INDEX

BILL OF COMPLAINT.

In Chancery of New Jersey

To His Honor, Edwin Robert Walker,
Chancellor of the State of New Jersey: 10

The complainant, Royal J. Mansfield, of the Borough of Leonia, County of Bergen and State of New Jersey, respectfully shows that:

1. On or about the fifteenth day of August, 1919, he, the said complainant, obtained title to certain premises in the City of Englewood, County of Bergen and State of New Jersey, by means of a conveyance from Rene Robert Salembier and Elizabeth G. C. Salembier, his wife, which deed was duly recorded in the office of 20 the Clerk of Bergen County on August 27, 1919, in Book 1026 of Deeds for said County on page 441, &c.

2. That the premises conveyed by said deed are fully described as follows:

> Beginning at a stone monument in the easterly line of Woodland street, said point being the southwesterly corner of property now or formerly of Charles F. Mattlage and 30 running thence (1) along the southerly line of Mattlage property south fifty two degrees thirty-seven minutes east three hundred feet to a stone monument; thence (2) parallel with Woodland street, north thirty-six degrees forty-three minutes east two hundred feet to a stone monument; thence (3) parallel with first course north fifty-two degrees thirty-seven minutes west three hundred feet to a stone monument in the easterly side of 40

Woodland street; thence (4) along the easterly line of Woodland street south thirty-six degrees forty-three minutes west two hundred feet to the point or place of BEGINNING.

Containing one and three hundred seventy-seven one-thousandths of an acre. Be the same more or less.

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3. That on or about the twenty-ninth day of December, 1922, the complainant, Royal J. Mansfield, conveyed the above described premises to Frank Hammond, who resides in Boonton, Morris County, New Jersey, which deed of conveyance was duly recorded in the office of the Clerk of Bergen County in Book 1194 at page 37 on the sixth day of January, 1923, and complainant respectfully shows that he received no consideration from Frank Hammond for the conveyance of said premises.

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4. That the said conveyance to Frank Hammond was made by the complainant, Royal J. Mansfield, at the request of the Greenwich Bank, at 135 William street, New York City, with which bank said complainant had business dealings for a considerable period of time; that at the time of the conveyance to said Frank Hammond the complainant was indebted to the said bank for monies loaned to him by it; that at the time of said conveyance the said bank requested from the complainant additional collateral to secure the advances or loans made by it to him, and demanded of complainant the execution and delivery of a deed for the above described property, situate in the City of Englewood as aforesaid, to Frank Hammond, who, at the time of the execution of said deed, was a vice-president of the Greenwich Bank.

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5. That said conveyance to said Frank Hammond was made for the sole purpose of furnishing additional collateral security to the bank for the advances and loans which were made by it to the complainant, and for no other purpose.

6. That at the time said conveyance was made by complainant to the defendant Frank Hammond, an agreement was made between them that the said premises would be reconveyed to complainant upon the payment by him to the Greenwich Bank of the monies due from complainant to said bank.

7. That subsequently the business relationship between the bank and complainant continued and the note or notes given by complainant to the bank were renewed from time to time and the bank at this time continues to hold the notes or evidences of indebtedness given to it by the complainant.

8. That complainant is informed and believes that the said Frank Hammond did, on or about the twenty-seventh day of February, 1926, enter into an agreement of sale with the defendant Frank A. Kraus, who resides at Ridgewood, New Jersey, according to complainant's information, under and by which he agreed to sell and convey the above described premises to the said Frank A. Kraus, for a consideration of Twenty Thousand Dollars ($20,000), title thereon to pass on April 28, 1926.

9. That at the time said agreement was entered into between the defendant Frank Hammond and the defendant Frank A. Kraus, the note held by the Greenwich Bank was not then due and payable, and no demand had been made

upon the complainant for the payment of said note when it became due in the future.

10. That as soon as the complainant was informed of the making of said contract between Frank Hammond and Frank A. Kraus, he communicated by letter with the defendant Frank A. Kraus, and advised him of the status of the property, of his, the complainant's, interest in said premises, and of the fact that the defendant Frank Hammond, under the circumstances, had no authority or power to properly convey said premises to him, Frank A. Kraus.

11. That on or about the fifteenth day of April, 1926, the complainant communicated with the defendant Frank A. Kraus by telephone, and was informed by the said Frank A. Kraus that he had received the letter previously sent by complainant, advising him of the status of the property.

12. That on or about the second day of March, 1926, the said Frank Hammond executed a deed in favor of the said Frank A. Kraus, which deed was delivered, according to complainant's information, to the said defendant Frank A. Kraus, on the seventeenth day of April, 1926, and the contract for the sale of said premises was closed on said April 17, 1926, in spite of the fact that the complainant had notified the Greenwich Bank, Frank Hammond and Frank A. Kraus of his disapproval to said sale and of his refusal to consent thereto.

13. That following the said conveyance by Frank Hammond to Frank A. Kraus, the complainant was informed that the date for closing the contract of sale was advanced from the

twenty-eighth day of April, 1926, to April 17, 1926, at the special instance and request of the defendant Frank A. Kraus, and complainant alleges that this was done for the purpose of effecting said transfer of title to defraud the complainant of his interest in said premises and to prevent him from establishing his claim thereto prior to the transfer by the said defendant Frank Hammond to the defendant Frank A. Kraus.

14. The complainant alleges that the conveyance of the above described premises by him to Frank Hammond was solely for the purpose of securing the Greenwich Bank in its loans or advances to the complainant, and that the said instrument, although an absolute deed of conveyance in form, was in fact a mortgage given by the complainant to secure to the said Greenwich Bank the payment of monies which might be due from complainant to said bank. Complainant further alleges that the said sale of said premises by Frank Hammond to Frank A. Kraus was without his consent or approval and was made by the said Frank Hammond at a time when no note or obligation given by the complainant to said Bank was due and payable, and that said agreement of sale was therefore inimitable to and made without regard to the proper rights of the complainant, Royal J. Mansfield, in and to the said premises.

15. That following the agreement between the defendant Frank Hammond and defendant Frank A. Kraus, of February 27, 1926, the said defendant Frank A. Kraus entered into the said premises and started the erection of a certain building on said premises, which building is not yet completed but remains in the process of erection,

which act on the part of the defendant Frank A. Kraus and Frank Hammond constitutes a trespass on said premises as against the rights and interests of the complainant, and will in the future cause complainant considerable embarrassment, trouble and difficulty due thereto.

10 The complainant is without adequate remedy in the courts of law and therefore prays:

1. That Frank Hammond and Frank A. Kraus, who are the defendants to this suit, may answer this Bill of Complaint and every statement therein contained.

2. That the said deed from the complainant, Royal J. Mansfield to Frank Hammond, dated December 29, 1922, and recorded in Book 1194, 20 page 37, be decreed to be a mortgage covering said premises, to secure the loans or advances made by the said Greenwich Bank to the complainant.

3. That the said defendants Frank Hammond and Frank A. Kraus be decreed to hold the said premises in trust for the complainant, Royal J. Mansfield, and to re-convey the said premises to said Royal J. Mansfield, upon the payment by him of such amount or amounts as may be due 30 from him to the said Greenwich Bank of New York City.

4. That the said Frank A. Kraus be decreed to be a holder of title to said premises, with due notice of the rights and interests and claims of the complainant in and to said premises.

5. That the said conveyance from Frank Hammond to Frank A. Kraus of the premises involved in this suit be decreed null and void and 40 that the said conveyance be cancelled and voided.

6. That the said Frank A. Kraus and Frank Hammond be enjoined by this Honorable Court from proceeding with the erection of said building on said premises, or with any other development, scheme, trespass or other action concerning the said premises, during the pendency of this suit.

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7. That the said Frank Hammond and Frank A. Kraus be decreed by this Court to render to the complainant a complete and full accounting of any and all monies received by either of said parties in connection with said premises.

8. That this Honorable Court may determine and decree the amount of damages suffered and sustained by the complainant by reason of the acts of the said defendants Frank Hammond or Frank A. Kraus.

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9. That this Honorable Court may grant to the complainant such other and further relief as may to said Court seem to be just and proper.

10. 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.

And your complainant will ever pray, etc.

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ANDREW J. WHINERY,
Solicitor for and of Counsel with Complainant.

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NOTICE OF MOTION TO STRIKE OUT.

IN CHANCERY OF NEW JERSEY.

Between ROYAL J. MANSFIELD, *Complainant,* *and* FRANK HAMMOND and FRANK A. KRAUS, *Defendants.*	*On Bill, &c.* *Notice.*

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To the complainant, Royal J. Mansfield:

TAKE NOTICE that on Monday, May 17, 1926, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, in the Chancery Chambers in the Court House of the City of Paterson, I shall apply to the Chancellor for an order striking out the bill of complaint in the above-entitled cause for the following reasons:

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1. The Court has no jurisdiction.

(a) The bill of complaint seeks damages against the defendant Frank A. Kraus for trespassing upon the property of the complainant, the said complainant having full and complete remedy in the courts of law.

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(b) The complainant is not entitled to any relief in a court of equity because although he alleges that he made a conveyance to one Frank Hammond from whom this property was purchased, he does not show that there was anything in the conveyance to give the complainant notice of any manner in which the said Frank Hammond held the title except as an absolute fee

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owner, and that although he states that he owed something to the Greenwich Bank of New York City, at whose request the conveyance was made to the said Frank Hammond, he does not state the amount which is due to the Greenwich Bank at the present time and tender himself ready, able and willing to pay the amount, nor does the said complainant show that the amount paid by this defendant to the said Frank Hammond was inadequate.

(c) The complainant states that the conveyance was made by him to Frank Hammond at the request of the Greenwich Bank of New York City for certain reasons stated in the bill of complaint, and if the said Frank Hammond or the Greenwich Bank have been guilty of violating the terms of any trust alleged to have been entered into, the complainant has adequate remedy in the courts of law.

2. The said bill of complaint discloses no cause of action for the following reasons:

(a) The complainant states that he conveyed the premises described in said bill of complaint December 29, 1922, to Frank Hammond, and that he received no consideration from the said Frank Hammond, for the said conveyance, and that this defendant Frank A. Kraus entered into and upon the said premises on the 27th day of February, 1926, and took possession of the same, and the bill filed in this cause seeks to set aside the conveyance made by the complainant to the said Frank Hammond although the complainant has been guilty of laches as appears from the above allegations, as knowledge of the lack of consideration came to the complainant upon the execution of the deed and knowledge of the possession

of the defendant, Frank A. Kraus, who has expended large sums of money as alleged in the bill, upon the said premises, came to the complainant February 27, 1926.

GARRET VAN CLEVE,
Solicitor of Defendant, Frank A. Kraus.

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ORDER DISMISSING BILL OF COMPLAINT.

Filed June 10, 1926.

IN CHANCERY OF NEW JERSEY.

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Between ROYAL J. MANSFIELD, *Complainant,* *and* FRANK HAMMOND and FRANK A. KRAUS, *Defendants.*	*On Bill, &c.* *Order.*

This matter coming on to be heard in the presence of Andrew J. Whinery, solicitor of the complainant Royal J. Mansfield, and Garret Van Cleve, solicitor of the defendant Frank A. Kraus, and the Court having heard the argument of the said solicitors and being of the opinion that the bill of complaint filed herein discloses no cause of action against the defendant Frank A. Kraus, and that the defendant Frank A. Kraus is not the holder of title to the said premises with notice of any rights and interest and claims of the complainant in and to the premises involved in this suit, and that the conveyance from Frank Hammond to Frank A. Kraus of the said premises is good and sufficient, and it appearing that due notice of the said defendant's motion to dismiss the said bill of complaint for the cause aforesaid has been given to the said complainant, it is thereupon on this 4th day of June, nineteen hundred and twenty-six, ORDERED, ADJUDGED and DECREED that the complainant's said bill of complaint be and the same is hereby dismissed in so

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far as it prays for any relief against the defendant Frank A. Kraus with costs to be taxed.

E. R. WALKER,
C.

Respectfully advised:

10 VIVIAN M. LEWIS, V.-C.

A true copy.

THOMAS BARBER,
Clerk.

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NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

Between ROYAL J. MANSFIELD, *Complainant,* *and* FRANK HAMMOND and FRANK A. KRAUS, *Defendants.*	*On Bill, &c.* *Notice of Appeal.*

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The complainant, Royal J. Mansfield, hereby appeals from the Order or Decree made in the above-entitled cause on the 4th day of June, 1926, in which it is Ordered, Adjudged and Decreed that the complainant's Bill of Complaint be and the same is hereby dismissed, insofar as it prays for any relief against the defendant Frank A. Kraus and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all cases.

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Dated July 9, 1926.

ANDREW J. WHINERY,
Solicitor for and of Counsel with Complainant,
Royal J. Mansfield.

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

ANDREW J. WHINERY,
Solicitor for and of Counsel with Complainant,
Royal J. Mansfield.

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PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10 ROYAL J. MANSFIELD, *Complainant-Appellant,* *vs.* FRANK HAMMOND and FRANK A. KRAUS, *Defendant-Appellee.*	*Appeal from the Court of Chancery.* *Petition of Appeal.*

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

20 The petition of Royal J. Mansfield, the complaintant-appellant in the above-entitled cause, shows that:

1. The petitioner finds himself aggrieved by an Order or Decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date June 4, 1926, in a certain cause in said Court of Chancery wherein Royal J. Mansfield 30 was complainant and Frank Hammond and Frank A. Kraus were defendants, in this respect, to wit, that the said Decree or Order adjudges that the Bill of Complaint be and the same is hereby dismissed insofar as it prays for any relief against the defendant Frank A. Kraus, with costs to be taxed, and further recites therein that the Bill of Complaint discloses no cause of action against the defendant Frank A. Kraus, and that the defendant Frank A. Kraus is not 40 the holder of title to the premises, with notice

of any rights and interest and claims of the complainant in and to the premises involved in this suit, and that the conveyance from Frank Hammond to Frank A. Kraus of said premises is good and sufficient.

2. The petitioner appeals from the Order or Decree of the Chancellor, which decrees or adjudges as aforesaid, upon the ground that the same is erroneous in that the Bill of Complaint does disclose a good and sufficient cause of action against the defendant Frank A. Kraus, and that he, the said defendant Frank A. Kraus, was a holder of the title to the premises described in said Bill of Complaint, with notices of the rights, interest and claims of the complainant in and to said premises, and in that the said Order in its recital states that the conveyance from Frank Hammond to Frank A. Kraus of the said premises is a good and sufficient conveyance, whereas said conveyance was made with notice of the interest and rights of the complainant, and upon the further ground that the findings and decision of the Chancellor as set forth in the Order or Decree are not based upon any evidence or affidavits submitted to the Court by either party.

3. Petitioner therefore prays that the said Decree or Order of the Chancellor may be wholly reversed, set aside and for nothing holden, and that the petitioner may have such further relief in the premises as to this Court shall seem proper.

ANDREW J. WHINERY,
Solicitor for and of Counsel with
Complainant-Appellant.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ROYAL J. MANSFIELD, *Complainant-Appellant,* *vs.* FRANK HAMMOND and FRANK A. KRAUS, *Defendants-Appellees.*	*On Appeal from the Court of Chancery.* *Answer to Petition of Appeal.*

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The answer of Frank A. Kraus, the above-named appellee, to the petition of appeal of Royal J. Mansfield, the above-named appellant.

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This appellee, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that a decree or order was, on June 4, 1926, made and entered in the Court of Chancery of New Jersey, in the above-entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree or order, this appellee begs leave to refer thereto when the same shall be produced.

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This appellee is advised and believes that the said decree or order is agreeable to equity; and he prays that the same may be affirmed with costs to be taxed in favor of this appellee.

GARRET VAN CLEVE,
Solicitor for and of Counsel with
Defendant-Appellee, Frank A. Kraus.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

MEMORANDUM OPINION.

In Chancery of New Jersey

Between

ROYAL J. MANSFIELD,
Complainant,

and

FRANK HAMMOND and FRANK A. KRAUS,
Defendants.

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Andrew J. Whinery, Esq., for complainant.
Garret Van Cleve, Esq., for defendants.

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LEWIS, *V.-C.*

This matter comes before the Court on notice to dismiss complainant's bill insofar as it prays for relief against the defendant, Frank A. Kraus.

The bill sets forth that on December 29, 1922, complainant conveyed the premises described therein to Frank Hammond. More than three years thereafter, or on the twenty-seventh day of February, 1926, Hammond entered into a contract to convey the same premises to Frank A. Kraus. On the second day of March, 1926, Hammond gave Kraus a deed for the property and was paid by Kraus the sum of Twenty Thousand Dollars ($20,000.00). Kraus entered possession of the premises and started the erection of a dwelling thereon. The complainant says that a few days before the fifteenth day of April, 1926, he sent a letter to Kraus, but sets forth no copy of the letter in his bill. His solicitor contended,

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however, that it was a notice to Kraus that he considered Hammond the sole owner of the premises. He refers to the letter in paragraph ten of the bill, but it appears to be simply a statement of his conclusions as to the purport of the letter. Upon the argument, I asked solicitor of the complainant why he had not set forth in more detail the contents of the letter. Kraus denied ever having received the letter, and during the course of the argument it appeared that it was addressed to Paterson, N. J., when in fact Kraus lives at Ridgewood, N. J. It was admitted that the letter was mailed to Paterson, N. J. In paragraph eleven complainant says that he communicated with Kraus by telephone and was informed that he had received the letter, but Kraus denies this telephonic communication.

As soon as Kraus had entered into the contract for the purchase of the property he began the erection of a dwelling for a home upon the same, which was a notice to everyone that he had some interest in the premises. He became obligated for the erection of the building and yet complainant took no steps to prevent the continuation of the work except by a letter which he says he sent to Kraus. Had Kraus received the letter it shows no special diligence on the part of complainant. He could have applied to this Court immediately for an injunctive order which would have relieved Kraus of his contractual obligations. Why should Kraus at the outset be compelled to litigate when he had no notice of any arrangement such as the complainant says he had with Hammond? Complainant has remained silent since December 29, 1922, and the deed to Hammond given at that time was absolute on its face. If Hammond held the premises

by virtue of any trust agreement, as claimed by the complainant, and Hammond has been guilty of a violation of his trust, the complainant has an adequate remedy at law against him. Hammond has filed an answer in this action denying any such agreement with complainant.

The motion to dismiss the bill as against the defendant, Frank A. Kraus, should be granted.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between ROYAL J. MANSFIELD, *Complainant,* *and* FRANK HAMMOND and FRANK A. KRAUS, *Defendants.*	*On Bill, etc.*

BRIEF OF COMPLAINANT-APPELLANT.

Facts.

This is an appeal from an order of the Chancellor dismissing the bill of complaint as against the defendant Kraus.

The complainant filed his bill of complaint against two defendants, Frank Hammond and Frank A. Kraus. The defendant Frank A. Kraus, through his solicitor, Garrett Van Cleve, served a notice on the solicitor for complainant that on Monday, May 17, 1926, he would move for an order striking out the bill of complaint on the ground (1) that the Court has no jurisdiction and (2) that the bill of complaint discloses no cause of action. On the return day of the motion, the solicitors for complainant and for the defendant Frank A. Kraus appeared before Vice-Chancellor Vivian M. Lewis, in Paterson, N. J. No affidavits were presented to the Court. No testimony or evidence was presented. The argument was addressed solely to the efficacy of the bill of complaint. On June 4, 1926, an order was made by the Chancellor (per Vice-Chancellor Vivian M. Lewis) dismissing complainant's bill of complaint insofar as it prays

for any relief against the defendant Frank A. Kraus, with costs to be taxed. From this order, this appeal is taken.

Allegations of Complaint.

The bill of complaint discloses the following allegations:

The complainant secured title to premises involved in this suit (and fully described in complaint) on August 15, 1919.

On or about December 29, 1922, he conveyed said premises to Frank Hammond, of Boonton, N. J., but received no consideration therefor from the grantee.

This conveyance was made at the request of Greenwich Bank of New York City, of which the grantee, Hammond, was then a vice-president, and was made to secure loans made by said bank to the complainant, the only purpose for such conveyance being to furnish this additional collateral security to the bank.

When this conveyance was made, Hammond, the grantee, agreed to re-convey to complainant upon the payment to the bank of monies due it from complainant.

The notes of complainant were renewed by the bank from time to time and the bank continues to hold them.

Complainant was informed that on or about February 27, 1926, Hammond entered into an agreement of sale with the defendant Kraus, of Ridgewood, N. J., to sell the premises in question for $20,000, title to pass on April 28, 1926.

When this agreement of sale was made, the note held by the Greenwich Bank was not then

due and payable and no demand had been made upon complainant for its payments when it would come due.

As soon as complainant learned of this agreement of sale "between Frank Hammond and Frank A. Kraus, he communicated by letter with the defendant Frank A. Kraus and advised him of the status of the property, of his, the complainant's, interest in the premises, and of the fact that the defendant Frank Hammond, under the circumstances, had no authority or power to properly convey said premises to him, Frank A. Kraus."

On April 15, 1926, complainant talked on the telephone with the defendant Frank A. Krause "and was informed by the said Frank A. Kraus that he had received the letter previously sent by complainant advising him of the status of the property."

Although complainant had notified Greenwich Bank, Frank Hammond and Frank A. Kraus of his disapproval of this proposed sale and of his refusal to consent thereto, the title was closed and the deed from Hammond to Kraus delivered on April 17, 1926, said deed bearing the date March 2, 1926.

After this conveyance had been made, complainant was informed that the date for closing the contract of sale was advanced from the 28th day of April, 1926, to April 17th, 1926, at the special instance and request of the defendant Frank A. Kraus, and complainant alleges that this was done for the purpose of effecting said transfer of title to defraud the complainant of his interest in said premises and to prevent him from establishing his claim thereto prior to the transfer by the defendant Frank Hammond to the defendant Frank A. Kraus.

Although the deed from complainant to Frank Hammond was an absolute conveyance in form, it was in fact a mortgage given to secure to the Greenwich Bank the repayment of monies loaned and was made solely for that purpose. The sale by Hammond to Kraus was without the consent or approval of complainant and was made at a time when no note or obligation given by complainant to said bank was due and payable and that said sale was therefore inimicable to and without regard for the rights of complainant.

After Hammond had agreed to sell to Kraus, the latter defendant entered upon the premises and began the erection of a building which was still being erected when this suit was started.

Prayers.

1. That the deed from complainant to Frank Hammond dated December 29, 1922, he decreed to be a mortgage to secure loans made by the Greenwich Bank to complainant.

2. That the defendants, Hammond and Kraus, be decreed to hold the premises in trust for complainant and to reconvey them to him upon payment by him of monies due to Greenwich Bank.

3. That said Kraus be decreed to be a holder of title to the premises with due notice of the rights, interests and claims of complainant therein.

4. That the conveyance from Hammond to Kraus be decreed null and void.

5. That Kraus be enjoined from proceeding with the erection of said building on the premises or with any other development, scheme,

trespass or action concerning the premises during the pendency of this suit.

6. That an accounting be decreed from the two defendants to complainant.

7. That the damages sustained by complainant by reason of the acts of the two defendants be determined by this Court.

8. That other further relief be granted as may seem just and proper.

There were also the usual prays relating to answering the complaint and the issuance of subpoena.

Notice of Motion to Strike Out.

The motion to strike out is based on the following grounds:

1. The Court has no jurisdiction

a. Because there is a full and complete remedy at law because damages are sought.

b. Because nothing in the conveyance from complainant to Hammond gave Kraus notice of complainant's rights; because the amount due Greenwich Bank is not stated nor does complainant tender himself ready, willing and able to repay this debt; becaues no inadequacy of price paid by Kraus to Hammond is shown.

c. Complainant has adequate remedy at law for breach of trust by Hammond or Greenwich Bank.

2. The bill of complaint discloses no cause of action because of laches.

Order Dismissing Bill as to Kraus.

After reciting that the Court is of the opinion that the bill of complaint discloses no cause of action against Kraus, that Kraus is not a holder of title with notice of any rights and interest and claims of complainant in and to the premises and that the conveyance from Hammond to Kraus is good and sufficient, the order decrees that the bill of complaint be dismissed insofar as it prays for any relief against Kraus, with costs.

ARGUMENTS.

No evidence, either by affidavit or testimony in open court, was presented. The motion was addressed solely to the efficacy of the bill of complaint and for the purpose of the motion, all allegations of the bill of complaint are admitted by the defendant Kraus.

The notice of motion to strike out was based upon reasons specifically set forth therein.

The first of these was that the Court had no jurisdiction because the complainant had a full and complete remedy at law, damages being sought against Kraus for trespass. The Court did not decree dismissal on this ground. The prayer (8th) in the bill for the determination of damages was incidental to the true relief sought. The principal prayers sought a decree that the conveyance to Hammond was in equity a mortgage; that Kraus was a holder of title with notice of complainant's rights; that Hammond and Kraus hold the premises in trust for complainant and reconvey said premises to complainant upon payment by him of monies due Greenwich Bank of New York by him. All other prayers were for incidental relief. The prin-

cipal prayers clearly seek equitable relief. The premises in question are situate in Englewood, New Jersey, a section wherein real estate values are rapidly increasing and wherein values will be favorably affected by the future developments, such as the proposed bridge from New York City to Bergen County. Complainant cannot secure adequate damages in a court of law because the damages there awarded would pertain solely to the value as of the time of transfer from Hammond to Kraus. He is entitled to the reconveyance of the property upon repayment of his debt, so that he may benefit from the increased values of the future if he desires to hold the property for such future anticipated values.

The second ground of the motion is that the Court has no jurisdiction because (1) the deed from Mansfield to Hammond gave no notice to Kraus of Mansfield's interests or rights therein; (2) the amount due Greenwich Bank is not stated and complainant does not tender himself ready, willing and able to pay this amount, and (3) complainant does not show that the amount paid by Kraus to Hammond was inadequate. (1) It is unnecessary for the deed from Mansfield to Hammond to set forth the interests or rights of Mansfield; Kraus received actual notice from Mansfield of the latter's rights and interest before title was passed. Constructive notice is not alleged; actual direct notice is alleged (see paragraphs 10 and 11). The Court in its order recites that Kraus is not a holder of title with notice of any rights and interest and claims of complainant in the premises. The allegations of the complaint (which must, on this motion, be assumed to be facts) specifically allege that Kraus did have actual notice thereof.

The complainant himself gave such actual notice by letter and by telephone (see paragraphs 10 and 11 of complaint). The telephone conversation was on April 15, 1926, and, *at the special request of the defendant Kraus,* Hammond gave title two days later, April 17, 1926, although the time originally set for that event was April 28, 1926, eleven days later (see paragraphs 11, 12 and 13 of complaint). This premature taking of title by Kraus may be presumed to have been caused by the telephone conversation between him and the complainant and to have been hastened by the desire of Kraus to take title before complainant could restrain and prevent such action by legal process (see paragraph 14 of complaint). Thus not only does the complaint allege notice of Mansfield's rights by letter and telephone, but the allegations of action by Kraus immediately following the telephone conversation clearly indicate by reasonable inference a desire on his part to defraud complainant. (2) It was not necessary to allege either the amount of the debt due Greenwich Bank or that complainant was then and there ready, willing and able to repay it (*see 27 Cyc. 1031 and cases there cited*). This action is not brought for the recovery of this debt due Greenwich Bank. The debt was not due and payable when the agreement to sell was made. The conveyance by Mansfield to Hammond was solely for the purpose of furnishing the Greenwich Bank with collateral security for its loan; in other words it was given as a mortgage. If the debt had then been due and unpaid—which it was not—the bank, through its vice-president, Hammond, should have instituted a foreclosure proceeding. *Pittinger* v. *Mayo,* 127 Atl. 177, 3 Adv. R. 163. Lloyd, *J.*, E. & A. (unanimous opinion).

Complainants filed bill to foreclose. Mayo was indebted to banks for loans and deeded

> property to Pittinger, *et al.*, to hold as security for term of one year. "The notes held by the bank * * * were due and unpaid long before the bringing of the present suit." "When the year expired, no further duty devolved on the trustees than to hold the property, in the language of the agent itself, for the benefit of the banks and for the better securing of the payment of the notes held by them. There was at the expiration of the year no limitation on the absolute character of the deed except that which flowed from the fendamental fact that the conveyance was to secure indebtedness. * * * The parties were left at arm's length in the relation of debtor and creditor with the creditor holding the security for its deed (mortgage). It was the right of the complainants, the trustees for the creditors, to avail themselves of the security, and *this they could only do by foreclosing the defendant's right of redemption, * * * the deed constituted a mortgage and was subject to foreclosure as such.*

It had no right or authority to sell without such foreclosure proceeding, when the debt was not yet due and without the true owner's assent. Mansfield had the right to redeem the property (see *Vanderhaize* v. *Hugnes,* 13 N. J. E. 244; *Griffin* v. *Cooper,* 73 N. J. E. 465).

(3) The inadequacy of price paid by Kraus to Hammond is not raised in the bill. It is immaterial in this proceeding. Mansfield does not allege that more money should have been received and applied against his debt with the bank. He alleges that this sale by Hammond was without his consent and was greatly prejudicial to his interests. It was his right and privilege to pay the debt due Greenwich Bank and hold the property for its anticipated increase in value in the future. Neither Greenwich Bank, nor Hammond nor Kraus had any

equitable or legal right or authority to so deprive him of his property. He seeks the opportunity to repay his loan to the bank and to obtain a reconveyance to him of the premises which were put up as security for the payment of the loan. He is entitled to it. Even in the case of personal property given to the bank or its agent, as security for a loan, the bank or its agent cannot sell and dispose of such security until and unless the debt secured thereby be due and payable. Surely, the rule as to real estate given as security is just as stringent. Mansfield does not want the monetary credit against his loan for the sale price of this property; he desires a reconveyance of the property itself, upon payment in specie of his debt. Thus the question of inadequacy is not involved.

(3) The third ground for the motion is that complainant has an adequate remedy at law for any breach of trust on the part of the Greenwich Bank or Hammond, its agent. This is untrue. As above stated, Mansfield is entitled to a return of the premises upon payment of his debt. Kraus, having notice of Mansfield's rights, is in no better position than Hammond, and the equitable rights of Mansfield attach to the property in the hands of Kraus under those facts. If Mansfield's remedy were limited to a suit at law for damages due to a violation of trust, he might be compelled to wait many months before such a case could be heard, and his damages would then be limited to proof of inadequacy of price at the time of the sale of premises to Kraus by Hammond. He would be deprived of his rights to the future enhanced value of the property, to the benefit of his investment in the land. To limit his damages to inadequacy of price as of the date of sale to Kraus would be inequitable and unfair to Mansfield. It would

permit Kraus to reap the benefit of the anticipated great increase in realty values in Bergen County on property which Mansfield, the true owner, desires to seek for himself.

The fourth reason for the motion is that the complainant was guilty of laches. This is not true. He was informed that on or about February 27, 1926, Hammond agreed to sell the premises to Kraus, title to pass on April 28, 1926. *As soon as he was so informed,* he wrote a letter to Kraus, advising him of his interest in the premises (see paragraph 10 of bill). On April 15, 1926, he communicated with Kraus by telephone and again advised him of his interest in the premises. On April 17, 1926, title to the premises passed from Hammond to Kraus and within a very few days thereafter this action was brought. There was no unnecessary delay by complainant; this suit was started prior to the date originally set for the closing of the Hammond to Kraus transfer of title. The motion to dismiss the bill was heard and argued just one month after the date of the actual conveyance from Hammond to Kraus. No claim of laches can prevail under these circumstances.

The order from which this appeal is taken recites as findings of fact that Kraus is not a holder of title with notice of complainant's rights in the premises and that the conveyance from Hammond to Kraus is good and sufficient. The bill of complaint clearly alleges the direct opposite to these findings. No affidavits or proof of any nature was submitted to the Court. In view of this situation, these findings of fact are without any foundation and are conclusions reached by the Court without the assistance of any evidence whatsoever. Under these facts,

these findings are clearly improper and unwarranted.

The order in this case, now under appeal, practically disposes of the action unless it is reversed. Complainant seeks the return or reconveyance of the property upon payment of his debt, and he therefore in this bill of complaint prays for a decree that the conveyance from him to Hammond is a mortgage that Hammond and Kraus hold the premises in trust for him subject to the payment of his debt; that the conveyance from Hammond to Kraus be set aside and made null and void. Thus, in order to secure this remedy it is necessary that the defendant Kraus be retained as a party defendant. The decree entered by the Court dismissing the bill of complaint as to the defendant Kraus is a final decree as to him, and therefore this appeal is proper at this time.

LAW.

The law of New Jersey is that the court of equity may declare a deed which is absolute on its face to be a mortgage and the fact may be proved by parol evidence. If the intention of the parties was that the deed should constitute security for the payment of money, then it is deemed a mortgage. *Papsco* v. *Novak,* 94 N. J. E. 642; *Cake* v. *Shull,* 45 N. J. E. 208; *Hogan* v. *Jacques,* 19 N. J. E. 123; *Phillips* v. *Hulsizer,* 90 N. J. E. 308; *Winter* v. *Earl,* 52 N. J. E. 52; *Pittinger* v. *Mayo,* 3 Adv. Rep. 163, 127 Atl. 177; *Adoue* v. *Spencer,* 62 Eq. 782, 784, and many other cases.

If premises conveyed as security for a debt are reconveyed to a third party who has notice of the rights of the original grantor, the new

owner also takes title as an equitable mortgagee. See *Jacques* v. *Hogan,* 19 N. J. E. 123, 130; *Frink* v. *Adams,* 36 N. J. E. 485; *Papsco* v. *Novak,* 94 N. J. E. 642.

In order to be a *bona fide* purchaser without notice it is necessary that a third party shall have paid the entire purchase money. Notice before actual payment of the entire purchase money is notice before the contract; giving a security and executing a bond or other obligation for payment is not sufficient, however. See *Bridgewater* v. *Ocean City Association,* 85 N. J. E. 378 (affirmed 88 N. J. E. 350); *Paterson* v. *J. D. Loiseaus Lumber Co.,* 92 N. J. E. 569; *Haughwoit* v. *Murphy,* 22 N. J. E. 531; *Leonard* v. *Leonia Heights Land Co.,* 81 N. J. E. 489; *Losey* v. *Simpson,* 11 N. J. E. 246; *Dean* v. *Anderson,* 34 N. J. E. 496, 4 Kent's Com. 179, Note (C); 1 Story's Eq. Jurs. 74; 3 Story's Eq. Jurs. 534; *Sargent* v. *Eureka,* 46 Hun. 19.

A third party who takes title to premises with notice of the rights of an original grantor-mortgagor is a proper defendant in a suit to establish the rights of the original grantor-mortgagor. See *Clark* v. *Condit,* 18 N. J. E. 358, and cases cited, *supra.*

This is consistent with sound reason, for otherwise a grantee holding as mortgagee might deprive the grantor-mortgagor of his right to redeem by making a conveyance to any third person. The grantor-mortgagor (Mansfield in this case) certainly is entitled to his right to redeem the premises by the payment of the debt due Greenwich Bank, of which Hammond is a vice-president.

Right to Amend.

In this case, Vice-Chancellor Lewis did not ~~permit~~ AUTHORIZE an amendment more fully setting forth facts as to notice to Kraus, but merely made the order dismissing the complaint as to this defendant. The complainant should have been permitted to amend his complaint in order to set forth the notice to Kraus in more detail, in case the allegations of the complaint did not seem sufficient to the Court.

Conclusion.

It is therefore respectfully submitted that the order of the Chancellor dismissing the bill of complaint as to the defendant Kraus was error and that this Honorable Court should decree the reversal of said order, thereby permitting the complainant to present his case and to obtain such remedy as may to the Court seem proper in the circumstances, or that the complainant be permitted to amend his bill of complaint, setting up the alleged notice to Kraus in more detail.

ANDREW J. WHINERY,
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with Complainant-Appellant.

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New Jersey Court of Errors and Appeals

Between ROYAL J. MANSFIELD, *Complainant-Appellant,* *and* FRANK HAMMOND and FRANK A. KRAUS, *Defendant-Appellees.*	*On Appeal.*

SUPPLEMENTAL BRIEF.

Since the preparation of the brief of the complainant-appellant, an opinion has been prepared and filed by Vice-Chancellor Vivian M. Lewis. This necessitates the filing of this supplemental brief by complainant-appellant.

The matter came before the Chancellor (per Lewis, *V.-C.*) on a notice to dismiss the Bill of Complaint insofar as it prays for relief against the defendant, Frank A. Kraus. On such a motion, the allegations of the complaint are presumed to be true. The only question involved is whether the complaint sets forth an equitable cause of action against Kraus.

I. The Vice-Chancellor misconceived or misinterpreted the facts as set forth in the complaint.

1. *The court* says that Hammond gave Kraus a deed for the property on March 2, 1926, and paid Hammond $20,000 therefor. *The complaint* alleges that, although the deed was dated and executed on March 2, 1926, it was not delivered until April 17, 1926, when title was closed (see

paragraph 12 of complaint). The complaint also alleged that title was passed on April 17, 1926, although the agreement between Hammond and Kraus provided for the closing of title on April 28, 1926, and although complainant had previously thereto notified Kraus of his interest in the property, of his disapproval of said sale and of his refusal to consent thereto (paragraphs 10, 11 and 12).

2. *The court* makes it appear that Kraus received no notice of complainant's rights prior to the transfer of title to Kraus. *The complaint* clearly shows otherwise. It alleges that "as soon as complainant was informed of the contract" between Hammond and Kraus, he notified Kraus by letter of his interest in the premises and that Hammond had no authority to make the sale; that on or about April 15, 1926, he telephoned to Kraus and was advised by him of the receipt of the above letter; that title passed on April 17, 1926 (two days after the telephonic communication), having been advanced from April 28, 1926, at the special request of the defendant, Kraus (paragraphs 10, 11, 12 and 13). Thus the complaint clearly shows notice to Kraus before he took title.

3. *The court* refers to the allegations in the complaint as to the letter to Kraus as "simply a statement of his conclusions as to the purport of the letter." *The complaint* alleges that the letter advised Kraus "of the status of the property, of his, the complainant's, interest in said premises and of the fact that the defendant, Frank Hammond, under the circumstances had no authority or power to properly convey said premises to—Frank A. Kraus." It is submitted that the allegations of the bill are not conclusions but are facts as to the contents of this letter. It

is not necessary to plead documents in full if their purport is fully alleged.

4. *The court* states that Kraus denied the receipt of the letter and the telephonic communication and states that the letter was addressed to Kraus at Paterson, when in fact Kraus resided at Ridgewood. *The complaint* alleges none of these matters of proof. At the argument on the motion, no evidence or affidavits were produced by Kraus. The conclusions of the court as to the above items indicate that the court determined the issues of the case without the production of any evidence. His consideration of the matter represents a trial by him without the aid of *any* proofs and without permitting complainant to sustain the allegations of his complaint. This was clearly error by the court.

5. *The court* states that Kraus, upon entering into a contract with Hammond, immediately started the erection of a dwelling on the property and that this was notice of his interest in the property; that complainant took no steps to prevent the completion of this work except to write a letter; that complainant could have immediately sought an injunction order. *The complaint* alleges that "*as soon as complainant was informed of the making of said contract*" between Hammond and Kraus, he notified Kraus by letter of complainant's interest therein and of his objections to the sale; that on April 15, 1926, he telephoned to Kraus and was informed of the receipt of the above letter; that title passed on April 17, 1926, although the date set therefor was April 28, 1926; and the Bill of Complaint was filed less than a week after April 17, 1926, in which bill injunctive relief is sought. The mere erection of a building on property of

another cannot give any rights therein to the builder and the owner or equitable owner of such property cannot be charged with notice of the interests of the builder until he, the equitable owner, actually receives such notice. In this case there was no laches on the part of complainant. He wrote Kraus "as soon as he was informed of the contract;" he telephoned him shortly thereafter; he started this proceeding within ten days after the telephonic communication. While the complaint does not allege the situation to that extent, the proof, when submitted, will disclose more clearly that there was no laches, and that complainant acted promptly upon learning of the contract between Hammond and Kraus and upon ascertaining that Kraus was erecting a building upon property of which complainant was the equitable owner.

6. *The court* says that if Hammond was guilty of a violation of any trust agreement, the complainant has an adequate remedy at law. *The complaint* alleges that there is no adequate remedy at law and it is submitted that this allegation is correct. The property is located in Englewood, where values have been rapidly increasing, due to the natural growth of the community and also to the prospect of the new bridge into New York City, which bridge will not be far distant from the property. The complainant, assuming he proves his interest in the property as alleged, is entitled to reap the benefits of this rapid increase in land values. His measure of damages against Hammond in a court of law would be limited to inadequacy of sale price at the time of the sale, and this, it is submitted, cannot compensate complainant for his loss. He is entitled to reap the benefits of his investment and it would be a gross, inequita-

ble fraud upon him to permit Hammond and Kraus, by the completion of a sale not approved by complainant, to deprive complainant of the real fruits of his investment. If there be an adequate remedy at law in this case, then the same theory should apply to all cases where one holds property in trust for another and refuses to reconvey. A long line of cases, cited in the main brief, holds that one holding title may be decreed to be merely a mortgagee. And one, taking title from such trustee or mortgagee with notice of the rights of the mortgagor in fact, can obtain no better title than that held by his grantee and therefore must likewise be held to be in the position of a mortgagee to the original mortgagor.

7. *The court* refers to the allegations in an answer filed by the defendant, Hammond. This answer was not filed until sometime after the entry of the order dismissing the complaint as to Kraus. Consequently it could not have influenced the court in arriving at its decision. Moreover, the allegations of an answer cannot in any way determine the sufficiency of the allegations of the complaint under the motion directed to the complaint.

II. The court determined the real issues of the case without giving complainant an opportunity to present his proofs.

The conclusions reached by the court are based, at best, upon mere statements of the solicitor for the defendant, Kraus. No evidence was presented. No affidavits were produced. Kraus presented no denials of facts claimed in the complaint to the court; if he had done so, issue would have been joined and a hearing,

with proofs, duly had. It is clear, from a perusal of the opinion, that the order of the court was not founded on the allegations of the complaint, or the supposed insufficiency thereof, but rather upon unsupported statements made in court by Garret Van Cleve, solicitor for the defendant, Kraus. The opinion does not consider the sufficiency of the Bill of complaint; it considers the issues of the case as though a trial or hearing had taken place and determines the real contentions as if heard on bill, answer and evidence. It is submitted that this is improper and that the order should be reversed for that reason.

III. Complainant should have the right to amend his Bill of Complaint if this court deems it necessary.

No answer has been filed by Kraus. If this court considers the allegations of the contents of the letter insufficient, they may be made more specific by inserting quotations from the letter or by adding the entire letter. If the allegations as to the telephone conversation be insufficient, they may be made more specific. If a more definite allegation as to the complainant's knowledge of the erection of the building be required, it may be so set forth.

By the order dismissing the Bill of Complaint, without leave to amend, the lower court deprived complainant of his right to assert his claim to this valuable property. Without the benefit of any evidential proof, the court decides the issues of the case and denies the complainant his interest in the property. This is a gross injustice to complainant. If the Bill of Complaint be deemed insufficient by this court, the order should, even in that case, be reversed to the ex-

tent that the complainant be permitted to amend his complaint. Justice demands that complainant be given the right to amend if his Bill of Complaint be deemed insufficient.

Conclusion.

It is respectfully urged that for the reasons set forth in the main brief, as well as those herein presented, the order of the Chancellor, dismissing the Bill of Complaint insofar as it refers to the defendant, Kraus, should be reversed to the end that complainant may have the opportunity to present his proofs and that this case may be determined upon its equitable merits.

Respectfully submitted,

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