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Notice of Appeal.

(Filed May 8, 1933)

The defendants William J. Barry and Margaret Barry, his wife, hereby appeal from the Order Striking out Answer and Decree Pro Confesso made in the above-entitled cause on the 28th day of April, 1933 by the Chancellor of the State of New Jersey on the advice of Vice Chancellor John O. Bigelow, and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes. 10

INSLEY, VREELAND & DECKER,
Solicitors for the Defendants, Wil-
liam J. Barry and Margaret
Barry, his wife.

Dated: May 5, 1933. 20

ALFRED R. BECKER,
Of Counsel.

I conceive there is a good cause for the Appeal in the above-entitled cause.

ALFRED R. BECKER,
Of Counsel with the Defendants 30
William J. Barry and Mar-
garet Barry, his wife.

Petition of Appeal.

(Filed May 15, 1933)

TO THE HONORABLE THE COURT OF ERRORS AND
APPEALS IN THE LAST RESORT IN ALL CAUSES:

The petition of William J. Barry and Margaret Barry, his wife, the appellants in the above-entitled cause, respectfully shows that:

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1. Petitioners find themselves aggrieved by an order striking out the Answer and Decree Pro Confesso made in the Court of Chancery by his Honor Luther A. Campbell, Chancellor of the State of New Jersey, on the advice of Vice Chancellor John O. Bigelow bearing date the 28th day of April, 1933 in a certain cause in said Court of Chancery wherein the said Albert Datz and Anna C. Datz, his wife, were complainants, and the said William J. Barry and Margaret Barry, his wife, were defendants, in this respect, to wit: that the said Decree adjudges that the answer filed by the defendants William J. Barry and Margaret Barry, his wife, in the above-entitled cause be and the same is stricken and further adjudges that the complainants' bill be and the same is hereby taken as confessed against the defendants William J. Barry and Margaret Barry, his wife.

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2. Petitioners appeal from the said order striking Answer and Decree Pro Confesso of the Chancellor which decrees as aforesaid, upon the ground that same is erroneous in that:

(a) The court below erred in finding that the answer of these petitioners was sham and based upon unfounded allegations of fact.

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(b) That the court below erred in striking out the answer filed by these petitioners.

Petition of Appeal.

(c) That the court below erred in holding that the complainants' bill be taken as confessed against these petitioners.

Petitioners therefore pray that the said Decree of the said Chancellor may be wholly reversed, set aside and for nothing holden and that petitioners may have such other relief in the premises as to this court shall seem proper. 10

INSLEY, VREELAND & DECKER,
Solicitors for Appellants, William
J. Barry and Margaret Barry, his
his wife.

ALFRED R. BECKER,
Of Counsel with Appellants. 20

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Answer to Petition of Appeal.

(Filed June 20, 1933)

The answer of Albert Datz and Anna C. Datz, his wife, the above named appellees, to the petition of appeal of William J. Barry and Margaret Barry, his wife, the above named appellants.

10 These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admit that an Order was, on the 28th day of April, 1933, 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 Order, these appellees beg leave to refer thereto when the same shall be produced.

20 These appellees are advised and believe that the said Order is agreeable to equity; and they pray that the same may be affirmed with costs to be taxed in favor of these appellees.

HUDSPETH & HARRIS,
Solicitors for Appellees, Albert
Datz and Anna C. Datz, his wife.

HARRY N. HARRIS,
Of Counsel with Appellees.

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Bill of Complaint.

(Filed Feb. 21, 1933)

IN CHANCERY OF NEW JERSEY.

TO THE HONORABLE LUTHER A. CAMPBELL,
 CHANCELLOR OF THE STATE OF NEW JERSEY:

The complainants, Albert Datz and Anna C. Datz, his wife, of the Township of Glen Ridge, County of Essex and State of New Jersey, respectfully show that: 10

1. On January 30th, 1924, William J. Barry and Margaret Barry, his wife, being indebted to your complainants in the sum of \$5,000.00, executed to them a bond of that date to secure that sum, payable on January 30th, 1928, with interest at the rate of 6% per annum, payable semi-annually from the date of the bond. 20

2. To secure payment of the said bond, William J. Barry and Margaret Barry, his wife, executed to your complainants a mortgage of even date with the bond; and thereby conveyed to them, in fee, the land hereinafter described, on the express condition that such conveyances should be void if payment should be made according to the terms of the bond. Which mortgage having been first duly acknowledged, and the certificate of acknowledgment duly endorsed thereon was recorded in the Register's Office of Hudson County in Liber 1205 of Mortgages, page 647. 30

3. The mortgaged premises are described as follows:

ALL that certain lot of land and premises, situate in Jersey City, County of Hudson and State of New Jersey, described as follows: 40

Bill of Complaint.

10 BEGINNING at a point on the northwesterly side of the Hudson Boulevard, distant seventy-one feet and fifty hundredths of a foot (71.50 ft.) southwesterly from a point formed by the intersection of the southwesterly line of Clendenny Avenue with the northwesterly line of Hudson County Boulevard; thence (1) running northwesterly and parallel with the southwesterly line of Clendenny Avenue ninety-eight feet and seventeen hundredths of a foot (98.17 ft.) to a point; thence (2) southwesterly at right angles to Clendenny Avenue thirty-three (33) feet to a point; thence (3) southeasterly and parallel with the southwesterly line of Clendenny Avenue eighty-six feet and sixty hundredths of a foot (86.60 ft.) to the Hudson County Boulevard; thence (4) northeasterly along the northwesterly side of the Hudson County Boulevard thirty-five feet and twenty-four hundredths of a foot (35.24 ft.) to the point or place of beginning.

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30 4. The mortgage contained an agreement that if any installment of interest should remain unpaid for thirty days after the same should fall due, then the whole principal sum with all unpaid interest, should, at the option of the mortgagee, become immediately due.

40 5. The mortgage also contained an agreement that in case of default for thirty days in payment of any municipal or other lien on the mortgaged premises, which is or may be prior to the lien of the mortgage, then the bond and mortgage should become due.

Bill of Complaint.

6. On January 4th, 1922, Frank W. Collins recovered a judgment together with costs in the sum of \$648.29 in the New Jersey Supreme Court against Stephen L. Richter and Wm. J. Barry. Said judgment is still unsatisfied and is a lien upon the premises described in the aforesaid mortgage.

Any interest which the said Frank W. Collins may have in the said premises is subject and subordinate to the lien of complainants' mortgage. 10

7. On June 17th, 1924, William J. Barry and Margaret Barry, his wife, conveyed the premises described in Paragraph 3 above, to Ksienia Onufrow. Said deed having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon was recorded in the Register's Office of Hudson County in Liber 1524 of Deeds for said County, page 532. 20

Any interest which the said Ksienia Onufrow may have in the said premises is subject and subordinate to the lien of complainants' mortgage.

8. Said Ksienia Onufrow is married and her husband's name is Luka Onufrow.

Any claims or interest which said Luka Onufrow may have in said lands or premises by way of curtesy or otherwise is subject and subordinate to the lien of complainants' mortgage. 30

9. On January 18th, 1928, your complainants extended the time of payment of the said bond and mortgage described in Paragraphs 1 and 2 above, to the 30th day of January, 1933. Said extension is recorded in the Office of the Register of Hudson County in Book 78 of Releases, page 55. 40

Bill of Complaint.

10 On May 2, 1928 Ksienia Onufrow and Luka Onufrow, her husband, conveyed the premises described in Paragraph 3 above, to Jacob Fleischman. Said deed having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon was recorded in the Register's Office of Hudson County in Liber 1682 of Deeds, page 551.

Any interest which the said Jacob Fleischman may have in the said lands and premises is subject and subordinate to the lien of complainants' mortgage.

11. Said Jacob Fleischman is married and his wife's name is Minnie Fleischman.

20 Any claim or interest which she may have in the said premises by way of inchoate right of dower or otherwise is subject and subordinate to the lien of complainant's mortgage.

30 12. On May 2, 1928 Jacob Fleischman made, executed and delivered to Ksienia Onufrow a bond and mortgage in the sum of \$2,000.00 to secure part of the purchase price for the conveyance of the premises as set forth in Paragraph 10 above. Said mortgage having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon was recorded in the Register's Office of Hudson County in Liber 1502 of Mortgages, page 410.

40 13. On October 11th, 1929, Ksienia Onufrow filed a Lis Pendens against Jacob Fleischman, Minnie Fleischman, his wife and Frances F. Cahill. The purpose of the action described in said Lis Pendens was to foreclose the mortgage made, executed and delivered to Ksienia Onufrow by Jacob Fleisch-

Bill of Complaint.

man as set forth in Paragraph 12 above. Said Lis Pendens was recorded in the Register's Office of Hudson County in Liber 19 of Lis Pendens, page 642.

14. On March 8, 1930 the Court of Chancery of the State of New Jersey issued a decree for the sale of the premises described in the Lis Pendens filed in Liber 19 of Lis Pendens, page 642, to satisfy a judgment for \$1,663.28 plus costs of \$144.15. Said Fieri Facias is filed in the Office of the Clerk of the Court of Chancery in Book Z 13 of Executions, page 187. 10

15. On April 24th, 1930 by reason of the Fieri Facias described in Paragraph 14 above, William C. O'Driscoll, Sheriff of Hudson County, sold the property therein described to Ksienia Onufrow at a public auction. Said deed having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon, was recorded in Liber 1741 of Deeds, page 36. 20

Any interest which said Ksienia Onurow may have in the said premises is subject and subordinate to the lien of complainants' mortgage.

16. On August 23rd, 1932 Ksienia Onufrow and Luka Onufrow, her husband, conveyed the said premises described in Paragraph 3 above, to Arthur F. Fuller. Said deed having been first duly acknowledged and the certificate of acknowledgment being duly endorsed thereon, was recorded in the Office of the Register of Hudson County on February 8th, 1933 and is known as Instrument #871. 30

Any interest which the said Arthur F. Fuller may have in the said premises is subject and subordinate to the lien of complainants' mortgage. 40

Bill of Complaint.

17. Said Ksienia Onufrow and Arthur F. Fuller have failed to pay the taxes on the said property for the year of 1931 in the sum of \$855.58. Complainants have elected that the whole principal sum with all unpaid interest shall be now due.

10 18. Said Ksienia Onufrow and Arthur F. Fuller have failed to pay the taxes on the said property for the year of 1932 in the sum of \$853.38. Complainants have elected that the whole principal sum with all unpaid interest shall be now due.

20 19. On July 30, 1932 one-half year's interest fell due on complainants' bond and mortgage and remained unpaid for more than thirty days thereafter and no part thereof has yet been paid. Complainants have elected that the whole principal sum with all interest shall be now due.

19 (a). The principal sum of \$5,000.00 has been reduced by payments in the sum of \$1,000.00, leaving a balance due thereon of \$4,000.00 together with interest from the 30th day of January, 1932.

30 20. On January 30th, 1933 the whole amount of principal with interest thereon from Jan. 30, 1932, became due upon complainants' bond and mortgage.

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

1. That William J. Barry and Margaret Barry, his wife, Frank W. Collins, Ksienia Onufrow and Arthur F. Fuller, who are defendants to this suit may answer this bill of complaint and each statement therein made.

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Bill of Complaint.

2. That an account may be taken of the amount due on complainants' mortgage.

3. That the defendants or one of them, may be decreed to pay complainants the amount so found due with interest and costs, by a short day to be appointed by this Court; and that in default of such payment they and each of them, be debarred and foreclosed of all equity of redemption in said lands; or

4. That a decree may be made for the sale of the mortgaged premises to raise and pay to the complainants the amount so found due on their mortgage with interests and costs.

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

HUDSPETH & HARRIS,
Solicitors for and of
Counsel with Complainants.

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**Answer of Defendants, William J.
Barry and Margaret Barry.**

(Filed March 15, 1933)

The defendants, William J. Barry and Margaret Barry, answering the bill of complaint state:

- 10 1. Said defendants admit the allegations of paragraphs 1, 2, 3, 4 and 5 of the bill of complaint.
2. Said defendants deny the allegations of paragraph 6 of the bill of complaint.
3. Said defendants admit the allegations of paragraph 7 except such part thereof as states or implies that complainants' mortgage is a lien on the premises described in the bill of complaint which portion said defendants deny.
- 20 4. Said defendants are without knowledge or belief as to the allegations of paragraph 8 except such portion thereof as states or implies that the complainants' mortgage is a lien on the premises described in the bill of complaint which portion said defendants deny and as to the remainder thereof said defendants leave the complainants to their proof.
- 30 5. Said defendants are without knowledge or belief as to the allegations of paragraph 9 and leave complainants to their proof.
6. Said defendants are without knowledge or belief as to the allegations of paragraph 10 except such portion thereof as states or implies that complainants' mortgage is a lien on the premises described in complainants' bill which portion defendants deny, and as to the remainder thereof said
40 defendants leave the complainants to their proof.

*Answer of Defendants, William J. Barry and
Margaret Barry.*

7. Said defendants are without knowledge or belief as to the allegations of paragraph 11 except such portion thereof as states or implies that complainants' mortgage is a lien on the premises described in complainants' bill which portion defendants deny, and as to the remainder thereof said defendants leave the complainants to their proof. 10

8. Said defendants are without knowledge or belief as to the allegations of paragraphs 12, 13 and 14 and leave complainants to their proof.

9. Said defendants are without knowledge and belief as to the allegations of paragraph 15 except so much thereof as states or implies that complainants' mortgage is a lien on the premises described in complainants' bill which portion defendants deny, and as to the remainder thereof said defendants leave the complainants to their proof. 20

10. Said defendants deny the allegations of paragraph 16 and leave complainants to their proof.

11. Said defendants are without knowledge and belief as to the allegations of paragraphs 17, 18 and 19 and leave the complainants to their proof. 30

12. Said defendants deny the allegations of paragraphs 19a and 20 of the bill of complaint.

Further answering the bill of complaint said defendants state:

1. On or about August 23rd, 1932 Ksienia Onufrow and Luka Onufrow, her husband, the then owners of said mortgaged premises conveyed said 40

*Answer of Defendants, William J. Barry and
Margaret Barry.*

10 mortgaged premises to the complainants or to their
nominee; that the consideration for such convey-
ance was that the same was given and accepted by
the complainants in full satisfaction of the bond
and mortgage mentioned in paragraphs 1 and 2 of
the bill of complaint. That ever since said deed
was given said complainants have been in posses-
sion of said mortgaged premises and are still in
possession thereof. That by reason thereof there is
nothing due to the complainants on said bond and
mortgage and said mortgage is not a lien on the
premises described in the bill of complaint.

20 INSLEY, VREELAND & DECKER,
Solicitors of Defendants,
William J. Barry and Margaret Barry.

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**Notice of Motion to Strike Out Answer
of Defendants, William J. Barry and
Margaret Barry.**

(Filed April 28, 1933)

To INSLEY, VREELAND & DECKER, Solicitors of
Defendants, WILLIAM J. BARRY and MARGARET
BARRY, and/or WILLIAM J. BARRY and MAR-
AGRET BARRY:

PLEASE TAKE NOTICE that on Monday, the 3rd day 10
of April, 1933, at the hour of ten o'clock in the
forenoon, or as soon thereafter as counsel can be
heard, at the Chancery Chambers, No. 1 Exchange
Place, in the City of Jersey City, we shall apply to
the Chancellor or to such Vice-Chancellor as may
sit for him, for an Order striking out the Answer
filed by the defendants, William J. Barry and Mar-
garet Barry, in the above entitled cause, on the
ground that Paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 20
and 12 of said Answer and the First Separate De-
fense of said Answer are sham and are based on
unfounded allegations of fact.

AND PLEASE TAKE FURTHER NOTICE that in the
event that the Court strikes out the Answer of the
defendants, William J. Barry and Margaret Barry,
we shall apply to the Chancellor or to any Vice-
Chancellor who might be present, for a decree
pro confesso to be entered against said defendants, 30
William J. Barry and Margaret Barry in the above
entitled cause.

PLEASE TAKE FURTHER NOTICE that in support of
our motion, we will rely upon the affidavits annexed
hereto.

Very truly yours,

HUDSPETH & HARRIS,
Solicitors of Complainants.

Dated: March 23rd, 1933. 40

Affidavit of Albert Datz.

STATE OF NEW JERSEY, }
 COUNTY OF HUDSON, } ss.:

ALBERT DATZ, of full age, being duly sworn according to law, upon his oath, deposes and says:

10 1. I am one of the complainants in the above entitled cause and one of the mortgagees named in the bond and mortgage set forth in the bill of complaint, which was made by William J. Barry and Margaret Barry to Albert Datz and Anna C. Datz, which said mortgage is the subject of foreclosure in the above entitled cause and which was recorded in Liber 1205 of Mortgages for Hudson County on page 647.

20 2. Anna C. Datz, the other complainant named in the above entitled cause is my wife.

3. At the time that the said bond and mortgage was made to Mrs. Datz and myself, we sold the property to William J. Barry and Margaret Barry, his wife, and the Barrys made the bond and mortgage, aforesaid, to us in part payment of the consideration for the conveyance of the said property by us to the Barrys.

30 4. The property was subsequently sold by William J. Barry and Margaret Barry, his wife, to Ksienia Onufrow as appears by the record in the Hudson County Register's Office and I am informed that they made a deed of conveyance to Ksienia Onufrow on the 17th day of June, 1924, and that the said deed is recorded in Liber 1524 of Deeds for Hudson County at page 532.

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Affidavit of Albert Datz.

5. I am informed and verily believe that Ksienia Onufrow thereafter sold the property to one Jacob Fleischman and conveyed the premises by deed of conveyance made on May 2, 1928, which deed of conveyance, I am informed and verily believe is recorded in the Register's Office of Hudson County in Liber 1682 of Deeds, on page 551.

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6. At the time that Ksienia Onufrow sold the premises to Jacob Fleischman, she, herself, received a bond and mortgage in the sum of \$2,000.00 from Jacob Fleischman in part payment of the purchase price for the said premises.

7. I am informed and verily believe that thereafter Ksienia Onufrow instituted a foreclosure proceeding to foreclose her mortgage, aforesaid, and that as a result of said foreclosure proceeding, the Sheriff of Hudson County sold the premises to Ksienia Onufrow at a public auction and did on the 24th day of April, 1930, make a deed of conveyance to the said Ksienia Onufrow, which said deed is recorded in Liber 1741 of Deeds for Hudson County at page 36.

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8. Ever since the said Ksienia Onufrow purchased the property from William J. Barry and Margaret Barry, his wife, and after she again acquired title from the Sheriff, as aforesaid, she paid the interest on our bond and mortgage until July 30th, 1932.

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9. The due date of the principal sum of the bond and mortgage held by Mrs. Datz and myself, was extended from January 30th, 1928 to January 30th, 1933 by an extension agreement dated January

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Affidavit of Albert Datz.

18th, 1928 and recorded in the Hudson County Register's Office in Book 78 of Releases, on page 55.

10 10. The bond and mortgage contains an agreement that should the taxes or interest remain unpaid for a period of thirty days, that then, in that event, the principal sum of the bond and mortgage held by Mrs. Datz and myself should become immediately due and payable.

20 11. I inquired at the Tax Collector's Office in Jersey City and found out that Ksienia Onufrow failed to pay the taxes on said property for the year of 1931 which amounted to \$855.58 and that she also failed to pay the taxes for the year of 1932, which amounted to \$853.38, all of which taxes remained unpaid for more than thirty days and are still unpaid.

12. Ksienia Onufrow failed to pay the interest to my wife or myself on the principal sum of our bond and mortgage when the same came due on July 30th, 1932.

30 13. I saw Mrs. Onufrow's husband, who was transacting the business for her, and told him that he would have to pay the taxes and also pay my interest or else we would be obliged to foreclose. He told me that he would take the matter up with his wife and would then report to me. In a few days I saw him and he told me that his wife would be unable to make the payments and that she was finding it difficult to even pay the interest on the prior mortgages and that he did not expect that she would pay our interest at all and that if we wanted to foreclose our mortgage, we should go ahead be-

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Affidavit of Albert Dätz.

cause he figured that his wife would be unable to carry the property any longer because it was a total loss to her.

14. I reported to my wife the difficulties that were facing us with respect to our mortgage, and we decided that it would be for our best interests to foreclose the bond and mortgage and, if necessary, proceed against the makers of the bond if they did not see fit to take the property over and pay us our money. We decided, however, that before proceeding to foreclose, it would be a good idea to try and secure an assignment of the rents from Mrs. Onufrow so that we could avoid the unnecessary expense and probable depreciation in the value of the property which might result if we applied for a receiver when we proceeded to foreclose. 10
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15. I took the question of assigning the rents to us up with Mr. Onufrow and thereafter he reported to me that his wife refused to assign the rents but Mr. Onufrow told me that his wife would be willing to give a deed to the premises to whom-ever we named, if we would pay \$500.00. I discussed the matter with my wife again and we finally decided to pay Mrs. Onufrow the sum of \$300.00 if she would give a deed to some third party to be named by us, so that we might gain control of the income and apply the same to the prior liens to avoid the foreclosure of the prior mortgages and to avoid the expense of a receivership and to protect the property as best we might be able to. 30

16. We did on August 23rd, 1932, pay the sum of \$300.00 as consideration for the making of the deed by Ksienia Onufrow and Luka Onufrow, her 40

Affidavit of Albert Datz.

husband, to Arthur F. Fuller, whom we named to be the vendee of the said property.

10 17. It was always our intention and desire to foreclose the mortgage and proceed against William J. Barry and Margaret Barry, the makers of the bond and mortgage, in the event that they refused to take over the property and pay us the money due on our bond and mortgage. We never at any time agreed to cancel the bond and mortgage nor did we at any time intend that the conveyance by Ksienia Onufrow and Luka Onufrow, her husband, should be made to our nominee in consideration of a full satisfaction of the bond and mortgage. As a matter of fact, the very reason why we paid the \$300.00 in cash, was to pay a valid consideration for the conveyance and to show a clear intention to keep the bond and mortgage alive and in full force and effect, and furthermore, in order that we might avoid any questions whatsoever, as to whether or not the mortgage was to merge with the deed, we proceeded to have the deed made to a third party rather than to either Mrs. Datz or myself. These are additional reasons why we proceeded in the manner aforesaid, besides those of trying to secure control of the income to protect the property itself.

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18. Since the property was conveyed to Arthur F. Fuller, I personally have given my time to look after the welfare of the property and to try and keep the place rented. I have paid the interest on the first mortgage and second mortgage and the expenses and disbursements for the carrying of the property, out of the rents received and I have even been obliged to expend more than I collected, in

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Affidavit of Albert Datz.

order to keep the property in shape and to make certain that the first and second mortgage would not foreclose their respective mortgages.

19. The defenses set up by William J. Barry and Margaret Barry, his wife, in the Answer filed by them, are sham and untrue and merely filed for the purpose of delaying this proceeding. 10

ALBERT DATZ.

Sworn and Subscribed to before me }
this 23rd day of March, 1933. }

BERNARD SOLOMON,
An Attorney-at-Law
of the State of N. J.

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Affidavit of Anna C. Datz.

STATE OF NEW JERSEY, }
 COUNTY OF HUDSON, } ss.:

ANNA C. DATZ, of full age, being duly sworn according to law, upon her oath, deposes and says:

10 1. I am one of the complainants in the above entitled cause and I am the mortgagee named in the bond and mortgage set forth in the bill of complaint, which was made by William J. Barry and Margaret Barry to Albert Datz and Anna C. Datz.

20 2. At the time that the said bond and mortgage was made to my husband and myself, we sold the property to William J. Barry and Margaret Barry, his wife, and the Barrys made the bond and mortgage to us as a purchase money mortgage.

3. The property was subsequently sold by William J. Barry and Margaret Barry, his wife, to Ksienia Onufrow and they did on the 17th day of June, 1924, make a deed of conveyance to the said Ksienia Onufrow, which deed is recorded in the Register's Office of Hudson County in Book 1524 of Deeds for said County, on page 532.

30 4. Ksienia Onufrow at the time of the default in interest set forth in the bill of complaint, was the owner of the property described in the bill of complaint. She failed to pay the interest on my bond and mortgage, aforesaid, which came due on July 30th, 1932. The interest that fell due on said date was one-half year's interest from January 30th, 1932.

40 5. On January 30th, 1933, the full amount of principal and interest came due, in accordance with

Affidavit of Anna C. Datz.

the terms of an extension agreement dated January 18th, 1928, as set forth in Paragraph 9 of the bill of complaint.

6. The principal sum of my bond and mortgage was reduced from \$5,000.00 to the sum of \$4,000.00 by payments aggregating the sum of \$1,000.00.

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7. After default in the payment of the interest on my bond and mortgage in July 1932, I notified Ksienia Onufrow that I would foreclose the bond and mortgage, unless she paid the interest and taxes that were then due on the premises for the years of 1931 and 1932.

8. I was notified by Ksienia Onufrow that she was unable to meet these payments and that I could foreclose if I desired.

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9. When faced with the necessity of foreclosing the mortgage, I talked the matter over with my husband, who owned the mortgage with me, and we decided that before proceeding to foreclose, it would be advisable to try and get Ksienia Onufrow to assign the rents to someone in order to avoid the necessity of securing a receiver in the event that we proceeded with the foreclosure and furthermore, to save the income of the property in order to take care of the prior liens, there being the taxes and two prior mortgages ahead of our mortgage.

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10. My husband reported that Mrs. Onufrow refused to make an assignment of the rents but that if we would pay her \$500.00 she would give a deed to the premises to whomever we named, so that we might then be in a position to protect the income

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Affidavit of Anna C. Datz.

and the property itself. After discussing the matter, we finally agreed to pay Mrs. Onufrow the sum of \$300.00 if she would give a deed to our nominee, so that we might secure control of the income and avoid the expense of a receivership and the usual destruction of the property annexed to a receivership.

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11. It was always our intention and desire to foreclose the property and proceed against William J. Barry and Margaret Barry, the makers of the bond and mortgage, in the event that they refused to take over the property and pay us the money due on our bond and mortgage. We at no time agreed to cancel the bond and mortgage nor did we at any time intend that the conveyance by Ksienia Onufrow and Luka Onufrow, her husband, should be in consideration of a full satisfaction of the bond and mortgage. On the contrary, it was always our intention to keep the bond and mortgage alive and in full force and effect and it was, therefore, that we paid a money consideration for the conveyance and in order to avoid any complications or questions as to whether or not the mortgage would merge with the deed, we proceeded to have the deed made to a third party rather than to either my husband or myself.

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ANNA C. DATZ.

Sworn and subscribed to before me }
 this 23rd day of March, 1933. }

BERNARD SOLOMON,
 An Attorney-at-Law
 of the State of N. J.

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**Affidavit of William J. Barry and
Margaret Barry.**

(Filed April 28, 1933)

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

WILLIAM J. BARRY and MARGARET BARRY, his wife, being duly sworn according to law on their respective oaths depose and say: 10

On January 30th, 1924 the complainants, Albert Datz and Anna C. Datz, his wife, conveyed to us the premises described in the bill of complaint filed herein by deed of that date, and to secure part of the purchase price we executed to the complainants a bond and mortgage of the same date as the deed which was the bond and mortgage the complainants are foreclosing in this proceeding. On June 17th, 1924 we conveyed this property to Ksienia Onufrow by deed of that date and as part of the consideration for the conveyance Ksienia Onufrow assumed and agreed to pay the said bond and mortgage of Albert Datz and Anna C. Datz. We are informed and believe that thereafter title to this property was transferred a number of times and again was acquired by the said Ksienia Onufrow. On August 23rd, 1932 Ksienia Onufrow and Luka Onufrow, her husband, conveyed the said property to Arthur F. Fuller by deed of that date, this deed contains a recital as follows: 20 30

“Subject to all mortgages, taxes, liens of record and otherwise from which the parties of the second part agree to save the parties of the first part harmless.”

Arthur F. Fuller who acquired title under this deed is a nephew of the said complainants, Albert Datz and Anna C. Datz, and is their nominee, holding 40

Affidavit of William J. Barry and Margaret Barry.

10 the title to the property in his name, for the sole
 use and benefit of the complainants, and without
 any beneficial interest of his own. That as part of
 the consideration for the conveyance of the prem-
 ises to Arthur F. Fuller as representative of Albert
 Datz and Anna C. Datz it was understood and
 agreed that the mortgage of the complainants was
 to be extinguished and cancelled of record; that
 ever since the deed to Arthur F. Fuller was given
 Albert Datz and Anna C. Datz, his wife, have been
 in possession of the mortgaged premises and have
 collected the rents, issues and profits thereof; that
 said Albert Datz and Anna C. Datz, his wife, had
 the title to said premises put in the name of Arthur
 F. Fuller in order to conceal from deponents the
 fact that they were the owners of the property and
 20 failed to cancel their said bond and mortgage of
 record to try to induce deponents to take over this
 property from them and avoid litigation arising
 out of the bond executed by deponents. That there
 is nothing due to the complainants on the said bond
 and mortgage and that the same is not a lien on the
 premises described in the bill of complaint.

WILLIAM J. BARRY.

MARGARET BARRY.

30

Sworn and subscribed to before me }
 this 29th day of March, 1933. }

THELMA P. AVON,
 Notary Public of N. J.

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Replying Affidavit of Albert Datz.

(Filed April 28, 1933)

STATE OF NEW JERSEY, }
 COUNTY OF HUDSON, } ss.:

ALBERT DATZ, of full age, being duly sworn, according to law, upon his oath, deposes and says:

1. I have read the affidavit sworn to by William J. Barry and Margaret Barry, the defendants herein, on the 29th day of March, 1933 in which affidavit they swear that when they conveyed the property to Ksienia Onufrow on June 17th, 1924 Ksienia Onufrow as part of the consideration for the conveyance assumed and agreed to pay the bond and mortgage made to me and my wife. I did not know that Ksienia Onufrow made any such agreement or assumption of our bond and mortgage and furthermore, the deed of conveyance made by William J. Barry and Margaret Barry does not show that Ksienia Onufrow ever did assume and agree to pay the bond and mortgage made by William J. Barry and Margaret Barry to me and my wife.

2. I again deny, as I have in my first affidavit, that as part of the consideration for the conveyance of the premises by Ksienia Onufrow and Luka Onufrow to Arthur F. Fuller that it was understood and agreed that the mortgage held by myself and my wife was to be extinguished and cancelled of record and I deny that the title to the premises was put in the name of Arthur F. Fuller in order to conceal from William J. Barry and Margaret Barry or anyone, the fact that my wife and myself were the owners of the property. As a matter of fact, everything that is stated in my affidavit and the affidavit of my wife, shows the true and clear intent of the entire transaction.

Replying Affidavit of Albert Datz.

3. It is untrue that there is nothing due on the bond and mortgage held by my wife and myself, but the sum of \$4,000.00 is still due to me and my wife, together with interest from January 30th, 1932.

ALBERT DATZ.

10

Sworn and subscribed to before }
me this 21st day of April, 1933. }

BERNARD SOLOMON,
Attorney-at-Law of the
State of New Jersey.

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Memorandum.

(Filed May 12, 1933)

BIGELOW, V. C.

This is a foreclosure suit. Complainants move to strike the answer of the mortgagors, William J. Barry and wife, on the ground that it is sham. Some facts are undisputed. Last summer, Mrs. Onufrow, who then owned the equity, conveyed it to Arthur F. Fuller at the request of complainants. Fuller holds the legal title for the use of complainants. The answer alleges that this conveyance was made in full satisfaction of complainants' bond and mortgage. 10

Complainants support their motion to strike by affidavits, disclosing that they paid Mrs. Onufrow \$300 for the conveyance to Fuller; that they never agreed or intended that the conveyance to him should be accepted in satisfaction of the bond and mortgage; that to avoid any questions of merger, they had the deed made to Fuller rather than to themselves. The Barrys make an answering affidavit in which they say that as part of the consideration for the conveyance to Fuller, "it was understood and agreed that the mortgage of the complainants was to be extinguished and cancelled of record". The Barrys were not parties to that transaction and they do not disclose the source of their information, or the facts from which they draw their inference, and therefore their contradiction of the complainants' affidavits is not evidential and must be disregarded. *Maplewood v. Margolies*, 102 N. J. Eq. 467; *Bull v. International Power Co.*, 87 N. J. Eq. 1. 20 30

Since complainants do not own the legal title to the land, their mortgage has not merged in the fee. The essential statement in the answer is that the conveyance to Fuller was made in satisfaction of the mortgage. This statement appears to be sham and therefore the answer will be struck. 40

**Order Striking Answer and Decree
*Pro Confesso.***

(Filed April 28, 1933)

10 This matter being opened to the Court by Huds-
peth & Harris, Solicitors of Complainants, in the
presence of Insley, Vreeland & Decker, Solicitors
of Defendants, William J. Barry and Margaret
Barry, and it appearing that a motion had been
made by said complainants and served upon defend-
ants, William J. Barry and Margaret Barry, for
an Order striking out the Answer filed by the de-
fendants, William J. Barry and Margaret Barry,
in the above entitled cause, on the ground that
Paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 of
said Answer and the First Separate eDefense are
sham and are based on unfounded allegations of
fact; and it further appearing that a motion had
20 been made by said complainants and served upon
the said defendants, William J. Barry and Mar-
garet Barry, that in the event that the Court strikes
out the Answer of the defendants, William J. Barry
and Margaret Barry, a decree pro confesso would
be applied for; and the Court having heard the
arguments of counsel and being of the opinion that
Paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of
said Answer and the First Separate Defense are
sham and are based upon unfounded allegations of
30 fact; and the Court being also of the opinion that
a decree pro confesso should be granted against the
defendants, William J. Barry and Margaret Barry,

It is on this 28th day of April, 1933, ORDERED,
ADJUDGED AND DECREED that the Answer filed by the
defendants, William J. Barry and Margaret Barry
in the above entitled cause, be and hereby is stricken
out.

Order Striking Answer and Decree Pro Confesso.

And it is further ORDERED, ADJUDGED and DECREED that the said complainants' bill be and the same is hereby taken as confessed against the defendants, William J. Barry and Margaret Barry.

LUTHER A. CAMPBELL,
C.

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Respectfully advised:

J. O. BIGELOW,
V. C.

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CONFIDENTIAL - SECURITY INFORMATION

Page 2 of 2

And it is the Commission's belief that the said complainant, Bill, has been a member of the Communist Party of the United States of America since approximately 1945.

William J. Brennan and Margaret Brennan, his wife, are both members of the Communist Party of the United States of America.

It is the Commission's belief that the said complainant, Bill, has been a member of the Communist Party of the United States of America since approximately 1945.

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Statement of Fact.

This appeal brings before the court the action of the court below in striking from the record the answer filed by these defendants-appellants and entering a Decree Pro Confesso against the said defendants-appellants. The action is based upon a suit to foreclose a mortgage held by the complainants Albert Datz and Anna C. Datz, his wife, which mortgage was given by the defendants-appellants William J. Barry and Margaret Barry, his wife. The mortgage was of course accompanied by the usual bond. After giving of the said mortgage the property was conveyed by these defendants to one Ksienia Onufrow by deed at which time and as part of the consideration therefor the said Ksienia Onufrow assumed and agreed to pay the said mortgage. There were other mesne conveyances and foreclosure, but on August 23, 1932 the property was again in the hands of the said Ksienia Onufrow and the position of the parties was as above outlined. On that date Ksienia Onufrow and her husband conveyed the said property to one Arthur E. Fuller by deed subject to all mortgages, etc., from which the said Arthur E. Fuller agreed to save the said Ksienia Onufrow harmless. Thereafter the complainants herein instituted their action to foreclose their said mortgage upon the said property, which action is the present suit. In the said action these defendants filed their answer (State of the Case, p. 12).

At the time of the conveyance from Onufrow to the said Fuller, the said Fuller was a nephew of the complainants herein and the complainant Albert Datz in his affidavit admits that on August 23, 1932 he did pay the sum of Three hundred (\$300.00) Dollars consideration to Onufrow for the conveyance to Fuller, whom he named as the

vendee of the said property (State of the Case, pp. 19-20), and that since the said property was conveyed to Fuller he had personally given his time to look after the welfare of the property and to keep the place rented (State of the Case, p. 20). It will be noted and significant that although the form of bill to foreclose as set forth on page 100 of the Rules of the Court of Chancery contains a paragraph (par. 13) :

“Said Richard Roe and John Brown, or one of them, has always been in possession of the mortgaged premises.”

that the complainants herein have deliberately omitted any reference to possession of the said premises from their bill of complaint. The defendants' answer sets forth, among other things, that the said premises were conveyed by Onufrow to Fuller at the request of the complainant Datz, as his nominee, in full satisfaction of the outstanding mortgage upon which this action is based; and that the complainants have been in possession of the said mortgaged premises and are still in possession thereof, and that nothing is due upon the said mortgage. The complainants moved to strike this answer of the defendants from the record as sham, which motion was granted by the court for the reasons expressed in a memorandum opinion (State of the Case, p. 27) and a Decree Pro Confesso was entered against these defendants (State of the Case, p. 28).

Grounds of Appeal.

These defendants bring this appeal before the court on the following grounds, to wit:

(a) That the court below erred in finding that the answer of these defendants was sham and based upon unfounded allegations of fact.

(b) That the court below erred in striking out the answer filed by these petitioners.

(c) That the court below erred in holding that the complainant's bill be taken as confessed against these petitioners.

The Court Below Erred in Finding that the Answer of These Defendants Was Sham.

While under the Statutes of the State of New Jersey enacted in 1915 a sham defense may be struck out on notice, it would seem that the practice upon this procedure follows the practice at law in the striking of a sham pleading. The court below in its opinion bases its decision upon the finding that:

"The Barrys were not parties to the transaction and they do not disclose the source of their information or the facts from which they draw their inferences, and therefore the contradiction of the complainants' affidavit is not evidential and must be dis-regarded."

Maplewood vs. Margolies, 102 U. J. Eq. 467. *Bull vs. International Power Co.*, 87 Eq. 1. These two cases would not seem to us to support the court's conclusion. The *Maplewood* case was brought to secure an injunction and the bill of complaint contained certain allegations upon information and belief, which said allegations were contradicted by affidavit of various people and the court denied a preliminary injunction; however, in the present case there is no allegation in the affidavit of these defendants upon information and belief. In the *Bull* case the only paragraphs which would seem to be at all applicable is on page 7 of 87 Eq. Rep. as follows:

“Before leaving the subject I think I ought to observe that the affidavit submitted on the pending motion contains some characterizations, hearsay and conclusions and are somewhat argumentative when they should have stated only matters of fact, leaving all inferences to be made by way of argument.”

The defendants' contention is that their affidavit (p. 25, State of the Case) cannot be said to contain characterizations, hearsay, conclusions nor is it argumentative, but on the contrary states matters of fact verifying the allegations of their answer.

It is the general rule that if the allegations of the answer are supported by affidavit, the defendants should be given an opportunity to try the issues raised rather than to dismiss the defendants' affidavit as false, placing entire reliance upon the affidavits presented by the complainants. In the case of *DiPaola vs. Trust Company of Orange*, 109 Eq. 80, the court said:

“The bill of complaint cannot be considered as sham, for the allegations of the bill are amply supported by the affidavits attached to the bill and the affidavits submitted in opposition to the motion to strike out the bill.”

In the case of *Coykendall vs. Robinson*, 39 N. J. L. 98, the court said:

“When a defendant—shows by his own affidavit or by other testimony that he has a defense stating specifically the grounds of it, a question of fact is presented to be passed upon and he cannot be deprived of the benefit of a trial in the ordinary mode.”

It would therefore seem that an affidavit being presented by the defendants herein which supports the allegations of their answer and contradicted solely by the affidavit of the complainants the de-

defendants should be given an opportunity to present their defense in an orderly way and the court erred in deciding the issue of fact raised by these affidavits in a summary manner.

The Defendants Will Be Greatly Prejudiced by the Decree *Pro Confesso*.

This action is brought to foreclose a mortgage as a preliminary step to a suit against these defendants upon the bond which accompanied the same. Should the Decree *Pro Confesso* entered below be allowed to stand, these defendants will have been precluded from any inquiry or defense to the amount due upon the bond and mortgage. A Decree *Pro Confesso* having been entered against these defendants, the amount claimed to be due from them to the complainants upon the bond and mortgage will be *res judicata* in any future action which is brought upon the bond given by these defendants. We cite the case of *Mutual Sav. Fund Harmonia vs. Gunne*, 164 Atl. Rep. 43, in which the court said (p. 49) :

“The rule has long been settled that the maker of a bond secured by mortgage on the property owned by him and who has conveyed away the property absolutely, is not a necessary party to a foreclosure of the mortgage though the complainant may join him as a party; and where he has been so joined if a personal action be brought against him for the deficiency, the decree would be *res judicata* as to any defense he might have set up on the bond.”

And in the case of *Usbe B. & L. Association vs. Ocean Pier Realty Corporation*, 165 Atl. Rep. 580, the court said :

“Our courts have since held that the amount of the decree in foreclosure is *res judicata* in an action upon the bond for deficiency, the obligor being a party to the foreclosure suit.”

See also cases of *Vanderbilt vs. S. W. Holding Co.*, 165 Atl. Rep. 634. *Mann vs. Bugbee*, 167 Atl. Rep. 202. *Vanderbilt vs. Kipp*, 110 N. J. Eq. 10. As we have stated Datz in his affidavit admits that he paid to Onufrow a consideration for the conveyance of the premises to his nephew Fuller. That he has since personally given his time and attention to look after the welfare of the property and keep the same rented. If it can be established that the conveyance by Onufrow to Fuller was an extinguishment of the mortgage given by these defendants, there could be no future judgment against these defendants for a deficiency upon the said mortgage. These defendants have presented to the court an affidavit (p. 25 State of the Case) in which they state such to be the case and these defendants having presented such affidavit should be entitled to present their proof before the court as to the extinguishment of the said bond and mortgage before determination is made as to the amount due upon the same, which determination would be *res judicata* in any future action brought against these defendants upon the bond.

Further than this it is evident from the affidavit of the complainants herein that they have taken possession of the property through a dummy, to wit: their nephew Fuller for their own benefit and have collected the rents therefrom and have become in effect mortgagees in possession. These defendants having denied the amount due upon the complainants mortgage, it becomes incumbent upon the complainants to account for their occupancy of the property as mortgagees in possession. This is the only court in which the matter of the amount due upon the said bond and mortgage can be put at issue and the matter having been put at issue by the pleadings and supported by affidavit, the defendants respectfully represent to the court that it

was an error to strike the said answer and enter a Decree *Pro Confesso* against these defendants whereby these defendants are barred from any further inquiry as to the amount due upon the said bond and mortgage in a subsequent suit on the bond.

For the reasons heretofore advanced it is respectfully requested that the order of the court below striking out the answer of these defendants and entering Decree *Pro Confesso* upon the complaint herein be reversed and set aside, in order that these defendants may properly present their defense in accordance with the practice of the court.

INSLEY, VREELAND & DECKER,
Solicitors for Defendants-Appellants.

ALFRED R. BECKER,
Of Counsel.

New Jersey Court of Errors and Appeals

ALBERT DATZ and ANNA C. DATZ,
his wife,
Complainants-Respondents,

vs.

WILLIAM J. BARRY, *et als.*,
Defendants-Appellants.

BRIEF OF COMPLAINANTS-RESPONDENTS.

Statement of Facts.

This is an appeal taken by the defendants-appellants from an order of the Court below striking out as sham the answer filed by them and entering a Decree *Pro Confesso* against the said defendants-appellants.

This is a foreclosure suit brought to foreclose a mortgage made by the defendants-appellants to the complainants-respondents back in January 30th, 1924. After the making of the bond and mortgage the defendants-appellants conveyed the premises to one Ksienia Onufrow, who thereafter conveyed the property and took back a purchase money mortgage and subsequently was obliged to foreclose her mortgage and again acquired title to the premises by Sheriff's deed made to her by the Sheriff of Hudson County on April 24th, 1930. The deed of conveyance by the defendants-appellants to Ksienia Onufrow does not recite or indicate that Ksienia Onufrow assumed or agreed to pay the complainants-respondents' mortgage.

The bond and mortgage contained the usual thirty day default clauses for non-payment of

taxes, interest and installments on account of principal.

The time of payment of the principal sum of said bond and mortgage was extended by the complainants-respondents to January 30th, 1933.

Ksienia Onufrow defaulted in the payment of taxes on the property for the years 1931 and 1932, amounting to over \$1,700.00 (State of Case, p. 10, paragraphs 17 and 18).

Interest that came due on July 30th, 1932, remained unpaid for more than thirty days (State of Case, p. 10, paragraph 19).

On January 30th, 1933, the balance of the principal sum then due, together with interest from January 30th, 1932, became due upon complainants' bond and mortgage (State of Case, p. 10, paragraph 20) and remains unpaid.

The complainants-respondents elected to foreclose their mortgage because of these defaults, but in order to avoid the unnecessary expense and probable depreciation in the value of the property, should the complainants-respondents apply for a receiver in the foreclosure suit, they decided to pay \$300.00 to the said Ksienia Onufrow for a conveyance of the premises to one Arthur F. Fuller in order that they might be able to give their personal attention to the preservation of the property. The deed was purposely taken in the name of Arthur F. Fuller in order to avoid any questions whatsoever as to whether or not the mortgage was to merge with the deed, it always being the intention and desire of the complainants-respondents to keep the bond and mortgage in full force and effect and to foreclose the mortgage and proceed against William J. Barry and Margaret Barry, who refused to take over the property and pay the complainants-respondents the money due them on their bond and mortgage (State of Case, p. 19, paragraphs 14

and 16 and p. 20, paragraph 17, Affidavit of Albert Datz).

The answer alleges that this conveyance was made in full satisfaction of complainants' bond and mortgage. This is the only essential statement in the answer upon which the entire defense of the defendants-appellants is based.

The complainants-respondents moved to strike the answer of the defendants-appellants from the record as sham, which motion was granted by the Court, and a Decree *Pro Confesso* was entered against the defendants (State of Case, p. 28).

ARGUMENT.

POINT I.

The Court below did not err in finding that the answer of these defendants was sham and based upon unfounded allegations of fact.

The defendants-appellants contend that the Court erred in finding that the answer of these defendants was sham because of what the Court says in its opinion is the basis for its decision.

It is well settled in this State "that error cannot be assigned on an opinion."

Ahlemeyer v. Miller, 133 Atl. 880;

Ruckman v. Demarest, 32 N. J. L. 528.

The important thing to be looked for is the finding of the Court that "the essential statement in the answer is that the conveyance to Fuller was made in satisfaction of the mortgage. This statement appears to be sham and therefore the answer will be struck" (State of Case, p. 27).

The defendants-appellants contend that their affidavit (State of Case, p. 25) cannot be said to

contain characterizations, hearsay and conclusions, and they contend that the matters therein stated are matters of fact verifying the allegations of their answer. Even a cursory reading of the affidavit filed by these defendants would clearly indicate that they are out on a fishing expedition as the result of unwarranted inferences drawn by them from the relationship of Arthur F. Fuller and Albert Datz, and the fact that the complainants-respondents admit in their affidavit that the said Arthur F. Fuller holds title to the premises for their benefit. In their answer, the allegation is that "*the consideration for such conveyance was that the same was given and accepted by the complainants in full satisfaction of the bond and mortgage mentioned in paragraphs 1 and 2 of the bill of complaint.*" After the whole situation was clearly set forth in the affidavits of Albert Datz (State of Case, p. 16) and Anna C. Datz (State of Case, p. 22) proving to the Court that the consideration for the conveyance was not any promise or understanding that the conveyance was in full satisfaction of the bond and mortgage but that the consideration was an actual cash payment of \$300.00 and that the reason for the complainants-respondents' desire to secure title was to save the property from deterioration and to see to it that the income was applied to the carrying of the property, so as to avoid the foreclosure of the prior liens, to wit, a first and second mortgage, and also to avoid the expense that would be attached to an application for the appointment of a receiver by the Court of Chancery pending the foreclosure, the defendants-appellants saw fit to change their defense as follows:

"That *as part of the consideration* for the conveyance of the premises to Arthur F. Fuller as representative of Albert Datz and Anna C. Datz

it was understood and agreed that the mortgage of the complainants was to be extinguished and cancelled of record," clearly showing that the defendants were beginning to shift their stand from their original line of defense and tended to venture a further guess with a resulting unwarranted conclusion. Furthermore, it is significant to note that this statement in the affidavit which is presumed to support the allegation in the answer "that the consideration for such conveyance was that the same was given and accepted by the complainants in full satisfaction of the bond and mortgage" does not at all support the allegations. The statement in the affidavit does not show who made the alleged agreement nor to whom it was made nor does it state between whom it was understood and agreed that the mortgage of the complainants was to be extinguished and cancelled of record. The statement in the affidavit is evasive and does not state clear and concise facts but is an unwarranted inference, assumption and conclusion on the part of the affiants, apparently based upon hearsay and conjecture. If the defendants were witnesses on the stand they would not be permitted to establish their case by any such testimony and the mere fact that the testimony is offered by way of affidavit does not in anywise change the rule.

Bull vs. International Power Co., 87 Eq. 1.

The defendants-appellants cite the case of *DiPaoia vs. Trust Company of Orange*, 109 Eq. 80, as supporting their contention that the Court erred in considering the answer of the defendants as sham because they claim that their answer is supported by affidavit. It seems that the defendants-appellants have misconstrued the meaning of the word "support." The word "support" does

not mean the mere filing of an affidavit repeating inferences and conclusions set forth in the answer. The rule means more than this. It means that the affidavit in support of the allegation must disclose the facts and basis upon which such allegation is made (*Schoenfeld v. American Can Co.*, 55 Atl. 1044 N. J.) and one glance at the affidavit of these defendants makes it unnecessary to argue any further. It is clear that the affidavit states mere inferences, assumptions and conclusions and unwarranted allegations based upon matters not within the knowledge of these defendants and the Court below so found.

It is a well settled rule of law that this Court will not disturb the finding of a Judge upon a motion that the defendant failed to show such facts as he deemed sufficient to entitle him to defend, and that such finding must be assumed to be true until the contrary appears.

Wittemann v. Giele, 123 Atl. 716, 99 N. J. L. 478.

The defendants-appellants cite the case of *Coykendall vs. Robinson*, 39 N. J. L. 98, in support of their theory that just because they filed an affidavit the Court erred in striking the defense out, apparently disregarding the fact that in the case cited the Court said "When a defendant—*shows* by his own affidavit or *by other testimony* that he has a defense stating *specifically* the grounds of it, a question of fact is presented to be passed upon" (italics my own), clearly indicating that in the case there under consideration the affidavit stated facts within the knowledge of the affiant because the Court says "or by other testimony," indicating that the affidavit of the affiant was such as could be considered testimony. Surely in the case at bar the affidavit of these defendants-

appellants could not be classed in the category of testimony.

In contradistinction to the affidavit offered by the defendants-appellants, the affidavits made by the complainants-respondents stand out markedly in the statements of facts based upon their own knowledge and none of these facts are contradicted by anything whatsoever in the affidavit of these defendants-appellants which is based upon facts within their own knowledge.

The complainants deny absolutely and unequivocally that they ever agreed to cancel the bond and mortgage or that they ever agreed that the conveyance by Ksienia Onufrow and her husband should be in consideration of a full satisfaction of the bond and mortgage and that as a matter of fact they paid \$300.00 as the consideration for the conveyance from Ksienia Onufrow to Fuller and that it was always their intention to keep the bond and mortgage alive and in full force and effect and it was for this very reason that they paid a money consideration for the conveyance and furthermore, in order to avoid any complications or questions as to whether or not there would be a merger of the mortgage with the deed, they proceeded to have the deed made to a third party rather than to either Mr. Datz or Mrs. Datz. These essential facts are sworn to by both Mr. and Mrs. Datz in their respective affidavits (State of Case, pp. 16, 22 and 26a).

The Court, therefore, did not err in finding that the answer of these defendants-appellants was sham and based upon unfounded allegations of fact.

POINT II.

The Court below did not err in striking out the answer filed by these petitioners.

The Court below having found that the answer of these defendants was sham and based upon unfounded allegations of fact, it had a right to strike the same out.

Pam. L. 1915, p. 185, Sec. 4, provides:

“Sham Defense. Any frivolous or *sham defense may be struck out on notice, and a decree pro confesso entered*, or the defendant may be allowed to defend on terms, or such other order or decree may be made in the premises as may be just.”

POINT III.

The Court below did not err in holding that the complainant's bill be taken as confessed against these petitioners.

There being nothing in the answer that would entitle these defendants-appellants to defend the complainants-respondents' foreclosure suit, and the answer being stricken out as sham, the Court was within its rights in ordering that the complainants' bill be taken as confessed against these petitioners.

Pam. L. 1915, p. 185, Sec. 4, *supra*.

POINT IV.

The defendants will not be greatly prejudiced by the decree *pro confesso*.

The defendants-appellants urge that a decree *pro confesso* in this case will greatly prejudice them because of the fact that the complainants-respondents are virtual mortgagees in possession by reason of the fact that the title is held by their nephew, Fuller, for their benefit and they have collected the rents therefrom.

In the affidavit of Albert Datz on page 20 of the State of Case, he swears: "Since the property was conveyed to Arthur F. Fuller, I personally have given my time to look after the welfare of the property and to try and keep the place rented. I have paid the interest on the first mortgage and second mortgage and the expenses and disbursements for the carrying of the property, out of the rents received and I have even been obliged to expend more than I collected, in order to keep the property in shape and to make certain that the first and second mortgagees would not foreclose their respective mortgages," clearly showing that the income from the property is not sufficient to meet the expenses incurred in the management thereof.

Furthermore, the defendants-appellants have no right to raise this question before this honorable Court because of the fact that the defendants-appellants have not in their answer demanded an accounting for the rental value of the premises. It has long been the well settled rule of law that the right of a mortgagor to compel a mortgagee in possession to account for the rental value of the mortgaged premises is, in a suit by the mort-

gagee to foreclose, a pure matter of defense, of which the mortgagor may avail himself by answer.

Krueger v. Ferry, 41 N. J. Eq. 432,
Affirmed in 43 N. J. Eq. 295.

This point not being set forth in the answer, it cannot be made a point of on appeal.

In the case at bar the answer does not set up that because of the alleged possession the complainant must account for the rental value of the premises, but claims that because of the alleged possession there is nothing due on the mortgage and that the same is not a lien on the premises described in the bill of complaint (State of Case, p. 14). In effect, the answer claims that the mortgage is merged with the title by reason of the possession by the complainants of the mortgaged premises, and the Court below has on this very point found that there is no merger of the mortgage in the fee. The grounds on which these defendants-appellants urge that they will be prejudiced are entirely out of order on this appeal, because the grounds set forth are not the result of any error made by the learned Court below.

For the reasons heretofore advanced, it is respectfully urged that the Court below made no error in

(a) finding that the answer of these defendants was sham and based upon unfounded allegations of fact;

(b) striking out the answer filed by these petitioners; and

(c) holding that the complainant's bill be taken as confessed against these petitioners.

Therefore, it is respectfully submitted that this appeal should be dismissed with costs and the order of the Court below affirmed.

Respectfully submitted,

HARRY H. HARRIS,
Of Counsel for Complainants-
Respondents.

HUDSPETH & HARRIS,
Solicitors.

(All italics is that of counsel.)

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