New Jersey Court of Errors and Appeals

Between MARTIN B. BLOOMER, *Complainant-Appellant,* and CHARLES N. FOWLER ET AL., *Defendant-Respondent.*	*On Appeal from Chancery.*

BRIEF FOR APPELLANT.

This appeal brings up for review an order of the Court of Chancery striking out complainant's Bill with costs. (C., page 15.)

I. THE BILL.

Concisely stated the Bill alleges an agreement for the sale of 120 shares of capital stock of the Gas Electric Company by the complainant and one William W. Ackerman to Charles N. Fowler for $12,000 to be consummated on January 1st, 1912. The time for consummating the transaction and paying the money was extended from time to time and that shortly after the making of the agreement for sale, being desirous of obtaining money from Fowler on account of said agreement, the sellers interviewed Fowler and the Vice-President of the defendant, Westfield Trust Company, and were informed by them that by pledging the stock and Fowler's agreement to purchase the same the Westfield Trust Company would discount their note for $6,000 which was done (Par. 1, 2 and 3 on pages

1 and 2). When this note became due, Fowler endorsed a renewal and gave the Trust Company additional collateral security (Par. 4). The note was renewed at the request of Fowler on March 1st, 1912, when Exhibit A was entered into (Page 10).

When the first note was discounted Fowler agreed with the complainant, Ackerman and the Trust Company that he, Fowler, would be personally responsible for the re-payment of said note as he was personally indebted to complainant and Ackerman in the sum of Twelve thousand dollars for said stock and the money raised by the discounting of the original note was for the benefit and accommodation of Fowler and applied on account of the purchase price of the stock (Par. 6, page 3). That the true relation of the parties to said note was and is, that Fowler is the principal debtor and complainant and Ackerman sureties, which relation was known to the Trust Company, but the note signed in its form at the request of the Trust Company.

Fowler didn't pay the note and suit was instituted on Exhibit A in the New Jersey Supreme Court and judgment entered in favor of the Trust Company against complainant and Ackerman and Fowler (Par. 7, page 4). Under said judgment supplementary proceedings were instituted against Fowler who made payments on account amounting to $1,400, although the Trust Company claims to have received a lesser amount (Page 4, par. 8).

On April 21st, 1914, suit was instituted upon the New Jersey judgment in the New York Supreme Court against complainant and Ackerman and judgment was there entered for the full amount notwithstanding that Fowler had paid $1,400; that

the Trust Company harassed and embarrassed complainant by continual supplementary proceedings in New York for the purpose of protecting Fowler (Par. 9, page 5).

On information complainant alleges a fraudulent agreement and conspiracy between Fowler and the Trust Company to compel complainant to pay the Trust Company and thus release the property of Fowler from the judgment and to assist Fowler, not to pay the money due for the stocks; that the Trust Company knows that if proceedings are continued against complainant and Ackerman they will not be able to pay the Trust Company and be entitled to be subrogated to the securities held by it; that these proceedings are taken by virtue of the fraudulent agreement between the Trust Company and Fowler acquiesced in by Ackerman (Par. 10, page 6); that the securities pledged with the Trust Company by Fowler were of more than sufficient value to pay the moneys due to the Trust Company, but by reason of its neglect, failure and refusal to proceed against such collateral security the same has depreciated in value and as to such depreciation complainant and Ackerman as cosureties are discharged (Par. 11, page 6). This paragraph alleges that the bill is filed to ascertain and decree the amount, if anything, for which complainant is liable to the Trust Company so that he may proceed to be legally subrogated to the securities held by the Trust Company (Page 7).

By paragraph 12 it is alleged that application has been frequently made to the Trust Company to sell and dispose of said collaterals, but that they have neglected and refused so to do. The Bill then prays for various discoveries, for an accounting as to the value of the collaterals, of the moneys

paid to the Westfield Trust Company on account of the note, that Fowler may be decreed to be the principal debtor and complainant a co-surety and as such co-surety discharged from liability by reason of the neglect of the Trust Company to proceed upon the collateral to the extent that such collateral has depreciated in value, that complainant may be decreed to be discharged and the law suits against him restrained.

II. THE MOTION TO DISMISS.

Defendant, Trust Company, moved to dismiss the Bill of complainant and alleged nine grounds which may be divided into two subdivisions:

(a) Nonjoinder of Ackerman as a complainant, and (b) Want of equity.

(a) Ackerman is Not Necessarily a Complainant.

On this point defendants rely upon the case of *Knikel* vs. *Spitz*, 74 N. J. Eq. 581. It is true in an ordinary case that Mr. Ackerman would be a proper party complainant, but in this case the Bill of Complaint shows that it will be futile to ask Ackerman to join in this suit against Fowler and the Trust Company because it is alleged in paragraph 11 that Ackerman has acquiesced in this fraudulent conspiracy concocted on the part of the Trust Company and Fowler in order to take these embarrassing proceedings under the New York judgment against complainant alone and from these facts it would be quite apparent that it would be useless to ask Ackerman to join in this Bill of Complaint as complainant.

Further the interests of Ackerman and the complainant are concurrent only in so far as they have a right to be paid by Fowler for the stock sold to him and as that is not the object of the present

suit there is not such a joint interest in Ackerman and the complainant as would necessarily compel the joining of Ackerman as a party complainant.

(b) Want of Equity.

It can be gathered from the last part of paragraph 11 and the general frame of the Bill of Complaint that the principal object of the present Bill was to have a discovery and an accounting in aid of another suit to be brought for an equitable subrogation after it should be determined whether or not the complainant was discharged by the neglect of the Trust Company to proceed on the collateral or if that were not established after it were determined that the complainant, being a surety on the note, was merely liable for the unpaid balance whatever the same might be.

In this case the negotiable instruments disclose that neither Ackerman nor complainant *prima facie* appeared to be sureties on an obligation of Fowler to the bank, but the contrary did appear and before complainant would be entitled to assert a right to either equitable or legal subrogation he would have to establish that he stood in the position of a surety for Fowler.

This Court has clearly recognized the distinction between equitable and legal subrogation. See

Polhemus vs. *Prudential Realty Corporation*, 74 N. J. L. 570.

In *Young* vs. *Vough*, 23 N. J. Eq. 328, it was held, that an endorser of a promissory note was a surety and upon payment entitled to be subrogated in the place of the creditor and to have all the collateral securities which the creditor had.

Of course, in this case, the complainant has not paid the amount of the indebtedness and that

seems to be the reason that the learned Vice-Chancellor dismissed the Bill of Complaint, but it is respectfully insisted that this was due to a misapprehension as to the object and effect of the Bill. This Bill does not ask that the Westfield Trust Company give up the collateral security, it endeavors to have established the relationship of the complainant, the amount of the indebtedness for the very purpose of then enforcing his right to equitable or legal sugrogation.

It seems to be settled that there is a sort of trust relationship between the creditor holding securities and the surety.

McMullen vs. *Kinkle*, 39 Miss. 142.
Hardin vs. *Eames*, 5 Ill., App. 153.
Riggs vs. *Chapman*, 46 S. W. R. (Ken.) 692.
Story Eq. Juris, Secs. 477-479.
Atwood vs. *Vincent*, 17 Conn. 575.
37 Cyc. 417.

In *Nelson* vs. *Williams* it was held that the creditor cannot himself or by collusion with the debtor, do any act to impair the security or destroy the surety's interest in it.

22 N. C. (2 Dev. & Bat.) 118.

It is most respectfully contended that in this case the Bill of Complaint shows the course of action between the Trust Company and Fowler by which the value of the security is impaired so that if upon final hearing it should develop that complainant is a surety as he claims that his liability is rendered different by reason of the fact that upon payment of the debt he would get the collaterals which have been rendered of less value and by reason of the failure of the Trust Company to proceed to reduce such collaterals to money.

From the cases cited it seems the surety would be discharged by such course of conduct.

In *Paulin* vs. *Kaighn,* 29 N. J. L., at page 485, this Court cited with approval the well considered case of *LaFarge* vs. *Herter,* 11 Barb. S. C. Rep. 164, and quoted with approval the language there used by Allen, *J.*:

> "The right of subrogation, although originating in courts of equity, is now fully recognized as a legal right, and any act of the creditor which interferes with that right, and is a fraud upon it, operates to discharge the surety as well at law as in equity. * * *"

CONCLUSION.

In conclusion it is respectfully insisted that the learned Vice-Chancellor misconceived the object of complainant's Bill and erroneously held that as complainant did not set up his claim of payment on account of the judgment in the suit in the New York Supreme Court, he could not now come into Equity for relief. It seems to me elementary that this could not have been set up in the New York Supreme Court on a suit on judgment roll. Inasmuch as the present bill is merely ancillary to one to be subsequently filed for equitable subrogation with an offer then made to pay, there is no need of the present bill offering to pay an unascertained amount due to the Trust Company. The complainant was certainly entitled to a discovery and an accounting and to a decree establishing his position as surety to the defendant, Fowler.

Therefore, it is most respectfully submitted that the Bill of Complaint should have been retained for final hearing and that the order made in the

Court of Chancery is erroneous and should be set aside with costs.

Respectfully submitted,

ABE J. DAVID,
Of Counsel for Appellant.

New Jersey Court of Errors and Appeals

Between MARTIN B. BLOOMER, Complainant-Appellant, and CHARLES N. FOWLER, et als, Defendants-Respondents.	BRIEF FOR WEST-FIELD TRUST COMPANY, Defendant-Respondent.

Upon the argument of the motion to strike out the bill of complaint the following memoranda were submitted to Vice-Chancellor Howell, and are now relied upon to support the decree of the Chancellor striking out the bill of complaint, the references therein being to the notice of motion as it appears on pages eleven and twelve of the printed case.

1. The first ground is a technical one; but that the point is well taken we refer to Knikel v. Spitz 74 N. J. Eq. 581 at p. 586 and cases therein cited.

2. The second ground is that the complainant does not tender himself willing to pay whatever sum might be due if an accounting were ordered. Reeves v. Cooper 12 N. J. Eq. 223.

In that case, as here, the attempt was made to have

this court interfere with a creditor seeking by legal means to obtain payment of his debt, and the court said:

> "The bill admits that the debts due from them to the plaintiffs and creditors under the attachment are honest debts, and that they are now due and owing. They give no reason why they should not promptly pay them. They complain that the defendants have obtained an advantage at law, and by the aid, and under the direction of a court of law, are appropriating their property to pay these debts. This court cannot deprive the defendants of their legal advantage, unless the complainants pay what they justly owe. They can relieve their property without the aid of this court. All they have to do is to pay the debt. Nothing can be plainer than that this court ought not to relieve them upon any other terms. It is a plain case for the application of the maxim—a party asking equity must do equity. 'Courts of equity never interfere to deprive a plaintiff at law of any legal advantage which he may have gained, unless the party seeking relief will do complete justice by paying what is really due. Indeed, they have, upon the same principle, gone so far as to refuse their assistance in relieving against a judgment obtained by fraud.' "

3. Upon our third point also we refer to Reeves v. Cooper supra.

> "To maintain a bill in equity to redeem a pledge some special ground must be shown, as that an accounting or discovery is wanted, as ordinarily his remedy is at law. (2 Story Eq. Jur. 1032). The necessity for an accounting must be real; there must be a series of transactions on both sides, and not merely one item on one side and a number of offsets on the other. (Jones on Pledges Par. 557).
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> "If the complainant is right in his contention as to the state of the accounts between these parties, the refusal to deliver upon demand the

certificates of stock amounts to a conversion, for which the defendants are liable at law. If their refusal to deliver is not justified, and if the pledgee should sell the stock improperly, he would be subject to the payment of all damages the pledgor might suffer.

"Having determined that the case as presented by the complainant does not entitle him to the relief asked, it follows that his prayer for discovery, and as to which he waives answer under oath, furnishes no ground for equitable jurisdiction, the single purpose of the discovery being in aid of the relief sought, as to which the legal remedy is perfect. (Miller v. Ford 1 N. J. Eq. 365; Metler v. Metler 18 N. J. Eq. 270, 19 N. J. Eq. 457)."

DeBevoise v. H. & W. Co. 67 N. J. Eq. 472 at p. 478.

"A person other than the real debtor, but in somewise liable for the debt, may pay such debt to the creditor and is thereupon entitled to subrogation to the rights of the creditor in any pledge or collateral security held by the latter for the payment of the debt."

Polhemus v. Prudential Realty Corp. 74 N. J. L. 570 at p. 577.

"When the very right of subrogation is in question it may be that the remedy is in equity, but when the right of subrogation itself is practically conceded, and there remains to be enforced only the right of realizing the value of the subject matter, such right may on proper occasion be within the cognizance of a court of law. (Sussex County Ins. Co. v. Woodruff 2 Dutch. 541, 555, 559; Paulin v. Kaighn 5 Dutch. 480)."

Polhemus v. Prudential Realty Corp. Supra at p. 578.

4. No special facts and circumstances are alleged such as would justify a court of equity in interfering

on behalf of the complainant, nor does it appear that the Westfield Trust Company is fully indemnified against loss or that it would be exposed to no risk of loss if the relief sought by the complainant were granted. Polhemus v. Prudential Realty Corp., supra; Irick v. Black 17 N. J. Eq. 189; Phila. & Readg. R. R. v. Little, 14 Stewart 519.

In this case not only does it not appear that the Trust Company is indemnified against loss or that it would be exposed to no risk of loss if the relief sought were granted, but it appears affirmatively from the bill of complaint that the complainant Bloomer could not be made to pay even the costs of the suit in the accounting, because he alleges that it developed upon his examination in supplemental proceedings in the New York Supreme Court that he had absolutely nothing except these very shares of stock, which are of so little value that he has not found it worth while to re deem them.

5. It does not appear that the complainant has ever asked the Trust Company what amount remains due upon the judgment, nor does it appear why the complainant did not defend the suit in New York as to the amount then due to the Trust Company.

6. The bill does not allege that complainant has ever offered to pay the note or judgment, nor does it specify when he demanded that the collateral be sold.

This is important because they allege a depreciation in value of securities as a result of failure to sell upon demand.

Upon the argument of this motion the court asked

counsel for the complainant why the complainant did not pay the note; counsel replied that they could not pay it because they did not know how much was due. It appears from their bill of complaint that they do know quite definitely just what does remain due; but assuming that they do not know it now and the Trust Company will not tell them, yet they must have known it when judgment was entered in the New Jersey Supreme Court on the original note, and if they did not pay the amount due at that time, but allowed the matter to drag along until it has become so complicated as to involve some difficulty, that result is due to the complainant's own negligence and laches, against which this court will never relieve.

7. The bill cannot be sustained on the ground of fraud, because it does not state the facts which constitute the alleged fraud. Davis v. Davis 55 N. J. Eq. 37 and cases there cited.

8. It cannot be sustained as a bill for an accounting because in an action for conversion based upon the refusal of the Trust Company to deliver the collateral to complainant upon tender of the sum alleged by the complainant to be due, the amount actually due might be readily proved.

> "According to settled law in this State, to justify an equitable accounting the accounts must be so complicated and intricate that a court of law cannot deal with them properly, having regard to the rights of litigants; if it can, the superior right of that court to hear and determine such matters is recognized. (Bellingham v. Palmer 54 N. J. Eq. 136; Cranford v. Waters 61 N. J. Eq. 284).

"In Cranford v. Waters, Vice-Chancellor Pitney formulates the test to be applied to the question in the following words: 'Are the issues so numerous and so distinct, and the evidence to sustain them so variant, technical and voluminous that a jury is incompetent intelligently to deal with them and come to a just conclusion?' "

DeBevoise v. H. & W. Co., supra.

9. Want of equity.

"It is well settled that mere delay by the creditor to sue the principal debtor will not discharge the surety, for the obvious reason that the surety may at any time discharge his obligation to the creditor and thus make the principal his debtor. The same rule holds when collaterals are pledged by the principal debtor. The surety may at any time after the debt becomes due and owing, discharge it and take the collaterals. The law implies no contract on the part of the creditor to proceed on the collaterals before he can sue the surety. Nor are the rights of the parties affected by the fact that the collaterals have depreciated between the time of the maturity of the debt for which they were pledged and the commencement of the suit against the surety. These principles are recognized as sound law by the Court of Appeals of New York in the well-considered case of Schroeppell v. Shaw 3 Comstock 446 and 4 Barb. 580."

Brick ads The Freehold Natl. Banking Co.
8 Vroom 307.

"A creditor holding a pledge or collateral security may upon default pursue any or all of his remedies at pleasure whether by bringing an action upon the principal contract or by proceedings to realize the value of the pledge or security. (See Jones on Pledges 2d Ed. 589, 663, 720). If the pledge or collateral security be commercial paper, the holder may bring either an action to

enforce the principal debt or one to collect the pledged paper.

"A surety is entitled to the benefit of all securities which the creditor holds against the principal as indemnity against loss by reason of his suretyship. The surety's right in this respect may be modified or controlled by contract between him and his principal, but it does not require any contract for its support. It is a right which results from the relation of surety and principal, independent of contract, and is founded upon the principle of natural justice of placing the charge where in equity it belongs. On the payment of the debt, the surety will be entitled to be subrogated to all the securities belonging to the principal the creditor has as security for the debt, in order that thereby the surety may indemnify himself against loss by reason of his suretyship. (1 Story Eq. Jur. 499).

For these reasons it is respectfully submitted that the decree of the Court of Chancery should be affirmed.

CODDING AND OLIVER,
Of Counsel with Westfield Trust Company,
Defendant-Respondent.

In Chancery of New Jersey

To the Honorable Edwin Robert Walker,

Chancellor of the State of New Jersey:

Humbly complaining, shows unto your Honor, your orator, Martin B. Bloomer, of the Town of Westfield, in the County of Union and State of New Jersey.

1. That on the fourth day of May, Nineteen Hundred and Eleven, your orator and one William W. Ackerman were the owners of temporary certificates, Numbers fourteen (14) and fifteen (15), for sixty shares each of the preferred capital stock of the Gas Electric Car Company, of which the par value was One hundred dollars ($100) per share and on that day, for a good and valuable consideration, the defendant, Charles N. Fowler, did agree with your orator and the said Ackerman to purchase said one hundred and twenty (120) shares of preferred stock of said Gas Electric Car Company and to pay the par value of One hundred dollars ($100) per share therefor, on or before January first, Nineteen Hundred and Twelve, which agreement was executed in triplicate.

2. That on the second day of January, Nineteen Hundred and Twelve, your orator, and the said Ackerman and Fowler, in writing, agreed that the time within which said Fowler might take said shares of stock and pay for the same, be extended to March first, Nineteen Hundred and Twelve, and on that date the time for taking stock and paying therefor was by a like written agreement extended to the first day of April, Nineteen Hundred and Twelve.

3. That after the making of the contract for the sale of the shares of said stock as set forth in the first paragraph and on or about the eighteenth day of July, Nineteen Hundred and Eleven, your orator and the said

Ackerman being desirous of obtaining from said Fowler, some money on account of said agreement, interviewed said Fowler and Joseph R. Conolly, the vice-president of the Westfield Trust Company, and said Conolly informed your orator that he could arrange for the discount of a note at the Westfield Trust Company, by the placing by them, as collateral thereto, the aforementioned stock and Fowler's agreement with them to purchase and pay for the same; acting upon the suggestion of said Conolly, a note for six thousand dollars ($6,000) was made by said Ackerman to your orator's order and endorsed by your orator, and thereafter the said Ackerman and your orator arranged with the Westfield Trust Company for the discount of said note. At the time neither your orator nor the said Ackerman had any account with the Westfield Trust Company, and after said note was discounted, as arranged for by said Conolly, the proceeds thereof were placed in two accounts, one to the order of your orator for three thousand dollars ($3,000) and one to the order of said Ackerman for three thousand dollars ($3,000) and said moneys were drawn upon from time to time by your orator and by the said Ackerman. That the shares of stock aforesaid and the contract of said Fowler to purchase the same and pay therefor, were assigned, transferred and delivered to the Westfield Trust Company as collateral security for the payment of said note of six thousand dollars ($6,000), discounted as aforesaid.

4. That said note became due and payable and after your orator and the said Ackerman had notified Fowler of what had been done, the said Charles N. Fowler when the note became due endorsed a renewal note and when said note became due, arranged for a renewal thereof, by endorsing a renewal note and then and there giving to said Westfield Trust Company, additional collateral security, viz. a bill of sale for an Oriental rug, which was then claimed by the said Fowler to be of great value, to wit, twenty-five thousand dollars

($25,000) and which was then and still is located in the City and State of New York.

5. That thereafter when said note so extended, at the request of Fowler, became due, your orator and the said Ackerman, ascquiesced in such extension and renewal of said note, until the first day of March, Nineteen Hundred and Twelve, upon which note was also appended and attached a written guarantee of payment and a waiver of protest, signed by all three, a copy of which note and guarantee is hereto annexed and made a part hereof as Exhibit "A."

6. That at the time of the discounting of the first note, the said Charles N. Fowler agreed with your orator and the said Ackerman, and with the directors of the Westfield Trust Company, repeatedly that he would be and become personally responsible for the repayment of said note and stating to the officers of the Westfield Trust Company, repeatedly, that he was personally indebted to your orator and the said Ackerman in the sum of Twelve thousand dollars ($12,000), being the purchase price of the stock mentioned in the first paragraph of this bill of complaint; and upon his requesting each and every renewal and extension of said note, he reiterated this promise and agreement to your orator and the said Ackerman and to the officers of the Westfield Trust Company, that he, said Fowler, would pay said note. At the time of discounting said original note, said Fowler further stated to the officers of the bank that the discount was for his benefit and accommodation and the proceeds were to be applied for and on account of the aforesaid purchase price of Twelve thousand dollars ($12,000) for said stock, and as a matter of fact that said money was actually applied to and credited on account of the said purchase price by your orator.

7. That upon the original note and the renewals the said Ackerman appears as maker, your orator as first endorser and said Charles N. Fowler as second endorser; but the true relation between the parties was and is, that the said Charles N. Fowler was and is the

principal debtor and your orator and said Ackerman were and are sureties; and such relation was known to and accepted by the Westfield Trust Company at the time of the original discounting of the first note, on or about the eighteenth day of July Nineteen Hundred and Eleven, the note having been signed and endorsed in the form in which it appears, at the request of the officers of the Westfield Trust Company. That notwithstanding the several renewals of said note, the said Charles N. Fowler failed in his agreement to pay said note or any part thereof, excepting the discount which was at each renewal paid by said Fowler, except on two occasions when your orator and said Ackerman paid Ninety dollars ($90) each, which the said Fowler agreed to reimburse, as well as a payment of One hundred and twenty dollars ($120), and thereafter to wit on the eighth day of May, Nineteen Hundred and Twelve, the Westfield Trust Company instituted a suit in the New Jersey Supreme Court, against your orator and the said Ackerman and Fowler upon the note hereto annexed and made a part hereof as Exhibit "A," and such proceedings were had thereon that on or about the twenty-third day of June Nineteen Hundred and Twelve, judgment final was entered in the New Jersey Supreme Court for the sum of Six thousand and ninety-five dollars ($6,095), in favor of the Westfield Trust Company, against your orator, said Ackerman and Fowler.

8. That upon such judgment so recovered the Westfield Trust Company instituted supplementary proceedings and adjourned the same from time to time, covering a period of more than one year, during which time said Fowler had continual negotiations with the Westfield Trust Company and arranged with them not to take any proceedings against his collateral, all without the knowledge and consent of your orator and the said Ackerman, and said Fowler did from time to time make payments on account of said judgment, in all, having paid, as your orator is informed and believes, the sum of Fourteen hundred dollars ($1,400) besides ac-

crued interest, but the Westfield Trust Company claims to have received a lesser amount.

9. That on the twentyfirst day of April, Nineteen Hundred and Fourteen, the Westfield Trust Company did institute a suit in the New York Supreme Court against your orator and the said Ackerman, eliminating the said Fowler, upon the judgment aforesaid, recovered in the New Jersey Supreme Court, and such proceedings were had that judgment final was entered therein in favor of the Westfield Trust Company and against your orator and the said Ackerman, but not against said Fowler, on the eighth day of September, Nineteen Hundred and Fourteen, for the sum of Six thousand nine hundred and fifty-two dollars and eighty-six cents ($6,952.86), notwithstanding that said Charles N. Fowler had paid to said Westfield Trust Company, Fourteen hundred dollars ($1,400) on account of the principal of said New Jersey judgment and the principal indebtedness of Six thousand dollars ($6,000) together with all costs and interest; that upon said New York judgment, the Westfield Trust Company examined your orator from time to time under supplementary proceedings, which disclosed that your orator had no other assets than the money which is due and payable by Charles N. Fowler, and which your orator had reasonably expected to realize from said Charles N. Fowler upon the sale of said shares of stock as alleged in the first paragraph; that said supplementary proceedings in New York are still pending and undetermined and have caused your orator great embarrassment and inconvenience and were taken for the purpose of harassing your orator and protecting said Fowler.

10. That your orator is informed and believes it to be true, and therefore alleges that there exists a fraudulent conspiracy and agreement between said Charles N. Fowler and the said Westfield Trust Company, for the purpose of compelling your orator to pay the moneys due to the Westfield Trust Company and to relieve the said Charles N. Fowler and his property

from the lien of said judgment, and to assist said Fowler in not paying unto your orator and said Ackerman the amount of the moneys which are due to your orator and said Ackerman for the stock mentioned in the first paragraph as agreed, and to delay and protest said Fowler from taking over the said shares of stock. That the said Westfield Trust Company and the said Fowler know that if continual proceedings are taken to embarrass and harass your orator and the said Ackerman, that they will be unable to realize any money to pay the Westfield Trust Company and to be legally subrogated to the securities which are held by the Westfield Trust Company to pay its claim, and your orator charges and insists that the proceedings against him have been taken by reason of the fraudulent agreement and conspiracy existing between the Westfield Trust Company and the said Charles N. Fowler acquiesced in by Ackerman and that the reason for said conspiracy is that said Fowler believes that thereby he will not be compelled and obliged to pay the balance of Six thousand dollars ($6,000) to your orator and the said Ackerman.

11. That at the time the Westfield Trust Company instituted its suit in the New Jersey Supreme Court, the value of the collateral securities pledged with it by said Charles N. Fowler were of more than sufficient value, if then realized upon, to have paid all the moneys due to the Westfield Trust Company; but that by reason of the neglect, failure and refusal of said Westfield Trust Company to proceed against said collateral security in pursuance of it fraudulent agreement and conspiracy with the said Charles N. Fowler, and their endeavors to harass and embarrass your orator, the said collateral so pledged by the said Charles N. Fowler with the Westfield Trust Company, has greatly depreciated in value and to the extent of such depreciation, your orator and the said Ackerman are discharged as co-sureties upon the obligation now due and owing to the Westfield Trust Company and should be by this Honorable Court decreed to be discharged. And that your orator files this bill

in order to have ascertained and decreed for what amount, if any, he remains liable to the Westfield Trust Company and to thereupon proceed for a legal subrogation to the collateral securities held by said Westfield Trust Company.

12. That your orator has frequently applied to the Westfield Trust Company and its officers to dispose of and sell the collateral securities pledged with it by said Charles N. Fowler, but said company and its officers have neglected and refused so to do, in order to protect said Fowler and his property, as your orator verily believes, in pursuance of their fraudulent agreement and conspiracy against your orator.

All which actings, doings and pretenses of the Westfield Trust Company and the said Charles N. Fowler, acquiesced in by said Ackerman, tend to the manifest wrong, injury and oppression of your orator and are contrary to equity and good conscience.

In consideration whereof and for as much as your orator is without adequate remedy at and by the strict rules of the common law and can only obtain adequate and proper relief in this Honorable Court:

To the end therefore that the said several defendants, the Westfield Trust Company, Charles N. Fowler and William W. Ackerman, may without oath, full, true, direct and perfect answer make to all and every the matters aforesaid and that as full and particular as if the same were here again repeated, and that they and each of them thereto particularly interrogated paragraph by paragraph and that the said Westfield Trust Company and the said Charles N. Fowler may under oath made a full and complete discovery of the agreement and arrangement under and by virtue of which the Westfield Trust Company did discount the note of Six thousand dollars ($6,000) of July eighteenth, Nineteen Hundred and Eleven, and credit the proceeds to accounts opened in the name of your orator and the said W. W. Ackerman and whether said discount was not made upon the request of the said Charles N. Fowler, and his promise

and undertaking to be personally responsible for the payment thereof and whether said Charles N. Fowler did not state to the officers of the Westfield Trust Company that he was indebted to the said complainant and the said W. W. Ackerman, in the sum of Twelve thousand dollars ($12,000) upon the agreement for the purchase of One hundred and twenty (120) shares of the preferred stock of the Gas Electric Car Company and whether the time for the payment of the said note of Six thousand dollars ($6,000) was not from time to time extended by the Westfield Trust Company upon the request of said Charles N. Fowler and for the reason that he had placed additional collateral security with the Westfield Trust Company and also what collateral security said Charles N. Fowler pledged with the Westfield Trust Company, the dates when so pledged with the Westfield Trust Company, and the value of property when so pledged and the value thereof at the present time; that they may also set forth and discover by virtue of what arrangement and agreement the Westfield Trust Company had neglected or refused or failed to endeavor to collect upon the collateral pledged with it by the said Charles N. Fowler and what secret arrangements and agreements the Westfield Trust Company has with the said Charles N. Fowler relating to the collateral pledged with the Westfield Trust Company by the said Charles N. Fowler and also the amounts of money which have been paid by the said Fowler on account of the note so discounted by the Westfield Trust Company and when paid and if all payments made on said note for discount or otherwise have been made by the said Charles N. Fowler; *and that* an accounting may be decreed between your orator and the said Charles N. Fowler and the Westfield Trust Company as to the value of the collateral security held by the said Westfield Trust Company in relation to said note of Six thousand dollars ($6,000) and of the moneys paid to the Westfield Trust Company on account of said note and any and all renewals thereof, or that the said Charles

N. Fowler may be decreed to be the principal debtor and your orator one of the co-sureties and that your orator may be decreed by this Honorable Court to be discharged from liability as such co-surety, by reason of the negligence of the Westfield Trust Company from proceeding upon its collateral to the extent that the collateral has depreciated in value by reason of the fraudulent conspiracy and agreement existing between the said Charles N. Fowler and the said Westfield Trust Company as aforesaid and that upon being so decreed to be discharged, that the Westfield Trust Company be restrained and enjoined by the injunction of this Honorable Court from taking any further or other proceedings against your orator upon the said several judgments held by the Westfield Trust Company against your orator and others, and arising out of the aforesaid note of Six thousand dollars ($6,000), and that your orator may have such other and further relief in the premises as may be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your orator not only the State's writ of injunction restraining and enjoining the Westfield Trust Company from taking any further or other proceedings upon the several judgments against your orator, but also the State's writ of subpoena issuing out of and under the seal of this Honorable Court, to be directed to the Westfield Trust Company, Charles N. Fowler and William W. Ackerman, commanding them and each of them on a certain day and under a certain penalty herein to be expressed, personally to be and appear before your Honor in this Honorable Court and then and there to answer the premises and to stand to and abide by and perform such decree therein as to your Honor shall seem meet, etc.

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

ABE J. DAVID,
Solicitor for and of Counsel with Complainant.

EXHIBIT "A"

$6,000 Westfield, N. J., Mar. 1, 1912.

On April 1st after date I promise to pay to the order of M. B. Bloomer, Six thousand dollars at the Westfield Trust Company.

Value received. Signed W. W. His X Mark ACKERMAN.

Witnessed by J. R. CONOLLY.

ENDORSEMENTS

M. B. Bloomer

Charles N. Fowler

For value received we hereby guarantee payment of the within note and any renewal of same, and hereby waive protest, demand and notice of non-payment thereof.

(Signed) M. B. BLOOMER.

W. W. His X Mark ACKERMAN,

Witnessed by J. R CONOLLY.

CHARLES N. FOWLER.

In Chancery of New Jersey

Between MARTIN B. BLOOMER, Complainant, AND CHARLES N. FOWLER, Et als., Defendants.	ON BILL, Etc. *Notice to Motion to Strike out Bill.*

To Abe J. David, Esquire, Solicitor for Complainant:

Sir:

Please take notice that on Tuesday, the fifth day of January, 1915, at twelve o'clock in the forenoon, or as soon thereafter as counsel can be heard, we shall apply to the Chancellor at Chancery Chambers, in the Prudential Building, in the City of Newark, New Jersey, for an order striking out the bill of complaint filed by you in this cause, upon the following grounds, viz.:

1. It appears from the bill that the complainant and the defendant Ackerman have a common interest in the contract and stock which were assigned as collateral and it is not alleged that Ackerman has refused to join as a complainant.

2. That complainant does not tender himself ready and willing to pay to the Trust Company any sum that might be found due to it were an accounting ordered.

3. From the allegations in the bill it appears that the complainant might obtain full and adequate relief in an action at law.

4. No special facts and circumstances are alleged such as would justify a court of equity in interfering on

behalf of the complainant, nor does it appear that the Westfield Trust Company is fully indemnified against loss or that it would be exposed to no risk of loss if the relief sought by the complainant were granted.

5. It does not appear that the complainant has ever asked the Trust Company what amount remains due upon the judgment, nor does it appear why the complainant did not defend the suit in New York as to the amount due to the Trust Company.

6. The bill does not allege that complainant has ever offered to pay the note or judgment, nor does it specify when he demanded that the collateral be sold.

7. The bill cannot be sustained on the ground of fraud because it does not state the facts which constitute the alleged fraud.

8. It cannot be sustained as a bill for an accounting because in an action for conversion based upon the refusal of the Trust Company to deliver the collateral to complainant upon tender of the sum alleged by complainant to be due, the amount actually due might readily be proved.

9. Want of equity.

Respectfully,

CODDING AND OLIVER,
Solicitors for the Defendant,
The Westfield Trust Company.

In Chancery of New Jersey

Between
MARTIN B. BLOOMER
Complainant,
AND
CHARLES N. FOWLER,
and others,
Defendants.

On motion to strike out bill

Mr. Paul Q. Oliver for the motion.
Mr. A. J. David, contra.

MEMORANDUM

Howell, V. C.

The prayer of the bill is (1) that an account may be had between the complainant and the defendants as to the value of the securities held by the Westfield Trust Company as collateral security for the payment of the six thousand dollar note held by them against the complainant and others; (2) that Fowler be decreed to be the principal debtor and the complainant a co-surety only, and that he may be discharged from liability to the trust company to the extent of the depletion of the value of the collaterals.

In my opinion the bill is totally without merit and the motion must prevail.

The cause of action set out in the bill is one which was originally cognizable in the law courts, and if the doors of the law courts are closed against the complainant it is only because of his own negligence. He alleges

that he cannot pay the note held by the trust company because the judgment was taken for a larger amount than was due, and that he does not know the amount. In the first place, he made no defence when he was sued, and, in the second place, the court in which the judgment is will undoubtedly institute an inquiry to ascertain the amount actually due upon the judgment in case the complainant desires to pay it off; and if paid off by the complainant the law court under its general powers, or under the special statutory authority given to it will ascertain whether he is primarily or secondarily or otherwise liable as between the parties to the judgment themselves, and will take order accordingly.

The reason why the complainant comes into a court of equity is because, as the bill alleges, the defendants have been guilty of fraud which has resulted in a loss or depreciation in the value of the sureties put up as collateral to the obligation; but the facts which constitute such fraud are not set out, and this court cannot regard mere allegations of fraud. The facts must be stated from which the fraud may be inferred as a matter of law by the court.

I am therefore of opinion that the motion to strike out must prevail.

In Chancery of New Jersey

Between
MARTIN BLOOMER
Complainant,
AND
CHARLES N. FOWLER,
et als.,
Defendants.

ON BILL, Etc.

Order to Strike Out Bill of Complaint

Application having been made in behalf of the Westfield Trust Company, one of the defendants herein, for an order to strike out the bill of complaint filed herein for want of equity and upon other grounds and the bill having been read and the argument of counsel heard and it appearing that the bill is without equity,

It is on this eighth day of February, Nineteen hundred and fifteen on motion of Codding and Oliver, Solicitors for the Westfield Trust Company, defendant, ORDERED, that the bill of complaint be and the same is hereby stricken out with costs.

Respectfully advised,

J. E. HOWELL,
V.C.

E. R. WALKER,
C.

In Chancery of New Jersey

Between
MARTIN B. BLOOMER,
Complainant,
AND
CHARLES N. FOWLER,
et als.
Defendants

ON BILL, Etc.

NOTICE OF APPEAL

The complainant, Martin B. Bloomer, hereby appeals from an order to strike out the bill of complaint made in this Court in the above entitled cause dismissing the complainant's bill of complaint with costs, and from the whole and every part of said order and decree, to the Court of Errors and Appeals in the last resort in all causes.

Dated February 15th, 1915.

ABE J. DAVID,
Solicitor of the Complainant.

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

ABE J. DAVID,
Of Counsel with the Complainant.

New Jersey Court of Errors and Appeals

Between MARTIN B. BLOOMER, Complainant and Appelant, AND CHARLES N. FOWLER, et als., Defendants and Respondents.	ON BILL, Etc. PETITION FOR APPEAL.

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

The petition of Martin B. Bloomer, the appellant in the above stated case respectfully shows:

That your petitioner finds himself aggrieved by a decree or order made in the Court of Chancery, by His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the Eighth day of February, Nineteen Hundred and Fifteen, where in Martin B. Bloomer was complainant, and Charles N. Fowler, Westfield Trust Company and William W. Ackerman were defendants, in the following respects, to wit.:

That the said order or decree, adjudges and decrees that the said bill of complaint of the complainant be stricken out with costs to be paid to the defendant, Westfield Trust Company, by the complainant.

And your petitioner humbly appeals from said order or decree of the Chancellor and each and every part thereof, as aforesaid, upon the ground that the same is erroneous, for the reasons:

1. That the Court erred in striking out said bill of complaint.

2. That the Court should not have struck out the said bill of complaint, but should have caused and compelled the defendant, Westfield Trust Company, to file its answer thereto, and dispose of the merits of the bill of complaint on final hearing.

3. That there are sufficient facts stated in the bill of complaint to warrant assistance and jurisdiction of the court of equity.

4. That the court should not have struck out the said bill of complaint, but should have granted the relief prayed for by the said complainant.

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

ABE J. DAVID,
Of Counsel with the Complainant.

New Jersey Court of Errors and Appeals

Between MARTIN B. BLOOMER, Complainant and Appellant, AND CHARLES N. FOWLER, et als., Defendants and Respondents.	ON BILL, Etc. *Answer to Petition of Appeal.*

The answer of the respondent The Westfield Trust Company to the petition of appeal of the above named appellant:

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto nevertheless says and admits, that an order was on the eighth day of February last past made and entered in the Court of Chancery in the cause for the purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said order is agreeable to equity, and prays that the same may be affirmed with costs to be adjudged to this respondent.

Dated March 3rd, 1915.

CODDING AND OLIVER,
Solicitors for and of Counsel with
The Westfield Trust Company, Respondent.