The case of *Hoy* v. *Bramhall, supra,* is the one presenting a situation most nearly analagous to that here shown and following the rule of that case the complainant should be permitted to redeem upon the payment to the present holder of the mortgage of the amount chargeable against the land retained, according to its relative value, as above suggested. Certainly the defendant Dreyer, the present holder of the mortgage, is not entitled to more. When on the witness stand he was unable to recall the amount received by him for the three parcels of land which he conveyed. It was quite obvious that his memory was conveniently adjusted to the occasion, and I have no doubt that the truth would disclose that he has already received from such conveyances more than the amount due on this mortgage. Under *Beardsley* v. *Empire Trust Co., supra,* if that fact were demonstrated, he would not now be entitled to receive anything from the complainant. But as the fact rests only in surmise and is not shown by any positive testimony, I am obliged to give this defendant the benefit of the doubt, and complainant will therefore be permitted to redeem upon payment of one forty-sixth of the sum of $2,300, the amount due thereon at the time of the conveyance from Mattice to Dreyer, and the prayer of the counter-claim for foreclosure will be denied.

TESTIMONY.

IN CHANCERY OF NEW JERSEY

Between,

STUYVESANT SECURITY Co., a corporation,

Complainant,

and

JOHN DREYER, *et als.*,

Defendants.

Transcript of testimony taken in the above entitled cause before Hon. Maja Leon Berry, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, on November, 1928.

Appearances:

Mr. Adam J. Rossbach for complainant.

Mr. William F. Headley, of Meeker & Headley, for defendant John Dreyer.

Mr. Anthony R. Finelli and Mr. Peter A. Sena for infant defendants.

Court: Put on the record just what the facts are. Give it to Mr. Bindseil and let him take it down, and put in whatever documents you want, and that will save time for all of us.

Mr. Rossbach: I offer in evidence deed dated the nineteenth of September, 1919, from the Stuyvesant Security Company, a corporation, to Harry T. Mattice, covering property on the west

side of Stuyvesant Avenue, recorded in Book W-63, pages 381-382, of Deeds for Essex County.

(Marked Exhibit C-1.)

I also offer mortgage dated the sixteenth of January, 1907, for fifty-four hundred dollars, on property on the west side of Stuyvesant Avenue, and the east side of Stuyvesant Avenue, including the entire property, recorded in Book V-20 of Mortgages, page 245, made by the Stuyvesant Security Company to Joseph C. Lindsley.

(Marked Exhibit C-2.)

By consent we offer in evidence map dated October 13, 1928, made by William D. Sayler, Surveyor, showing the entire block, both on the west side and the east side, with the parts released by the two releases marked on the map.

(Marked Exhibit C-3.)

I also offer release dated 9th of September, 1919, by Harry T. Mattice, executed to the Stuyvesant Security Company, reciting consideration of $2,100 for the release, which is recorded in Book 64 of Releases, pages 345-346.

(Marked Exhibit C-4.)

I offer in evidence copy of a release made by Martha O. Mattice to the Stuyvesant Security Company, dated November 1, 1916, on part of the premises on the west side, reciting consideration of $1,000.

(Marked Exhibit C-5.)

Mr. Headley: I object to the papers on the ground that they are inadmissible.

The Court: If there is any objection to any of these papers, make it when the offer is made. So far there is no objection of record.

Mr. Rossbach: These papers are a line of conveyance, offered on the theory that a person holding a mortgage on different parcels, releasing part of the property and saddling an additional burden on some of the property held by other owners, the question of release is important to show—

The Court: Make your offer and I will know what it is all about. There is no objection to the form?

Mr. Finelli: No objection to the form of the instrument.

Mr. Rossbach: I offer deed from John Dreyer and Augusta Dreyer, present owners of the property, to William Hoermann and Christine C. Hoermann, for part of the property, recorded in Book K-67, page 181, of Deeds for Essex County. That is one of the conveyances mentioned in the bill of complaint.

Mr. Headley: I object to that.

The Court: The objection is overruled.

(Marked Exhibit C-6.)

Mr. Rossbach: I offer deed, Dreyer to Fuhrmeister, recorded in Book K-65, 184.

Mr. Headley: We object for the same reason, immaterial and irrelevant. This is one of the conveyances mentioned in the bill.

The Court: Objection overruled.

(Marked Exhibit C-7.)

Also, deed recorded in W-66 of Deeds, page 76.

(Marked Exhibit C-8.)

The Court: I assume from what I have read in the bill, that the theory of defense is here, that is, what I have read in the bill and what I

have heard, that there was no merger of the title under the deed and under the mortgage.

Mr. Finelli: Exactly.

The Court: Because of the express reference to the mortgage and assignment; in other words, the intention of the parties was that the mortgage should be kept alive. Is that correct?

Mr. Finelli: Yes, and that expression subject to the mortgage, occurred some years prior to the most recent transaction, and that, of course, the burden must remain upon the party who owned it.

The Court: The complainant's claim is that after you received title to a portion of this property, and received also title to the mortgage on part of the property, that you had no right to convey a portion of the property, or the portion to which you received title, free and clear of the mortgage, and hold the mortgage on the balance owned by the complainant. Is that correct?

Mr. Finelli: Yes, sir; that is correct. But we also say that the part that they still hold—

The Court: There is still some of the property—

Mr. Rossbach: Plenty of it. Yes, the biggest part.

The Court: There will have to be proof as to the different parcels.

JULIUS E. DONIG, sworn for complainant.

Direct-examination by Mr. Rossbach:

Q. Mr. Donig, you were connected with the Stuyvesant Security Company? A. Yes.

Q. What was your position with the company? A. President.

Q. And you knew of the transaction regarding this property on Stuyvesant Avenue at the time it was bought? A. Yes.

Q. And the delivery of the mortgage? A. Yes.

Q. How much was that mortgage for? A. $5,400.

Q. Did you pay anything on the mortgage after that? A. $1,000 for a release of seventy-five by two hundred on the southwest corner of the property.

Q. Just look at this map; will you show which part that was? Point out on Exhibit C-3; mark out the plot that was released. A. (Witness does as requested.)

Q. Was there anything paid after that? A. Yes, sir.

Q. What for? A. On the western part, about two and one-fifth of an acre was sold to Mr. Patrick Dolan, and we took a release for $2,000.

Q. Does that show on the map, that part?

The Court: That is this end of the property here (indicating)?

The Witness: Yes.

Q. You made a deed to Harry T. Mattice for part of the property later on? A. Yes.

Q. How did you come to make that deed?

Discussion

Mr. Finelli: I object. The answer invokes the Statute of Frauds, and we represent the infants. I don't think this conversation is binding on us. I think he is going to introduce some conversation which is set up in the bill and denied in the answer of Mr. Dreyer, and on behalf of the infants, we are invoking the Statute of Frauds. This is a conversation which varies a writing; we are not bound.

The Court: What is the purpose of this?

Mr. Rossbach: I want to show that they gave a deed and didn't get any consideration for it.

The Court: What does the deed recite?

Mr. Rossbach: The deed recites "subject to this mortgage," "One Dollar and good and valuable consideration."

The Court: The deed being under seal, the seal imports consideration, doesn't it?

Mr. Rossbach: I don't want to break down the deed by showing there was no consideration, but I mean they received no other valuable consideration. The deed was merely made to obviate the foreclosure of the mortgage.

The Court: You may ask why the deed was given. You may get up to that point without asking that question. I think you ought to be permitted to show what the circumstances were so far as consistent with the rules of evidence. You may get to that point without asking that question, it seems to me. Who handled this matter for Mattice at that time?

Mr. Rossbach: Mr. Dawson.

The Court: Mr. Dawson is here, is he not?

Mr. Rossbach: Mr. H. H. Dawson.

Q. You made a deed to the Mattices? A. Yes.

Q. Was there anything of value outside of the consideration to make the deed given by you to him—

Mr. Finelli: I object; the paper speaks for itself; we are not direct parties to it.

The Court: I don't see how you can be permitted to—it doesn't make any difference whether there was any additional consideration or whether there wasn't other than the deed shows.

Q. You had been pressed by Mr. Dawson before that to pay the mortgage, and threatened with foreclosure? A. Yes.

Q. And then in order—

The Court: Let the witness testify.

Q. In order to obviate the foreclosure, what was done? A. We went to Mr. Dawson and talked the matter over, and decided the best way would be to transfer that piece of property there back to the heirs in payment of the mortgage.

Mr. Finelli: I move that that be stricken out, because it is a conversation which does not bind us.

The Court: He hasn't related any conversation.

Mr. Finelli: He is giving us a conclusion.

The Court: He is telling what the arrangement was. The arrangement was reached with Mr. Dawson—I don't know who Mr. Dawson was—to convey the property, he says, in payment of the mortgage.

Mr. Finelli: He (Dawson) was the representative of Mr. Mattice.

We came in subsequently; we are subsequent grantees. This does not bind us at all; we have a warranty deed. To break down the title?

The Court: Whom do you represent grantees of?

Mr. Finelli: Grantees of Mattice.

The Court: Is that Dreyer?

Mr. Finelli: Yes.

The Court: Dreyer was also the assignee of the mortgage, was he not?

Mr. Finelli: Yes, Mr. and Mrs. Dreyer.

The Court: And Dreyer was the man who conveyed two parcels of this property free of the mortgage, and Dreyer is the man who retains part of the property which was conveyed to you, is he not?

Mr. Finelli: That is right.

The Court: Your motion is to strike out the answer?

Mr. Finelli: Yes.

The Court: I deny the motion.

CROSS-EXAMINATION by Mr. Headley:

Q. Your agreement was to convey this property on the east side of the street for this mortgage?

A. No, sir.

Q. And that has been a standing agreement from that time down to date, that you would convey that property to cancel this mortgage? A. No, the west side. You have got that wrong—the west side, which is held by Mr. Dreyer now.

Q. And this agreement from that time down has been recognized by you that this mortgage was to be paid out of the property on the east side of the street, isn't that a fact?

The Court: He says the west side.

A. The west side; you have got it all wrong.

EXAMINATION by Mr. Finelli:

Q. Why didn't you convey the whole property if you wanted to avoid a foreclosure? A. Convey the whole property?

Q. If you made this arrangement and it was in order to save the expense, and in order to wipe out the mortgage liability, why didn't you give up the whole property? A. This is very easy to answer. We have been involved in an outlay of a good many thousands of dollars and had no return. I don't know if you know the state of real estate at that time; this piece on the other side was practically valueless—on the east side; and the part on the west side was all good land; therefore, we deeded back what was good to the mortgage holder.

Q. Who represented your company? A. At that deal, you mean?

Q. Yes. A. Mr. Dawson drew the papers.

The Court: Who represented your company in this conversation with Mr. Dawson?

The Witness: I was there.

The Court: You don't think you had a legal representative; was any lawyer there with you, representing you or your company?

The Witness: Your Honor, I really—

The Court: If you don't know, say so.

The Witness: I don't recollect, your Honor.

Q. Was the arrangement you had one conversation, one visit at Mr. Dawson's office? A. I cannot say.

Q. Was the deed prepared and executed on the occasion of the conversation? A. I don't think so; I cannot recollect.

VALENTINE BONHAG, sworn for complainant.

Direct-examination by Mr. Rossbach:

Q. You were connected with the Stuyvesant Security Company? A. Yes.

Q. In what capacity? A. Secretary and treasurer.

Q. And are you familiar with this transaction of the Lindsley property? A. Yes, I was there at the time of the transaction.

Q. You know the purpose of it; you were instrumental in negotiating the purchase of it? A. Yes.

Q. And the handling of it afterwards? A. Yes.

Q. You know about these two releases? A. Yes.

Q. And know about the settlement at Mr. Dawson's office? A. Yes.

Q. Were you there at Mr. Dawson's office? A. I was.

Q. How many times were you there? A. Three or four times; I don't quite recollect.

Q. What was the object of your going? A. Deeding the property back to the mortgagee, as the mortgagee wanted to foreclose.

Q. For what purpose was the deed made? A. To cancel the mortgage, of course.

Q. Anything else; did you get anything else? A. We got $200.

Q. For the deed or for the— A. For the release of the mortgage.

Q. I ask you now about that; did you get anything for the deed? A. Not that I know of.

Q. Was the release executed at the same time as the deed? A. That I don't know; it was all one transaction; why there was an extra release made, I don't know.

Q. Were you represented there by counsel, do you recall? A. I was not.

Q. You were in the real estate business in Vailsburg? A. At that time?

Q. About this time? A. Yes.

Q. 1919? A. About that time, yes.

Q. And familiar with values in and around there? A. Somewhat.

Q. Did you ever sell and buy any property in the neighborhood? A. I did.

Q. Plenty of it, didn't you? A. Yes.

Q. Have you any idea as to the value of this property in 1919? A. Well—

The Court: The question is do you know what the value was in 1919.

The Witness: I would say about $3,500.

The Court: Altogether?

The Witness: Altogether. We tried to sell it for the mortgage price and we couldn't sell it.

The Court: You mean the whole property which was subject to the $5,400 mortgage, or only that portion which remained after the release of the two parcels?

The Witness: After the release of the one parcel. After the release of the second parcel, there was a deal that went through at the same time that the release of the entire property and deed was made out; it was all one transaction and made the same day.

Q. What did you get from Mr. Dolan for the release of this rear portion shown on Exhibit C-3?

Mr. Finelli: I object; the minutes of the corporation should show.

The Court: That is already in evidence.

Q. What did you get from Dolan on the sale? A. I don't remember the exact amount; I think twenty-six hundred or something like that.

Q. Have you a record of the figures with you? A. Mr. Julius E. Donig has the figures.

Q. As secretary of the company did you keep this record of these figures? A. I had the flu for awhile and when I moved out of this part of the town—

Q. If you look at them, do you know if they were correct? A. They were correct at the time.

Q. Take a look at this paper and see whether these are the figures that you saw when you knew they were correct. A. Yes, these are the figures.

Q. The figures of what? A. Of the selling price of the second release of property.

Q. Will you state what you got? A. $2,680.80.

Q. Any taxes and assessments against it? A. Yes.

Q. What were they? A. $89.05.

Q. What in your opinion is the value of the part on the west side of Stuyvesant Avenue and the part on the east side of Stuyvesant Avenue at that time? A. The part on the east of Stuyvesant Avenue I would say was probably one hundred to one hundred and fifty dollars at that time.

Q. Free and clear? A. Free and clear. It was a big deep depression, eight or ten feet deep, practically valueless at that time.

Q. Is that the plot which is 79.20 feet in front and 46.20 in depth on one end? A. Yes, that is the plot.

Q. 46.20 in depth on both sides, that is the plot? A. Yes.

Q. What property is that, the property on the east side? A. Yes.

Q. That is what you say it was worth, about $150? A. Yes.

Q. What was the part on the west side worth? A. $3,500. By taking this $150 off, it was that much less; $3,400 probably at that time.

CROSS-EXAMINATION by Mr. Headley:

Q. When you were there with Mr. Dawson, did you have a written agreement to convey all of this property to Mattice? A. We did not; no, sir.

Q. Did you have an agreement that this mortgage was to be paid by the tract on the east side of the street? A. No, sir.

Mr. Finelli: No cross-examination.

HARRY H. DAWSON, sworn for complainant.

Direct-examination by Mr. Rossbach:

Q. You are a counsellor-at-law, practising in Newark? A. I am.

Q. And been such for a good many years? A. A number of years.

Q. Do you recall this transaction? A. I recall some of it; somewhat hazily, at least.

Q. Do you recall the Stuyvesant Security officers coming to your office and negotiating this transfer? A. Oh, yes; I had quite some negotiations with them; they came in to see me and also wrote to me, and I wrote to them.

Q. About what? A. About the mortgage. The mortgage was held by the Estate of Mrs. Martha O. Mattice.

Q. You were pressing the mortgage for foreclosure? A. Yes.

Q. And then there was a deed made by them to Mattice? A. Yes.

Q. And then the foreclosure stopped? A. Yes; the foreclosure never had been begun.

Q. What was the purpose of taking that deed, Mr. Dawson? A. They were to convey all of the property covered by the mortgage, and the mortgage was to be cancelled.

Q. That is your recollection? A. That is my recollection.

Q. As a matter of fact, all was not conveyed? A. All was not conveyed.

Q. Was that inadvertence or what? A. I don't know. They were in to see me and said that they thought they would be able to obtain a purchaser for the property and asked me if I would not go easy with the matter of the foreclosure, so that if there was anything that they could realize on the sale of the property they could do so; and I told them certainly, we didn't want to impose upon them, and then they said that they had obtained a purchaser for a portion of the property, and asked to have a release of that portion—it was a rear part—which we agreed to do. And my recollection is that they were to convey then the balance of the property.

Q. The deed in evidence does not show the part to the east of Stuyvesant Avenue. Could it be, Mr. Dawson, that it was considered too insignificant at the time to include in the deed, or subject to too many assessments and taxes to be included in the deed?

Mr. Finelli: I object to the question.

The Court: Objection sustained.

CROSS-EXAMINATION by Mr. Finelli:

Q. I show you an instrument here, an assignment of a mortgage—Fidelity Union to Mattice; do you identify that? A. The mortgage was originally held by the Lindsley Estate; the Fidelity were the executors of the Lindsley Estate, and they assigned the mortgage to Mrs. Martha O. Mattice during her lifetime. That is the assignment, I assume.

Q. In other words, at the time of this transaction, the making of the grant, who held the mortgage? A. The Estate of Mrs. Martha Mattice.

Mr. Finelli: While Mr. Dawson is here and probably wants to get away, I want to have some documents marked for identification.

By consent of Mr. Rossbach, I offer in evidence the assignment of mortgage from Harry T. Mattice, Executor of the last will and testament of Martha O. Mattice, deceased, dated January 5, 1921; recorded in Book 150 of Assignments of Mortgages, for Essex County, at page 259.

(Marked Exhibit D-1.)

The Witness: I am the subscribing witness, and I also took the acknowledgment. It is my signature.

Mr. Finelli: I also offer deed bearing date January 5, 1921, from Harry T. Mattice, unmarried, to John Dreyer and Augusta Dreyer, his wife; recorded in Book U-64 of Deeds for Essex County, pages 161-162.

The Witness: I am the subscribing witness and took the acknowledgment, and it is my signature.

EXAMINATION by the Court:

Q. I understood you to say that the arrangement which resulted in the conveyance of this property to Mattice was that all the property covered by the mortgage was to be conveyed in settlement of the mortgage? A. Yes, sir.

Q. Why was the mortgage not cancelled? A. I don't know; evidently the mortgage was not cancelled and not given up at the time. I am trying to think back. To the best of my recollection, although I am not positive about this, your Honor, they thought they might be able to get a little more money from that other portion of the property.

Q. What do you mean by "that other portion"? A. That was not covered by the deed, although I wouldn't want to say that positively. The description in the deed was not drawn up in my office nor by me. It was furnished to me by the Stuyvesant people, as prepared by them, the way they wanted the deed drawn at that time, and it was so drawn. I find among my papers a copy of a letter which I sent to Mr. Mattice prior to the deeds being drawn—I can refer to that—in which I stated that I would suggest to him that the deed be taken in his name for convenience sake, and as all of the parties interested were out and were not responsible, and that the mortgage could be cancelled afterwards. That was prior to the deed, and these are the things that I am basing my present recollection on.

Q. Was the conveyance made to an individual? A. The conveyance was made to the executor as an individual.

Q. And the mortgage was held by you as executor? A. Yes, as executor.

The Court: There couldn't have been any merger anyway.

The Witness: It was taken that way, so there would not be a merger.

Q. You don't know how the small plot on the east side of Stuyvesant Avenue happened to be left out of the conveyance? A. Outside of that, I do not know; no, sir.

RE-DIRECT-EXAMINATION by Mr. Rossbach:

Q. In the deed, Mr. Dawson, from Mattice to Dreyer, you put a clause "Being the same premises conveyed to the said Harry T. Mattice by Stuyvesant Security Company, a corporation, by deed dated September 9th, 1919, and recorded in the Register's office of Essex County, in Book W. 63 of Deeds for said county, pages 381 etc. Said premises are conveyed expressly subject to the taxes for 1920, Assessment for the Vailsburg Drainage Sewer, the Vailsburg Sewer, Southwesterly Section, the house sewer connection and also assessments for the water service connection and also subject to the lien of a mortgage given by Stuyvesant Security Company to Joseph C. Lindsley recorded in Book V. 20 of Mortgages for Essex County, pages 245 etc., on which there is now due the sum of twenty-

three hundred dollars of principal." So the mortgage was fully in your mind at the time you made the deed; must have been? A. It is so recited in the deed.

Q. That is, the deed to Dreyer and his wife, the present defendants? A. I don't know about the defendants.

The Court: That was how long subsequent to the conveyance to Mattice?

Mr. Finelli: This deed is dated the fifth of January, 1921, and the other date is September, 1919.

The Court: At the same time this conveyance was made to Dreyer by Mattice, he, as executor, also assigned the mortgage to Dreyer; is that correct?

The Witness: I don't know the dates; the papers speak for themselves. I think that is correct.

Mr. Finelli: That is correct.

The Court: Why was the mortgage assigned, then, instead of cancelled?

The Witness: I cannot say, except possibly that was the way they asked to have it done.

The Court: Did you have anything to do with the arrangements for the conveyance between Mattice and Dreyer?

The Witness: I think I did; I know I had some communications with parties who owned property immediately in the rear, and asked them if they did not want to buy this property fronting on the street, and my recollection is that the transfer came

through that communication. Whether it is the same party or not, I don't recall at this present moment, and my papers do not show.

The Court: What I was trying to get at was, whether you knew anything of the bargain made between Mattice and Dreyer as to the sale of the property, and whether that would indicate any reason for keeping the mortgage alive.

The Witness: I suppose I must have known what it was, if there was any. I have no recollection whether there was any definite agreement in regard to it, other than what the papers show.

Q. You didn't make a search when you took a deed to the property, I don't suppose? A. No.

Q. Is that, perhaps, the reason why you kept the mortgage alive? A. I cannot say that; it may be; that is sometimes done.

Mr. Finelli: I object.

The Court: Objection sustained. He has stated his recollection of the transaction.

JAMES P. DONNELLY, sworn for complainant.

Direct-examination by Mr. Rossbach:

Q. You are in the real estate business? A. Yes.

Q. In and around Vailsburg? A. Yes.

Q. And Stuyvesant Avenue? A. Yes.

Q. You have been such for how many years? A. About twenty.

Q. Have you bought and sold property in the neighborhood of Stuyvesant Avenue? A. Yes.

Q. Near the old Lindsley property? A. Yes.

Q. Are you familiar with the property shown on this map? A. I know the property.

Q. What in your opinion, in 1919 was the value of the property?

Mr. Finelli: I object to that line of testimony.

The Court: Objection overruled.

A. At that time things was pretty dead around that section, you could hardly give anything away. We spent a lot of money advertising. You could hardly get anybody from Newark or anywhere else up in that section, just about that time, and a few years before that.

Q. Tell us about what was the value.

The Court: Speaking of 1919 now.

A. About 1919 it was just at its lowest ebb.

The Court: What was that, in dollars and cents?

The Witness: Not more than about $1,500 an acre, at the very most.

Q. You said you were familiar with this property? A. Yes.

Q. This property is shown on the map, Exhibit C-3. What was the value of that property in dollars and cents? A. It was offered—

Q. No, not what it was offered; you are asked to give your opinion of the value of it. A. It wasn't worth, I don't think, at that time more than what I say, about $2,000 an acre, at the very most.

Q. This property—we don't know how many acres in this property—this property as you see it on the map, and which you say you know, how much was it worth in 1919? A. On the west side, you mean?

Q. Altogether. A. Altogether all told, I know I couldn't get $5,000 for it.

The Court: If you couldn't get $5,000 for it, then it probably was not worth that.

The Witness: I don't think so.

Q. What was it worth? A. I figured about $4,000 or $4,500 all told.

Q. How much was the property on the east side of the road worth? A. The property on the east side of the road was valueless, on account of a swampy condition there; that laid there for many years and was an eye-sore in the neighborhood.

Q. How about its size; what do you say about its size; did that have anything to do with the value? A. It had a whole lot to do with it, in a way, because there wasn't much depth to it.

Q. You mean by "valueless' that if someone had offered it to you as a gift, you would not have taken it? A. I don't think I would have paid the taxes on it, because at that time we organized an improvement association to just condemn that very site.

Q. What was it worth in dollars and cents? A. I wouldn't give a hundred dollars for it.

Q. What was it worth? A. It wasn't worth any more in my mind at that time—

Q. Do you think it was worth a hundred dollars? A. I would say it was worth a hundred dollars.

Q. Then what do you think the part on the west side was worth? A. On account of its elevation, that was worth, as I say, around $4,000 to $4,500.

CROSS-EXAMINATION by Mr. Headley:

Q. When you speak of the west side of the street, how much of this property are you including in it, all of it? A. Why, yes. There was a parcel there of about two acres; that is my understanding of it; originally I was asked to sell two acres and a quarter, I think it was.

Q. There was 175 feet on the west side; how much of that 175 feet would a piece of it 400 feet deep be worth? A. At that time it would be worth around $4,500, at the very most.

Q. What would the land be worth a front foot? A. About $20 or $25.

Q. That is, $20 a foot front? A. Yes.

CROSS-EXAMINATION by Mr. Finelli:

Q. What is the principal street up there? A. Stuyvesant Avenue is now the principal street.

Q. What is the next principal street? A. West Sandford Avenue.

Q. This plot is between South Orange Avenue and Springfield Avenue? A. Yes.

Q. And it is one of the main avenues leading from the Oranges out to Union and Plainfield? A. Yes, the main artery now.

Q. Isn't it true that in 1921 we had the peak prices of building lots? A. I wouldn't say that.

Q. In 1921 we had the peak prices of building values and dwellings? A. About 1923 the peak was.

Q. When do you think we had the peak of land values? A. About that time.

Q. When? A. About 1923.

Q. Didn't it begin about 1921? A. No.

Q. You didn't keep your eye upon Stuyvesant Avenue at that time? A. I didn't very much.

Q. Did you know of the improvements on the avenue, its width, and the fact that it was going to be a main artery leading from the principal adjacent towns? A. There was nothing to indicate it in 1919, that it was to be a main artery, because it is a short street.

Q. What? A. It starts at South Orange Avenue and don't go any further.

Q. The distance between South Orange Avenue and Springfield is two miles? A. It is.

Q. And this plot is about a mile away from South Orange Avenue? A. Yes, about that. The Eighteenth Avenue busses made that.

Q. It is a mile from Springfield Avenue? A. Yes. The Eighteenth Avenue busses brought that into its own. That is the main thing.

Complainant rests.

JOHN DREYER, sworn for defendants.

Direct-examination by Mr. Headley:

Q. You know Mr. Dawson, Mr. Dreyer? A. Yes.

Q. And were you present at his office? A. I was there, when I bought the property.

Q. Do you know anything about this piece on the east side of Stuyvesant Avenue? A. At the time when I did have the deed, the title was missing, with a piece on the east side of Stuyvesant Avenue, and Mr. Mattice told me if I want the deed—

Mr. Rossbach: I object.

The Court: Objection sustained.

Q. What did you do there? Not what someone told you, but what did you do? A. I accepted the mortgage against the Stuyvesant Security Company.

Mr. Finelli: I object to that. That is his conclusion.

The Court: I will let it stand for what it is worth. The fact is that he took an assignment.

Q. Did you have any arrangement with regard to this mortgage to be on the east side of the property?

Mr. Rossbach: The record speaks for itself.

The Court: Objection sustained.

Q. Do you know of any agreement regarding this mortgage and the property on the east side of Stuyvesant Avenue?

Mr. Finelli: Yes or no.

A. Not that I know of.

Q. Have you had any dealings with the Stuyvesant Avenue people, Stuyvesant Security Company, about this matter? A. Not up until now. The mortgage was worth more at that time thar the deed, so that I let them have the deed.

Q. Why did you take this assignment of this mortgage?

Mr. Finelli: I object to that. He may have had any number of reasons. The assignment shows the very purpose for which it was taken.

The Court: If you object to it, I sustain the objection. It should be more material to you than the other side. If you object, I will sustain the objection.

CROSS-EXAMINATION by Mr. Finelli:

Q. Mr. Dreyer, what is your line of business? A. I am in the milk business.

Q. How long have you been in the milk business? A. Going on four years.

Q. Is Mrs. Dreyer now dead? A. Yes.

Q. Will you please give us the date of her death? A. Eighth of December, 1924.

Q. And she left her surviving yourself, and any children? A. Five boys.

Q. Will you please name them and give their ages? A. Gustav Dreyer, nineteen; William Dreyer, seventeen; Walter Dreyer, sixteen; Edward Dreyer, fifteen, and Theodore Dreyer, thirteen.

Q. Are there any credits or offsets that are to be allowed on account of this bond and mortgage which you and your wife own and which is the subject of this litigation? A. I don't know.

Q. How much is due you? A. The mortgage.

Q. And what is interest, whatever is due; give us the amount roughly, generally.

The Court: Let the witness testify.

A. $2,300 mortgage with interest, and the costs they put onto me.

No cross-examination.

The Court: I want to examnie this witness for a moment.

EXAMINATION by the Court:

Q. You bought this property from Mattice? A. Yes.

Q. When you bargained for the property what did you bargain for? A. I bargained for the whole property.

Q. What whole property? A. On both sides of the street.

Q. How did you know anything about the property on the other side of the street? A. I was living there long before; I know what belonged to it.

Q. You had a deed for the property on the west side of the street? A. Yes.

Q. Didn't you know that Mattice didn't have a deed for the property on the other side? A. Not when I bought it, but found out in the search—

Q. Did Mattice sell you the property on the east side of the street? A. Surely did.

Q. How much did he sell the property on the east side of the street for? What value did he place on it? A. It was all in one price, the whole piece.

Q. Did you have a written agreement for the purchase of that property? A. There was.

Q. Where is it? A. I cannot say now, because there is lots of papers lost.

Q. In that written agreement was the property described? A. I cannot remember now.

Q. What was the purpose of having a written agreement if the property was not described? A. I bought everything.

Q. You bought what Mattice had, didn't you? A. What Mattice had.

Q. And you paid him a certain sum of money for it? A. Yes.

Q. Now, when did you find out that there was some property covered by the mortgage which was on the east side of the street? A. When Mr. Mattice went to give me the deed, the deed was missing for that part.

Q. The deed was missing for it; you mean to tell me that Mattice paid for the property on the east side of the street when you knew he didn't own it? A. Well, I didn't know when I bought it that he didn't own it, not at that time.

Q. You sold some of the property afterwards? A. Yes.

Q. Two different parcels of it? A. Yes.

Q. When you sold that property why did you sell it free and clear of the mortgage which you

held? A. The parties made some objection because the mortgage is on record, and it was to be on the whole property, but when they turned back to Mr. Mattice, or give him half side of the street, and the other side he kept back; and so they cannot see that the mortgage cannot cover on one side of the street, where he give the deed back for, and take it free and clear of that matter, this mortgage.

The Court: Is Mr. Mattice here?

Mr. Finelli: He is dead.

The Court: I want to say that I don't believe that this man intended to buy anything on the east side of the street. It doesn't make any difference what he said, I wouldn't believe him. How that may affect the decision, I don't know, but I don't believe his testimony on that point.

Mr. Finelli: I think the witness didn't—

The Court: He understood what I said, and he understands the purpose of this suit. He is not as dumb as he would have some people believe.

CROSS-EXAMINATION:

Q. What did you get for the property sold to Hoermann? A. I don't know.

Q. What did you get for the other one? A. I don't know.

By the Court:

Q. You remember how much you paid for the property when you got it? A. I have bills.

Q. You don't know how much you paid? A. No.

Q. You don't know how much you got for what you sold? A. I sold one for $900.

Q. What did you sell the other one for? A. I cannot say. I have to look up.

Q. You don't know how much you paid for the whole property? A. I paid the debts and everything was on it.

Q. You don't know whether you lost or made money on the transaction? A. I didn't make anything and I didn't lose any.

RE-DIRECT-EXAMINATION by Mr. Headley:

Q. What is the property worth now?

Objected to.

The Court: I will receive it.

A. I kept that for my home. I have that for a home. I cannot say.

Mr. Finelli: We have no testimony on behalf of the infants.

EXHIBIT C-1.

THIS INDENTURE,

MADE the Ninth day of September, in the year of Our Lord One Thousand Nine Hundred and Nineteen

BETWEEN Stuyvesant Security Company, a corporation, of the City of Newark in the County of Essex and State of New Jersey of the First Part; AND Harry T. Mattice of the City of New York in the County of New York and State of New York of the Second Part;

WITNESSETH, That the said party of the first part, for and in consideration of

One Dollar and other good and valuable consideration, lawful money of the United States of America, to it in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part, therewith fully satisfied, contented and paid, hath given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents doth give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party of the second part, and to his heirs and assigns forever, ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate lying and being in the City of Newark in the County of Essex and State of New Jersey:

BEGINNING at the South East corner of land belonging to the Estate of Jonathan Lindsley as de-

scribed in Deed from Joseph C. Lindsley to the Stuyvesant Security Company by Deed dated January 16th, 1907 and recorded in the Register's Office of the County of Essex in Book F. 41, pages 483 to 485 and in the middle of the Road leading from John S. Taylor's to said Lindsley's; thence along the line of said Estate North Sixty-two degrees West Four hundred and Fifteen feet and Six hundredths of a foot; thence South Thirty degrees West Two hundred and Fifty-one feet and Fifty-nine hundredths of a foot, more or less, to line of land belonging to Daniel Hedden; thence along his line South Sixty-two degrees Ten minutes East One hundred and Ninety feet and Six hundredths of a foot; thence North Thirty degrees East Seventy-five feet; thence South Sixty-two degrees Ten minutes East Two hundred and Twenty-five feet to the middle of the above mentioned Road; thence in the middle of said Road North Thirty degrees East One hundred and Seventy-five feet and Thirty-nine hundredths of a foot to the place of BEGINNING.

The above premises are conveyed subject to whatever mortgage liens, taxes and assessments there may be thereon.

TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining:

ALSO, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel hereof,

Exhibit C-1

To have and to hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever:

And the said party of the first part doth for itself and its successors covenant and grant to and with the said party of the second part, his heirs and assigns, that it the said party of the first part is the true, lawful and right owner of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered, or defeated in any way whatsoever, except as aforesaid.

And also, that the said party of the first part now has good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid:

And also, that it the said party of the first part will Warrant, secure, and forever defend the said land and premises unto the said party of the second part, his heirs and assigns, forever, against the lawful claims and demands of all and

every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever, except as aforesaid.

In Witness Whereof, the said party of the first part hath hereunto affixed its common corporate seal and caused these Presents to be signed by its President the day and year first above written.

STUYVESANT SECURITY COMPANY,
Julius E. Dornig,
Pres.

Signed, Sealed and Delivered
in the presence of
Valentine Bonhag,
Secty.
(Canceled Revenue Stamp)

(Corporate Seal)

EXHIBIT C-2.

This indenture made this Sixteenth day of January in the year One Thousand Nine Hundred and Seven Between the Stuyvesant Security Company a corporation of the State of New Jersey with an office in the City of Newark, State of New Jersey of the first part and Joseph C. Lindsley of the City of Newark in the County of Essex in the State of New Jersey of the second part:

Whereas the said party of the first part is justly indebted to the party of the second part in the sum of Fifty four Hundred Dollars lawful money of the United States of America secured to

be paid by its certain obligation bearing even date with these presents conditioned for the payment of the first mentioned sum to the said party of the second part, his certain attorneys, executors, administrators or assigns on the Sixteenth day of January which will be in the year Nineteen Hundred and Seventeen at and after the rate of five per cent per annum payable semi-annually. And it is hereby expressly agreed that the obligor therein the said party of the first part herein its successors and assigns shall not nor will make or claim any deduction from or credit on the interest therein or herein agreed to be paid by reason of any tax or taxes assessed or which may be assessed on the real property described in this mortgage or any part thereof; and that should any default be made in the payment of the said interest or any part thereof (without deduction as above agreed to) on any day whereon the same is made payable as above expressed or should any tax assessment water rent or other municipal or governmental rate, charge imposition or lien be hereafter imposed or acquired upon the property described in this mortgage and become due and payable and should the said interest or any part thereof remain unpaid and in arrears for the space of thirty days or said tax, assessment water rent or other municipal or governmental rate, charge or imposition or lien or any or either of them or any part thereof remain unpaid and in arrears for the space of Ninety days after the first shall become due and payable then and from thenceforth, that is to say after the lapse or expiration of either of the said periods as the case

Exhibit C-2

may be, the above first mentioned principal sum with all arrearage of interest thereon without deduction or credit as aforesaid shall at the option of the said Mortgagee, his executors, administrators or assigns become due and payable immediately thereafter although the period above limited for the payment thereof may not then have expired anything herein contained to the contrary notwithstanding. And the said Mortgagee, his executors, administrators or assigns may at his or their option pay any such tax assessment or water rent in arrears and the amount so paid shall be added to and become part of the principal sum secured by the said bond and by the said mortgage and shall be payable on demand with interest at the rate of six per cent per annum as by the said bond or obligation and the condition thereof reference being thereunto had may more fully appear. Now this indenture Witnesseth that the said party of the first part for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation with the interest thereon according to the true intent and meaning and also for and in consideration of One Dollar to it in hand paid by the said mortgagee at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged, conveyed and confirmed and by these presents does grant bargain sell alien release convey and confirm unto the said party of the second part his heirs and assigns forever, all those certain tracts or parcels of land situate lying and being in the City of Newark, in the County of Essex in the State of New Jersey:

Exhibit C-2

BEGINNING at the southeast corner of land belonging lately to the estate of Jonathan Lindsley and in the middle of the road leading from John S. Taylors to said Lindsleys; thence along the line of said estate North Sixty-two degrees West twelve chains and thirty-nine links thence still in the line of said estate and the line of David Jaggers South twenty two degrees west three chains sixteen and one half links to a corner; thence south seventeen degrees and thirty minutes west thirty three and one half links to the line of land of Charles Belcher thence with the line of said Belcher south sixty two degrees and ten minutes east eleven chains and eighty eight links to the middle of the above mentioned road; thence in the middle of said road North thirty degrees east three chains forty one and a half links to the beginning. Containing four acres, eighteen and one-tenth hundredths of an acre.

Also one other piece tract or parcel of land and premises BEGINNING in the south corner of a lot of land belonging to Leonard and in the middle of the road leading from John S. Taylors to Jonathan Lindsleys; thence along the middle of said road south thirty degrees west twenty five feet to the line of lands belonging to Daniel Hedden; thence along the line of said Hedden North sixty two degrees and ten minutes west eleven chains and eighty links to the line of David Jaggers; thence along the line of David Jaggers north seventeen degrees and thirty minutes east twenty five feet and six inches to the line of Leonard Ward; thence along the line of said Ward south

sixty two degrees and ten minutes east eleven chains and eighty eight links to the place of beginning. Containing forty four hundredths of and acre strict measure.

Also one other tract or parcel of land and premises BEGINNING on the east side of the road leading from John S. Taylors to Jonathan Lindsleys; thence along the line of said Lindsleys south seventy four degrees and thirty minutes east seventy links to a corner, thence along the line of said Lindsleys North thirty degrees east one chain to a corner; thence along the line of said Lindsleys north fifty nine degrees and thirty minutes west seventy links to the east side of the above mentioned road; thence along the east side of said road south thirty degrees west one chain and twenty links to the place of beginning.

The three above described parcels of land and premises will be found recorded, the first in Book W 4 of deeds for Essex County in pages 189, 190; The second in Book 5 of Deeds for Essex County in pages 432, 433 and 434; and the third in Book S 5 of Deeds for Essex County in pages 211, 212.

Reference being thereunto had will more fully appear.

Being the same premises this day conveyed to the part of the first part by Joseph C. Lindsley, this mortgage being taken as a purchase money mortgage.

It is understood and agreed by and between the parties hereto that the said party of the first part shall have the privilege of paying off the whole of

the principal of this mortgage at any time before the expiration of said term of Ten years; also the privilege of paying installments on the principal of said mortgage of not less than Five Hundred Dollars semi-annually.

It is also understood and agreed by and between the parties hereto that the said party of the second part at the proper expense however of the party of the first part will release from the lien hereof any lot or lots upon the payment to the said party of the second part of fifty per cent of the purchase price of the lot or plot so released paid therefore by a bona fide purchaser to the party of the first part, said purchase price however to be in each case fair reasonable and in accordance with the building lot marked at the time of release; and it is further agreed that in case any dispute arises between the said parties as to the fairness in this regard of the purchase price paid for every lot or plot by any purchaser and for which lot or plot a release is sought said dispute shall be referred by the parties hereto to two arbitrators, one thereof to be selected by the party of the first part and the other by the party of the second part who shall arbitrate award and determine the fair and reasonable sum to be paid by the said party of the first part to the said party of the second part for the release of the lot plot or lots creating said dispute and in case said two arbitrators are unable to agree then they shall have the right to select a third person to act in connection with them and the sum fixed upon and determined by any two of said three arbitrators as a fair and reasonable sum to be paid to the

said party of the second part by the said party of the first part for the release of the lot or plot in question shall be paid by the said party of the first part and accepted by the said party of the second part for the release thereof. And it is further agreed that all moneys paid by the party of the first part to the said party of the second part shall for the release of lots or plots be deposited in the name of the party of the second part in a banking institution of the County of Essex the party of the first part to receive the interest on said deposits paid by said banking institution until wholly turned over to said party of the second part and credited on the bond accompanying these presents.

It is also understood and agreed by and between the parties hereto that in default of the payment of the interest on this mortgage and the bond accompanying the same or in the payment of taxes and assessments taxed and assessed against said premises within thirty days from and after the date when the same are each due and payable then and in that case the whole of the principal sum then due on this mortgage together with the interest accrued shall become instantly due and payable and all the covenants herein to be performed on the part of the said party of the second part shall become null and void and he shall have the right to demand and receive full payment of the principal sum then due on said mortgage with interest due thereon.

Together with all and singular the tenements hereditaments appurtenances thereunto belonging

or in any wise appertaining and the reversion and reversions, remainder and remainders, rents issues and profits thereof. And also all the estate right title interest property possession claim and demand whatsoever as well as in law as in equity of the said party of the first part of in and to the same and every part and parcel thereof with the appurtenances. To have and to hold the above granted and described premises with the appurtenances to the said party of the second part, his heirs and assigns to his and there own proper use benefit and behoof forever. And the said party of the first part do covenant with the said party of the second part that it is seized of an indefeasible estate in fee simple in said premises and will warrant and forever defend the title thereof unto the said party of the second part his heirs executors administrators and assigns against all lawful claims whatever. Provided always and these presents are upon this express condition that if the said party of the first part its successors or assigns shall well and truly pay unto the party of the second part his executors administrators or assigns the sum of money mentioned in the condition of said bond or obligation and the interest thereon according to the terms of said bond or obligation then these presents and the estate hereby granted shall cease determine and be void. And the said party of the first part for itself and its successors doth covenant and agree to pay unto the said mortgagee, his executors administrators and assigns the said sum of money and interest as mentioned above and expressed in the condition of said bond. And it

is also agreed by and between the parties to these presents that the said party of the first part shall and will keep the buildings erected and to be erected upon the lands above conveyed insured against loss or damage by fire in some safe and responsible Insurance Company.

In Witness Whereof the said party of the first part has by its proper officers hereunto set its hand and affixed its corporate seal the day and year first above written.

STUYVESANT SECURITY COMPANY,
By Julius E. Dornig,
Pres.

Signed sealed and delivered
in the presence of
Frederick G. Scott,
Secty.

(Corporate Seal)

State of
County of Essex. } ss:

Be it Remembered That on this Sixteenth day of January in the year of our Lord One Thousand Nine Hundred and seven before me the subscriber, an attorney at law of New Jersey personally appears Frederick G. Scott. Who, being by me duly sworn doth depose and make proof to my satisfaction, that he well knows the corporate seal of Stuyvesant Security Company the grantor named in the foregoing deed; that the seal thereto affixed is the proper corporate seal of said company; that the same was so affixed thereto and the said

deed signed and delivered by Julius E. Dornig who was at the date and execution thereof, the President of said company, in the presence of the said deponent, as the voluntary act and deed of the said company, and that the said deponent thereupon signed the same as subscribing witness,

FREDERICK G. SCOTT,
Secty.

Sworn and subscribed before me at
Newark the date aforesaid
Adam J. Rossbach,
Atty. at Law of
New Jersey.

EXHIBIT C-4.

THIS INDENTURE,

MADE the Ninth day of September in the year of Our Lord One Thousand Nine hundred and Nineteen

BETWEEN Harry T. Mattice, Executor of the last Will and Testament of Martha O. Mattice of the City of New York in the County of New York and State of New York of the First Part;

AND Stuyvesant Security Company, a corporation, of the City of Newark in the County of Essex and State of New Jersey of the Second Part;

WHEREAS, Stuyvesant Security Company, a corporation by an Indenture of Mortgage, dated the

Exhibit C-4

Sixteenth day of January in the year of our Lord One Thousand Nine hundred and Seven for the consideration therein mentioned, and to secure the payment of the money therein specified, did convey certain lands and tenements, of which the lands hereinafter described are part, unto Joseph C. Lindsley to secure the sum of Fifty-four hundred Dollars which mortgage is Recorded in the Register's office of the County of Essex in Book V. 20 of Mortgages, pages 245 etc., which mortgage was assigned to Martha O. Mattice, deceased, by Fidelity Trust Company, as Administrator with the Will annexed of the Estate of Joseph C. Lindsley, deceased, by Assignment of Mortgage recorded in Book 91 of Assignments of Mortgages for Essex County, on pages 61 etc.

And Whereas, the said party of the first part, at the request of the said party of the second part, hath agreed to give up and surrender the lands hereinafter described, unto the said party of the second part and to hold and retain the residue of the mortgaged lands as security for the money remaining due on the said mortgage: Now this Indenture Witnesseth, That the said party of the first part, in pursuance of the said agreement and in consideration of Twenty One Hundred Dollars to him duly paid at the time of the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, released, quit-claimed and set over, and by these presents doth grant, release, quit-claim and set over, unto the said party of the second part, all that part of the said mortgaged lands

hereinafter particularly described, situate, lying and being in the City of Newark in the County of Essex and State of New Jersey:

BEGINNING in the Southerly line of land belonging lately to the Estate of Jonathan Lindsley as mentioned in Deed from Joseph C. Lindsley to The Stuyvesant Security Company, by deed dated January 16th, 1907, and recorded in the Register's Office of the County of Essex in Book F. 41, pages 483 to 485 which said beginning point in said line is Four hundred and Fifteen feet and Six hundredths of a foot Westerly from the middle of the Road leading from John S. Taylor's to said Lindsley's; thence along the line of said Estate North Sixty-two degrees West Four hundred and Two feet and Sixty-eight hundredths of a foot; thence in the line of said Estate and the line of David Jagger's South Twenty-two degrees West Three chains and Sixteen and one-half links to a corner; thence South Seventeen degrees Thirty-minutes West Forty-seven feet and Sixty-one hundredths of a foot to line of land belonging to Daniel Hedden; thence along his line South Sixty-two degrees Ten minutes East Three hundred and Sixty three feet and Seventy-four hundredths of a foot and thence North Thirty degrees East Two hundred and Fifty-one feet and Fifty-nine hundredths of a foot, more or less, to the place of BEGINNING.

TOGETHER with the hereditaments and appurtenances thereto belonging; and all the right, title and interest of the said party of the first part, of, in and to the same, to the intent that the lands

hereby conveyed may be discharged from the said mortgage, and that the rest of the lands in the said mortgage specified, may remain to the said party of the first part, as heretofore. To HAVE AND TO HOLD, the lands and premises hereby released and conveyed, to the said party of the second part, its successors and Assigns to its and their only proper use, benefit and behoof forever, free, clear and discharged of and from all lien and claim under and by virtue of the Indenture of Mortgage aforesaid.

IN WITNESS WHEREOF, the said party of the first part hath hereunto his hand and seal the day and year first above written.

ESTATE OF MARTHA O. MATTICE (L. S.)
HARRY T. MATTICE,
Executor.

Signed, Sealed and Delivered
in the presence of
Henry H. Dawson.

EXHIBIT C-5.

RELEASE

MARTHA O. MATTICE (by att'y in fact—Fidelty Trust Co) to STUYVESANT SECURITY COMPANY, a corp.	Bk. 58 Page 471 Dated Nov. 1, 1916 Ack'd Nov. 11, 1916 Rec'd Nov. 14, 1916 Cons. $1,000.00

Releases from Mtge V 20—245.

Whereas Martha O. Mattice is holder of mtge by assgnmt recd in Bk 91-61.

Prem in the City of Newark.

BEG in the Wly li of Stuyvesant Ave formerly Wall St at the intersen of the sa wi the Sly li of tract conv to sd Stuyvesant Security Co by Joseph C. Lindsley by deed dated Jan. 16, 1907; and recd in the Reg's Of of Essex Co in Bk F 41-483; th rg Nly alg the sd Wly li of Stuyvesant Ave 75 ft; th N 62 deg 10 min W 200 ft; th Sly par wi Stuyvesant Ave 75 ft to the Sly li of sd Stuyvesant Security Co; thence Ely alg the sa 200 ft to the pl of BEG.

Recites: Bg pt of sa prem conv to sd Stuyvesant Security Co by deed Jan. 16, 1907 by Joseph C. Lindsley, sd deed bg recd in F 41-483, etc.

EXHIBIT C-6.

DEED

Wtty

JOHN DRYER and AUGUSTA DRYER his wife,	Bk. G 65 Page 181
	Dated July 12, 1921
to	Ack'd July 13, 1921
	Rec'd July 13, 1921
WILLIAM H. HOERMANN and CHRISTINE C. HOERMANN, hs wf	Cons. $1.00 etc G F H F

CONV prem in the City of Newark,

BEG in the NWly li of Stuyvesant Ave formly Wall St at a pt therein dist 115 ft NEly fr the Nly li of formly Daniel Hedden's ld, sd BEG pt being also the Ely corner of prem this day convd to Charles H. Fuhrmeister and wife; th rg N 62 deg 10 min W alg their li 200 ft to a corner; th N 29 deg 31 min E 40 ft to an iron pipe; th S 62 deg 10 min E 200 ft to sd li of Stuyvesant Ave; th S 29 deg 31 min E alg sd li of Stuyvesant Avenue 40 ft to the pl of BEG.

Recites: Bg pt of sa prem convd to sd John Dryer and wf by Harry T. Mattice by deed bearing date Jan 6, 1921 recd in V 64-161.

Note:

No reference to mortgage.

EXHIBIT C-7.

DEED

Wtty

JOHN DRYER and AUGUSTA DRYER, his wife,	Bk. K 65 Page 185
	Dated: July 12 1921
to	Ack'd July 13, 1921
	Rec'd July 13, 1921
CHARLES H. FURHMEISTER and DORA FUHRMEISTER, his wife.	Cons. $1.00 etc.

CONV prem in the City of Newark,

BEG in the NWly li of Stuyvesant Avenue formerly Wall St at a stake set at the most Ely cor of lds convd to Louis Santamaria and wife by George J. Hamburger, Sr. and wife, by deed dated Sept. 27, 1919 and recd in F 62-414; th N 62 deg 10 min W alg their li 200 feet to a cor; th N 29 deg 31 min E 40 ft to an iron pipe; th S 62 deg 10 min E 200 ft to sd li of Stuyvesant Avenue; th S 29 deg 31 min E alg sd li of Stuyvesant Ave 40 ft to the pl of BEG.

Bg the extreme Sly pt of lds convd to sd John Dryer and wife by Harry T. Mattice in V 64-161. It bg understood and agreed that this deed shall also release sd prems above desc fr any right, title, and interest of sd John Dryer and wife under a cert mtge (V 20-245) which was duly assigned to sd John Dryer and wife by Assgt 150-259.

EXHIBIT C-8.

DEED

Wtty

JOHN DRYER and AUGUSTA DRYER, his wf.	Bk. W 66 Page 76
	Dated June 8, 1922
to	Ack'd June 8, 1922
	Rec'd June 10, 1922
J. GEORGE REICHSETTER Jr. and BERTHA C. REICHSETTER, his wife,	Cons. $1.00 etc. G F H F

CONV prem in the City of Newark,

BEG in the Wly li of Stuyvesant Ave at the NorEly cor of lot recently convd to W. H. Hoermann and wife; rng th Wly alg sd Hoermann's li 150 ft; th Nly par with Stuyv Ave 40 ft; th Ely par to 1st course 150 ft to sd li of Stuyv Ave; th Sly alg sd li of Stuyv Ave 40 ft to pl of BEG.

Recites: Bg pt of sa prem convd to sd John Dryer and Augusta Dryer, his wife, by Harry T. Mattice, unmarried by deed bearing date Jan 5, 1921, recd in V 64-161. This conv bg expressly md subj to assessment for the recent paving, crbg, etc of Stuyv Ave. The pty of the 1st pt does herewith remise, release and forever discharge a mtge held by John Dryer by virtue of a cert assgt as to the above descbd prem.

EXHIBIT D-1.

KNOW ALL MEN BY THESE PRESENTS, That I, Harry T. Mattice, Executor of the last will and testament of Martha O. Mattice, deceased party of the first part, in consideration of the sum of Twenty three hundred Dollars lawful money of the United States of America, to me in hand paid by John Dreyer and Augusta Dryer his wife party of the Second Part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer, and set over unto the said party of the second part their executors, administrators or assigns. Indenture of Mortgage bearing date the Sixteenth day of January One Thousand Nine hundred and seven made by Stuyvesant Security Company on lands in City of Newark, Essex County, New Jersey to secure the payment of the sum of Fifty four hundred Dollars which mortgage is Recorded in the Registers office of the County of Essex in Book V 20 of Mortgages, pages 245 &c. and by Fidelity Trust Company as Administrator of Joseph C. Lindsley, deceased assigned to Martha O. Mattice by assignment recorded in Book 91 of assignments of mortgages page 61 &c.

Together with the bond or obligation therein described, and the money due and to grow due thereon, with the interest. To Have and to Hold, the same unto the said party of the second part their executors, administrators or assigns for their use forever subject only to the proviso in

the said Indenture or Mortgage mentioned: And I do hereby make, constitute, and appoint the said party of the second part my true and lawful attorney, irrevocable, in my name, or otherwise, but at their proper costs and charges, to have, use and take all lawful ways and means for the recovery of all the said money and interest; and in case of payment, to discharge the same as fully as I might or could do if these presents were not made:

In Witness Whereof, I have hereunto set my Hand and Seal the Fifth day of January in the year of Our Lord One Thousand Nine hundred and twenty one.

HARRY T. MATTICE,
Executor.
(L. S.)

Signed, Sealed and Delivered
in the presence of
Henry H. Dawson.

New Jersey
Court of Errors and Appeals

Between	On Bill etc.
STUYVESANT SECURITY COMPANY, a corporation,	On Appeal from Chancery.
Complainant-Respondent,	Berry, V. C.
and	Decree for Complainant.
JOHN DREYER, *et al.*,	Defendants' Appeal.
Defendants-Appellants.	

BRIEF OF ANTHONY R. FINELLI FOR APPELLANTS.

STATEMENT OF THE CASE.

Complainant prays relief against an encumbrance of a mortgage originally in the sum of $5,400.00, reduced to $2,300.00, upon premises on the east side of Stuyvesant Avenue, Newark, New Jersey, which mortgage also covers premises on the west side of Stuyvesant Avenue, Newark, New Jersey. In 1906 the premises were conveyed by Joseph C. Lindsley to the Stuyvesant Security Co., a corporation, the complainant, and at the time of the conveyance there was executed and delivered to Joseph C. Lindsley a mortgage for $5,400.00 upon the premises. The premises orig-

inally consisted of three tracts of land, the first containing 4.18 1/10 acres; the second containing .44 acres; and the third a plot of land 79.20 feet along Stuyvesant Avenue by 46.20 feet in depth. The first and second tracts were adjoining tracts on the west side of Stuyvesant Avenue, having a frontage of 250 feet and a depth of about 800 feet, and the third tract was on the east side of Stuyvesant Avenue. Joseph C. Lindsley died, and the Fidelity Trust Company, a corporation, was appointed administrator C. T. A., and assigned said mortgage to Martha O. Mattice by assignment of mortgage dated December 3, 1909. Martha O. Mattice received $1,000.00 on account of the mortgage in 1916, and released from the mortgage a plot 75 feet by 225 feet at the southeasterly corner of the tract, to the west of Stuyvesant Avenue. On the 9th of September, 1919, the rear of the premises to the west of Stuyvesant Avenue was released from the mortgage and the sum of $2,100.00 paid on account of the mortgage. The portion of the property released was approximately one-half of the property in area, but consisted wholly of rear land, the nearest point to Stuyvesant Avenue being 390.06 feet. With the released portions out, the property remaining subject to the mortgage consisted of approximately 2 acres on the west side of Stuyvesant Avenue, with a frontage of 175 feet on Stuyvesant Avenue and a depth of about 400 feet, and the small, irregular shaped lot on the east side of Stuyvesant Avenue, 79.20 feet in front by 46.20 feet in depth.

Martha O. Mattice, in the meantime, died, and the Stuyvesant Security Co., the complainant, conveyed the portion of the premises on the west

side of Stuyvesant Avenue to Harry T. Mattice, the husband of Martha O. Mattice, by deed dated September 9, 1919. The portion of the premises to the east of Stuyvesant Avenue was retained by the Stuyvesant Security Co. The deed recited a consideration of One Dollar ($1.00) and other good and valuable consideration.

On January 8, 1921, Harry T. Mattice conveyed the portion of the premises to the west of Stuyvesant Avenue, being the same conveyed to him by the Stuyvesant Security Co., to John Dreyer and Augusta Dreyer, his wife. The deed contained this clause:

> "Said premises are conveyed expressly subject to taxes for 1920, assessment for Vailsburg drainage sewer, the Vailsburg sewer, southwesterly section, the house sewer connection, and also assessments for the water service connection, and also subject to the lien of mortgage given by the Stuyvesant Security Co. to Joseph C. Lindsley, recorded in Book V 20—245, on which there is now due the sum of $2,300.00 of principal."

On the same day as the conveyance, the mortgage recorded in V 20—245 was assigned to John Dreyer and Augusta Dreyer, his wife, by Harry T. Mattice as administrator of the estate of Martha O. Mattice.

The defendant, John Dreyer, and Augusta Dreyer, his wife, made three separate conveyances of the portion of the premises conveyed to them, one to William H. Hoermann and wife, recorded in K 65—181, another to Charles H. Fuhrmeister and wife, recorded in K 65—184, and another to J. George Reichstetter, Jr., and wife,

recorded in W 66—76. The defendant, John Dreyer, testified that he did not know how much he had sold these parcels for, or how much he had received for them.

Dreyer was not aware that Mattice had no deed for the property on the east side of the street, and that the description of the third tract was not included in the deed. That his grantor sold him the property on both sides of the avenue for a single price as a single parcel, and that the agreement of sale of the property was lost and could not be found. That in examining the abstract of title, it was reported to Dreyer that Mattice had no title to the strip of land on the east side of the street, and that in order to cure the defect and to obtain the complete benefit of the contract, he took a transfer of the mortgage (Testimony of Dreyer, p. 58).

The appellant, Dreyer, testified further that he only discovered that there was some property covered by the mortgage which was on the east side of the street when his grantor, Mattice, offered to give him the deed (Testimony of Dreyer, p. 56), and that at the time that he contracted to purchase the property, he was unaware that the vendor, Mattice, did not own all of the three tracts, described in the mortgage.

Over the objection of the infants, the learned Vice Chancellor received evidence of the circumstances under which the deed from the respondent was delivered to Harry T. Mattice, the appellants' grantor, in 1919. The deed (Exhibit C-1) bears date September 9th, 1919, while the assignment of the mortgage to Martha O. Mattice, is dated November 12th, 1909 (Amended Bill of Complaint, paragraph 4).

The objection to evidence was given by Mr. Bonhag (p. 43, l. 20) as follows:

> "After the release of the second parcel, there was a deal that went through at the same time that the release of the entire property and deed was made out; it was all one transaction and made the same day."

Mr. Dawson, a most distinguished citizen, was the legal representative of the Mattice estate, and he testified that the respondent company was to convey all of the three tracts described in the mortgage, but that as a matter of fact, all of the property was not conveyed, through inadvertence or some other happening (State of the Case, p. 46). Mr. Dawson's recollection is that the officers of the company were to convey the balance of the property, except the portions released (State of the Case, p. 46).

There was one source of title to the land which came to Mr. Mattice, while the title of the mortgage from another source came to the estate of Mrs. Mattice. Mr. Dawson, interrogated by the learned Vice Chancellor, testified that his understanding of the arrangement which resulted in the conveyance of the property to Mattice, was that all the property covered by the mortgage was to be conveyed in settlement of the mortgage. Evidently the mortgage was not given up at that time. The description of the three tracts as written in the deed was not drawn by Mr. Dawson, or in his office, but was furnished by the respondent's officers as prepared by them, and Mr. Dawson could not tell how the small plot on the east side of Stuyvesant Avenue happened to be left out of the conveyance (State of the Case, p. 48).

The bill prays for:

2. That the defendants account for the payments received toward the mortgage debt.

3. That the monies received by the defendants, upon the released portion of the premises be credited.

4. That the proportionate value of the lots released be credited on the mortgage.

5. That part of the mortgaged premises conveyed by the mortgagor be declared subject to its proper portion of the mortgage so as to relieve, to the extent of the relative value of the portion conveyed, that portion of the mortgaged premises retained by the mortgagor.

6. That the mortgage be declared to have been merged in the legal estate of the defendants—a, by the deed, and b, by the transfer of the mortgage.

7. That the mortgaged premises be redeemed.

The third paragraph of Dreyer's answer sets forth that the mortgage was purchased by him and his wife under compulsion to protect their holdings in said three tracts of land which were conveyed to them free and clear of the said mortgage, and Dreyer's answer denied that the conveyance was made in payment of the balance of the mortgage indebtedness, or that the strip of land excluded from the deed and retained by the respondent should be discharged from the mortgage; and that on the contrary, it was expressly agreed that the retained strip of land should stand solely as security of the balance of said mortgage indebtedness; and in the seventh para-

graph of the answer, Dreyer sets out an agreement between the respondent and Harry Mattice to the effect that said lands were conveyed free and clear of any mortgage. The legal theory advanced in behalf of Dreyer, on the final hearing, was the contention that there was no merger of title under the deed and under the mortgage because of the express reference to the mortgage in said deed contained; in other words, the intention of the parties to the deed aforesaid was that the mortgage should be kept alive; that the debt being primarily the respondent's, namely, the obligation to pay the debt of the bond, should remain on the respondent company.

The defense further contended that the mortgage was purchased (Answer, paragraph 7) for a full bona fide consideration, and for a just and full price.

The infant defendants set up the Statute of Frauds and filed a cross bill to foreclose.

Mr. Dawson's language (p. 46):

> "They were to convey all the property covered by the mortgage, and the mortgage was to be cancelled."
>
> "And my recollection is that they were to convey then the balance of the property."

The ground on which the liability for apportioning a part of the mortgage burden on the appellants land is sought to be maintained, as stated in the bill, to be that by virtue of a stipulation in the appellants' deed, the appellants' land became in equity bound equally with the respondent's land, to be answered and pay the mortgage debt. The only contract of the appellants was

that which arose from the acceptance of the deed from Mattice. And the respondent cannot hold the appellants' land for the mortgage debt, unless by force of the stipulation in said deed, the contract was made by appellants to contribute to the payment of the respondent's debt by suit in equity.

The learned Vice Chancellor could not decide matters not set up in the pleadings, "for when a decree is made in relation to such matters, it is void even in a collateral proceeding." (*Reynolds* v. *Stockton*, 43 N. J. Eq. 211, affirmed 140 U. S. 254).

The decision seems to be based upon a finding that the transaction between the complainant and Mattice was an exchange of equities, and that the appellant, as the grantee of Mattice, having a deed containing a clause that the grant was subject to the mortgage in question, that appellant was bound by the exchange of the equities. The pleadings were not formulated to have such an issue determined and hence, the decree is erroneous.

BRIEF OF ARGUMENT.

The deed from the Stuyvesant Security Co., the complainant, to Mattice, contained the usual covenants of seisin and warranty, and against encumbrances, in the following language:

> "And the said party of the first part doth for itself and its successors, covenant and grant to and with the said party of the second part, his heirs and assigns, that it, the said party of the first part, is the true, lawful and right owner of all and singular

> the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever, except as aforesaid.
>
> "AND ALSO, that the said party of the first part now has good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid;
>
> "AND ALSO, that it, the said party of the first part, will WARRANT, secure, and forever defend the said land and premises unto the said party of the second part, his heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever, except as aforesaid." (Exhibit C-1, p. 62, at p. 64.)

And it is the effect of this covenant which calls for consideration.

The appellant contends that the language of the deed merely provides against the possibility of an action at law, and never to support the claim that the insertion of the quoted clause was to declare that the property conveyed must bear its just proportion of the mortgage encumbrance.

The appellants argue that justice demands, in this case, that Dreyer for himself and on behalf of his children, should not be held bound by the circumstances which motivated the transaction from the respondent to deliver the warranty deed. The mortgage being on the property of the respondent, justice demands that its land should be used to satisfy the mortgage burden. Did the appellants ever promise to pay the mortgage or any part thereof? Should not the residue, of the land described in the mortgage, remaining in the possession of the respondents, first be applied to pay off the mortgage?

The debt on the bond was the obligation of the complainant corporation, and the charge on the land was only the security for the debt.

When the words, "subject to mortgages," are found in an absolute deed of conveyance containing full covenants, including warranty, the language is used for a purpose indicating an intent to except the mortgage from the operation of the covenants for title.

An assumption by the grantee of the payment of a mortgage which the grantor is under no obligation to pay, does not create any equity in favor of the mortgagee and by the stronger reason (equality is equity) the clause in Dreyer's deed should not create any equity in favor of the mortgagor.

Now, having submitted the fundamental reasons to sustain our contention for a reversal, we will revert to the habit of endeavoring to find decided cases to fit the situation.

I.

"A deed between parties whereby an estate is conveyed, if accepted by the grantee, is in legal effect the deed of both parties, but in the absence of a stipulation in such a deed by the grantee, that he will assume and pay a debt secured by a mortgage on the premises for the payment of which the grantor is personally liable, it is not a contract by the grantee to pay the mortgage debt for the benefit of the mortgagor."

> "Any right of action thereon by a third person must be derived from the covenantee, and may be released and discharged by the immediate parties in such a contract, regardless of the encumbrancer's interest." (*Crowell* v. *Currier,* 27 N. J. Equity 152; see also note to *Fanning* v. *Murphy,* 4 L. R. A., New Series, 666.)

In equity, a stipulation of this kind is regarded as a contract simply to indemnify the grantor against the mortgage debt. As such, it is operative between the parties to the deed, but does not make the mortgage debt a personal debt of the grantee. This is clearly shown in cases where the controversy is between the heir or devisee and the personal representatives, with respect to the payment of assumed mortgages out of the personal estate, in exoneration of the lands.

Carter v. *Executors of Denman* (1852), III Zabriskie 260, is a leading case.

Opinion by Chief Justice Green, that was an action upon a covenant contained in a deed of bargain and sale. The action was brought by a subsequent purchaser of the land against the executors of the covenantor.

The Chief Justice says:

> "The plaintiff claims, as assignee of the land, against the executors of the grantor, and he claims not by deed directly from the covenantor, but through an intervening sheriff's sale. To maintain his right of action he must show—1 That the covenant is personal, binding on the personal representatives of the covenantor. 2 That the covenant runs with the land, in the nature of a real covenant, and that it passed to him by the assignment or conveyance of the land."

The character, the office and the operation of the ordinary covenants for title are well settled. They are all personal covenants, binding on the personal representative of the covenantor and not real covenants, in the sense of the ancient feudal law. Three of them, viz: 1. That the grantor is lawfully seized; 2. That he has good right to convey; and 3. that the land is free from encumbrances, are strictly personal covenants. They do not run with the land or pass to the assignee. They are all in language *de presenti*, having respect to the date of the deed, and if not true, are broken as soon as made. If, at the date of the deed, the grantor is not lawfully seized, or if he has not good right to convey, if the land is not free from encumbrances, the covenant is broken and a right of action vests *eo instanti* in the grantee. The covenant broken become a chose in action which, at the common law, is not assignable. The two remaining covenants of the deed, viz: that the grantee shall quietly enjoy, and that the grantor will warrant and defend the title, are prospective, both in their language and operations. An eviction or disturbance of possession

is necessary to constitute a breach of them. They are, therefore, in the nature of real covenants; they run with the land conveyed, descend to heirs, and vest in assignees.

And to maintain an action on the covenant of warranty or for quiet enjoyment, it is not enough that there is a defect of title or that the grantor had not a right to convey, or that there are outstanding encumbrances. There must be an eviction, or what is tantamount to an eviction, by title paramount to the plaintiff's, originating before or at the time of the grant to the plaintiff.

II.

Where a mortgagor for valuable consideration conveys away a part of the mortgaged premises, the portion retained is, in general, primarily liable for the payment of the mortgage debt.

There are certain rules of equity on this subject which are entirely settled by the course of decision in this state. (1) Where a mortgagor, for valuable consideration, conveys away part of the mortgaged premises, the portion retained is, in general, primarily liable for the payment of the mortgage debt (*Hoy* v. *Bramhall,* 19 N. J. Eq. 569. (2) Where the consideration is not valuable, but the deed contains the usual covenants, the same result obtains (*Gaskill* v. *Sine,* 13 N. J. Eq. 400; *Harrison* v. *Guerin,* 27 N. J. Eq. 222). But (3) where the conveyance is voluntary, and there are no covenants, the part conveyed remains liable for its proportionate share of the mortgage debt (*Gray* v. *Hattersley,* 50 N. J. Eq. 210; *Jackson* v. *Condict,* 57 N. J. Eq. 522). These

rules are founded upon equitable grounds. They are based upon the presumed intention of the parties, and will not be applied when there is competent proof of a contrary intention.

And in *Sternberger* v. *Sussman,* 69 N. J. Eq. 199, Vice Chancellor Stevens, that illustrious jurist:

> "That the ground upon which equity throws the burden primarily upon the land that remains after conveyance of a part is either that the grantee, having paid full value for what he buys, ought not to pay any more, or that where the consideration is not valuable, the grantor, having covenanted against incumbrances, is bound to make that covenant good. The rule, says PITNEY, V. C., in *Gray* v. *Hattersley,* 50 N. J. Eq. 211, is based upon the intention of the parties, either expressed in the writing passing between them, or implied from the facts and circumstances of the case."

Unless a grantee retains from the purchase price, part of the vendor's money, no duty is imposed upon the vendee to protect the mortgagor against the mortgaged lands and premises.

There are no facts in the case to indicate that on the execution of the contract of purchase between Dreyer and Mattice, that the amount of the mortgage was deducted from the consideration, and therefore, Dreyer never obligated himself to pay the mortgage debt, or to subject his lands proportionally with the respondent's lands. The very nature of the transaction indicated the contrary intent. Dreyer's words are as follows: "The mortgage was worth more at that time than the deed, so that I let him have the deed" (State of the Case, p. 57). He did not accept

the land subject to the mortgage by keeping enough of the vendor's money to pay it, but, on the other hand, he went out and used his own funds to purchase the mortgage. What notions of Justice were offended? What promise did Dreyer fail to keep?

As Judge White, in his concurring opinion, case of *Chancellor of New Jersey* v. *Joseph Towell,* 80 N. J. Equity, page 223, expresses himself:

> "Of course, a warranty of title against the mortgage will give rise to the application of the equity (doctrine of inverse order of alienation), but obviously there would be no warranty of title if a part of the consideration was to be the payment by the conveyed parcels of the mortgage debt; and, on the other hand, the mere absence of an express warranty of title against the mortgage encumbrance, if there had in fact been a payment of the full consideration for the conveyed parcel, would not defeat the real reason for the equity, and consequently, as it seems to me, would not defeat the application of the equitable doctrine under consideration. In other words, if the grantee of the conveyed parcel expressly assumes the payment of the mortgage debt, such assumption obviously enters into the consideration for the conveying and defeats the application of the rule or equity of inverse order of alienation. So, if it appears in any other way that the consideration, in whole or in part, was not paid because of the parcel being conveyed subject to the lien of the mortgage debt, the rule is also defeated to the extent of such nonpayment of consideration, but if it appears that the full consideration for the conveyed parcel was actually paid to the

mortgagor grantor, the grantee is entitled to call upon the remaining mortgaged land owned by the mortgagor grantor, to pay the mortgage debt before the conveyed parcel shall be attacked, and this quite irrespective of the nonexistence of any express covenant of warranty of title. This is my understanding of the doctrine laid down by Pomeroy (1224 & 1225) and by Mr. Justice Reed in *Thompson* v. *Bird,* 57 N. J. Eq. 175, 40 Atl. 857."

III.

As a general rule, a party coming into a court of equity to redeem, pays costs to the defendant, in addition to the amount due upon the mortgage, although he obtains the relief prayed for.

The defendant Dreyer has not resisted improperly the claim of the complainant to redeem, nor has he set up an unconscientious defense; he should not have been refused his costs and should not be compelled to pay costs to the adverse party.

We respectfully submit, therefore, that the decree is in the aforesaid various respects, erroneous and should be reversed, or at least, modified as to the costs in the Court of Chancery, with costs to the appellants in this court.

ANTHONY R. FINELLI,
Solicitor for and of Counsel
with Appellants.

May Term, 1929.

New Jersey Court of Errors and Appeals

Between STUYVESANT SECURITY CO., a corporation, Complainant-Respondent, and JOHN DREYER, *et als.*, Defendants-Appellants.	On Bill, &c. On Appeal from Court of Chancery.

BRIEF OF COMPLAINANT-APPELLEE.

Statement of Facts.

Complainant owned two parcels of land in the City of Newark, Essex County, New Jersey, one on the West side of Stuyvesant Avenue, and the other on the East side of Stuyvesant Avenue. The premises were subject to a mortgage in the sum of $5,400.00, which had been reduced to $2300.00. On the 9th day of September, 1919, the complainant conveyed the parcel on the West side of Stuyvesant Avenue to Harry T. Mattice by a warranty deed, which deed contained this clause:

> "The above mentioned premises are conveyed subject to whatever mortgage liens, taxes, and assessments there may be thereon." (p. 63)

By deed dated January 5, 1921, Harry T. Mattice conveyed the premises to the West of Stuyve-

sant Avenue, being the same parcel conveyed to him by the Stuyvesant Security Co.. to John Dreyer and Augusta Dreyer, his wife, by a deed which contained this clause:

> "Being the same premises conveyed to the said Harry T. Mattice by Stuyvesant Security Co., a corporation, by deed dated September 9, 1919, and recorded in the Register's Office of Essex County in Book W 63 of Deeds for said county on page 381. Said premises are conveyed expressly subject to taxes for 1920, assessment for Vailsburg Drainage Sewer, the Vailsburg Sewer, Southwesterly section, the house sewer connection and also subject to the lien of mortgage given by Stuyvesant Security Company to Joseph C. Lindsley, recorded in Book V 20-245 of Mortgages for Essex County, on which there is now due the sum of $2300.00 of principal." (p. 47 and p. 49)

The situation thus arising stood as follows: a mortgage on two parcels of land, one retained by the mortgagor and the other conveyed subject to the mortgage encumbrance. To this situation, Vice Chancellor Berry applied the rule that each of the parcels subject to the mortgage must bear its proportionate part of the mortgage indebtedness, based on the proportionate value of the respective parcels at the time of the conveyance.

POINT ONE.

The stipulation in the deed from the Stuyvesant Security Co., a corporation, to Harry T. Mattice and in the deed to John Dreyer and Augusta Dreyer, his wife, that the lands were sold subject to the mortgage encumbrances makes the part conveyed subject to its proportionate part of the mortgage indebtedness.

The rule invoked by the Vice Chancellor is laid down in Hoy v. Bramhall, 19 N. J. Eq. 74, and 19 N. J. Eq. 563. In that case there was a mortgage upon eighteen lots of land for Ten Thousand Dollars ($10,000.00). Eight of the lots were sold with full covenants by Bramhall to Kinne by two deeds containing these clauses:

> 1. "subject, however, to the payment by said grantee of all existing liens upon said premises",
>
> 2. "This conveyance is made subject, nevertheless, to the payment by said party of the second part of all existing liens on said premises."

Kinne later sold to Worthington the eight lots covered by the mortgage, and upon a foreclosure of the mortgage the eight lots conveyed to Kinne and then to Worthington were charged with a proportionate part of the mortgage debt.

In addition to charging the eight lots with a proportionate part of the mortgage debt at the time of the foreclosure, the Court of Errors and Appeals charged the eight lots with a proportionate part of $2500.00 paid on account of the mortgage debt after the conveyance to Kinne. The

Court said that the mortgagor, in inserting this clause in the deed "had a lien on the land conveyed to Kinne for a proportionate part of the mortgage debt in exoneration to that extent of the residue of the mortgaged premises and of his personal liability on the bond", and "in equity, that security enures to the benefit of the complainant".—Hoy vs. Bramhall, 19 N. J. Eq. p. 563 at p. 571.

The case was tried in the Court of Chancery. The Chancellor charged the land conveyed to Kinne with its proportionate part of the mortgage upon the entire premises, which at that time was $7,500.00, but the Chancellor did not take into account the $2,500.00 which had been paid on account of the mortgage since the conveyance to Kinne, and the Court of Errors and Appeals reversed the case on this ground, namely: that the $2500.00 also should be charged against Kinne.

Both the Chancellor and the Court of Errors and Appeals agreed, however, that a conveyance of premises subject to encumbrances charges the land conveyed with the payment of its proportionate part of the mortgage debt.

Here is what the Chancellor said:

> "The clause in the deeds to Kinne, "subject to the payment of all liens now on said premises", cannot be construed into a covenant to pay the liens. It is only a limitation of the covenants of warranty, and against encumbrances. The effect of such a deed is the same as that of a deed of bargain and sale of part of mortgaged premises; it makes the part conveyed, subject to its proper proportion of the encumbrances. The rule, that the part of mortgaged premises last conveyed must be first sold, only applies where the conveyances are by deeds, with warranty or covenants against encumbrances. And, in this case, the clause above mentioned ex-

pressly provides for the payment of liens by the lots conveyed to Kinne. Bramhall had the right and the power in conveying these lots, either absolutely, or by way of mortgage, to stipulate that they should bear their part of the bank mortgage claim, so as to relieve, to that extent, the lots retained by him, in order that he might have something wherewith to pay or secure his other creditors. With this express provision, Worthington's situation or equity is no stronger, because he is a mortgagee whom Bramhall is bound to pay out of any of his property. Worthington is entitled to have credited on the mortgage of the complainant, so much of the sum received by Hoy on the release of the five lots as is their proportionate share of that mortgage debt. The excess over that amount is the amount due to Bramhall, as the price of his equity of redemption in those lots, which he had a right to sell and appropriate."

Hoy v. Bramhall, 19 Eq. 74, p. 78.

And here is what the Court of Errors and Appeals said on the point:

"It may be that the language of the stipulations in these deeds, with reference to the complainant's mortgage, is not sufficient to create a covenant on which a strictly personal liability may be based; but the effect is clearly that stated by the Chancellor, to make the part conveyed subject to its proper proportion of the encumbrances, so as to relieve to that extent that part of the mortgaged premises retained by the mortgagor, by force of which the lots conveyed and those retained must contribute towards discharging the common burthen, according to their relative values.

The general rule is, that where several parcels of land are charged with a common

> burthen, that burthen shall be shared by all. Equality, in that respect, is equity.
>
> To this general rule there are several exceptions, prominent among which is that where a mortgagor conveys away part of the mortgaged premises, the portion retained is primarily liable for the payment of the mortgage debt. This exception is, however, founded on equitable principles, and has no application where the encumbrance is, by agreement between the mortgagor and his grantee, made a charge upon the granted premises, either in the whole or in part. If, by the terms of sale, the mortgage is to remain a common charge upon the whole, and to be paid by the mortgagor and purchaser without any specific agreement as to the proportion which each one is to pay, they must contribute according to the relative value of each one's part." Mickle v. Woodward, opinion of Chancellor Williamson, October Term, 1822, Halst. Dig. 635; Wikoff v. Davis, 3 Green's C. R. 224; Engle v. Haines, 1 Halst. C. R. 186; S. C, on appeal Ibid. 632."

Counsel for the appellants relies upon the fact that the deed to Mattice is a full covenant deed, and the same is set out at length in the memorandum of the complainant without, however, a statement of the stipulations in the deed that "the above mentioned premises are conveyed subject to whatever mortgage liens, taxes, and assessments there may be thereon". These stipulations are, of course, the crucial part of the deed. (Exhibit C-1, p. 63).

The deed in Hoy v. Bramhall, *supra,* given by Bramhall to Kinne was a full covenant deed. This appears in the opinion of the Chancellor on page 76 of Hoy v. Bramhall, 19 Eq. 74, where the Court says:

> "Bramhall by three deeds dated on the 30th and 31st days of May, 1865, had conveyed eight of these eighteen lots to H. M. Kinne with full covenants stating them to be 'subject, nevertheless, to the payment of all existing liens now on said premises' ".

It also appears in the opinion of the Court of Errors and Appeals at page 569 of Hoy v. Bramhall, 19 N. J. Eq. p. 563, where Justice Depue says:

> "In the conveyance of the date of May 30th, 1866, after the habendum clause and before the covenants the following clause is inserted: 'Subject however, to the payment by said grantee of all existing liens upon said premises'. And in a like portion of the deed of May 31st, 1865, 'this conveyance is made subject, nevertheless to the payment by said party of the second part of all existing liens on said premises'."

There appears nothing in the report of the case of Hoy v. Bramhall, *supra,* in the Court of Chancery or in the Court of Errors and Appeals whether the deed to Worthington from Kinne contained a similar stipulation as to the premises being conveyed subject to encumbrances, but in the instant case there is an express provision in the deed from Mattice to Dreyer, expressly repeating and reaffirming the subjective clause in the prior deed, and reading as follows:

> "* * and also subject to the lien of a mortgage given by Stuyvesant Security Company to Joseph C. Lindsley, recorded in Book V 20 of Mortgages for Essex County, pages 245 &c., on which there is now due the sum of $2300.00 of principal."

This provision is found in the deed from Mattice to Dreyer. (p. 49)

The appellant claims that he only discovered that:

> "* * there was some property covered by the mortgage which was on the East side of the street when his grantor, Mattice, offered to give him the deed, and that at the time he contracted to purchase the property he was unaware that the vendor, Mattice, did not own all of the three tracts described in the mortgage."
>
> (Paragraph 4 of Appellant's Brief)

How this ramification of lack of information and misinformation can affect the complainant is difficult to see. The fact is, the defendant took his deed subject to a definite stipulation affecting the premises purchased, creating a distinct equity in favor of the complainant, and it is submitted that the equity of the complainant can not be affected by the shortcomings of the defendant.

POINT TWO.

Where there is no specific agreement as to the proportion which each parcel is to pay toward the mortgage encumbrance, they must contribute according to the relative value of the parcels at the time of the conveyance.

The opinion of Justice Depue in Hoy v. Bramhall, *supra,* p. 569, would appear to settle this point. It reads:

> "If, by the terms of sale, the mortgage is to retain a common charge upon the whole, and to be paid by the mortgagor and purchaser without any specific agreement as to

the proportion which each one is to pay, they must contribute according to the relative value of each one's part."—Mickle v. Woodward, opinion of Chancellor Williamson, October term, 1822, Halst. Dig. 634; Wikoff v. Davis, 3 Green's C. R. 224; Engle v. Haines, I Halst. C. R. 186; S. C. on appeal Ibid. 632.

POINT THREE.

The stipulation in the deed from Stuyvesant Security Co. to Harry T. Mattice that the premises are conveyed subject to encumbrances, imports a consideration, and while the deed stands, is conclusive of the question that the conveyance was made in part consideration of the charge upon the part conveyed.

There is no allegation of mistake, or any claim for reformation in the pleadings or in the proof. The claim in the answer is that the agreement between the complainant and Mattice was that the complainant was to assume the payment of the mortgage, and that Mattice was not to pay any part of it, and that was the issue the Court tried. (p. 15)

POINT FOUR.

The allowance for counsel fees is a matter within the discretion of the Court under Section 91 of the Chancery Act of 1902.

There is ample warrant for an allowance to counsel. Vice Chancellor Berry in his opinion says:

> "Certainly the defendant Dreyer, the present holder of the mortgage, is not entitled to more. When on the witness stand he was unable to recall the amount received by him for the three parcels of land which he conveyed. It was quite obvious that his memory was conveniently adjusted to the occasion, and I have no doubt that the truth would disclose that he has already received from such conveyance more than the amount due on this mortgage." (p. 31)

It is respectfully submitted that the opinion of Vice Chancellor Berry be affirmed.

A. J. ROSSBACH,
Solicitor for and of counsel with
Complainant-Respondent.

Dated: May 6, 1929.