

## New Jersey Court of Errors and Appeals

FRANK R. SMITH,  
*Complainant-Respondent,*

*and*

COLONIAL WOODWORKING Co.  
INC., a corporation of New  
Jersey,  
*Defendant-Appellant.*

*On Bill, &c.*

### BRIEF OF DEFENDANT-APPELLANT.

#### Statement of Facts.

This appeal is the result of a foreclosure suit in which Colonial Woodworking Co. Inc., hereinafter called "Colonial" filed a counterclaim claiming a set-off. Complainant-respondent is the assignee of the mortgage in question made by Colonial to Julius Joachimsthal, hereinafter called "Joachimsthal."

In March, 1927, Joachimsthal agreed, in writing, to purchase from Colonial certain premises in the City of Newark, for \$30,000, which Colonial agreed to sell to him for that price. In the same contract, Colonial agreed to purchase from Joachimsthal property in the Town of Irvington, for the sum of \$20,000, which Joachimsthal agreed to sell for that price.

It was agreed that Colonial should convey subject to mortgages on its properties, execute the bond and mortgage under foreclosure, and to pay the balance, less adjustments, by note. Titles to be conveyed by warranty deeds so as to "assure to the grantees, an absolute fee of said premises." Joachimsthal took a credit for the mort-

gages on Colonial properties, was given the mortgage under foreclosure, plus a note, which was paid, and is therefore cash, and Joachimsthal accepted the Warranty Deed, containing the following provision as to encumbrances:

“The first tract above described is subject to a mortgage for \$12,000.00 held by Manhattan B. & L. Association recorded in M-56-326, and to a mortgage for \$2,307.14 held by Angelo Ruggiero recorded in Book C-59 of Mortgages, on page 184. The Second Tract above described is subject to a mortgage for \$10,000.00 held by the West End B. & L. Association recorded in Book V-56 of Mortgages, on page 552 and a mortgage for \$2,400.00 held by Harry Kaplan, recorded in Book I-58, on page 595.”

Colonial was the maker of the bonds and second mortgages, subject to which Joachimsthal took the Warranty Deed, and for which he took a credit. The mortgages, by their terms, came due September 24, 1928, and September 1, 1928, respectively. Demand for their payment was made on their respective due dates. Joachimsthal's possession was peaceable and undisturbed, and he collected the rents and profits, and subsequently conveyed the premises in question to some corporation which is alleged to be his.

On October 1st, 1928, subsequent to the due dates of the second mortgages aforesaid, subject to which he took his deed, Joachimsthal assigned to Federal Trust Company, the mortgage under foreclosure, as collateral security for a loan given him by the bank.

The two first building and loan mortgages, subject to which Joachimsthal also took the premises, were foreclosed and nothing was realized on the second mortgages.

On April 29th, 1930, the bank assigned the mortgage to complainant, who in the instant case is a "straw man" for it, the assignment being unrecorded.

Colonial was compelled to pay the two second mortgages, with interest and costs, in the sum of \$5,069.00.

Upon the filing by complainant of his bill to foreclose, Colonial tendered itself ready, willing and able to pay the difference between the amount claimed by the complainant and the amount which Colonial was compelled to pay to protect its bonds. It therefore prays that it should be reimbursed with interest and costs by proper credits on account of the mortgage under foreclosure and to be relieved from the payment of interest on the amount to be found due complainant by reason of its tender, setting out among others, the following reasons:

1. Complainant-respondent is in the same position as Joachimsthal, insofar as Colonial claim is concerned, and its claim should be allowed against the mortgage under foreclosure.

2. Complainant-respondent's claim is subject to Colonial's claim, and Colonial should receive a credit on the mortgage under foreclosure or it can never collect the debts paid for Joachimsthal, which he was legally and equitably bound to pay.

3. Joachimsthal agreed to pay \$30,000 for the Colonial properties, but is now attempting to pay less. Inferentially therefore, his aim is to make Colonial pay more than \$20,000 for his property, contrary to the terms of the contract.

4. He agreed to pay the mortgage debts, by retaining so much of the purchase price, but

failed to pay them, so that Colonial paid in order to protect its bonds.

5. It is inequitable to have it pay Joachimsthal's debts, where he deducted from the purchase price, the money with which to pay them, because Colonial would be paying them twice, which is contrary to justice and not within the spirit and terms of the contract.

6. The transaction was a sale and purchase, and not a common law exchange, and the rights of the parties are to be determined accordingly.

### POINT I.

#### *Proposition of Law.*

The assignee of a bond and mortgage can acquire, by virtue of the assignment, no greater interest than that which was held by his assignor, and all the equities affecting the assignor pass with the assignment to and with the assignee.

#### *Argument.*

From time immemorial, it has been held, and such is the undisputed law today, that the assignee of a bond and mortgage can acquire, by virtue of the assignment, no greater interest than was held by the assignor, and all the equities affecting the assignor pass with the assignment, to and with the assignee. *Shannon v. Marselis*, 1 N. J. Equity, page 413; *Bolles v. Wade*, 4 N. J. Equity, page 458; and even though the complainant is a bona fide holder, he takes such mortgage subject to all the equities subsisting against it in the hands of his assignor. *Andrew v. Torre*, 14 N. J. Equity, page 355; *Black v. Thurston*, 71 N. J. Equity, page 643.

The assignment from Joachimsthal to the Federal Trust Company (Springfield Avenue Branch) was made on October 1st, 1928 (State of Case, page 11, lines 30 to 34), and was recorded in the Register's Office of Essex County on October 2nd, 1928 (State of Case, page 12, lines 28-34). The assignment from the bank to the complainant-respondent was made on April 29th, 1930 (State of Case, pages 14, lines 15-20, inclusive), and was not recorded.

The law is definite that it is the duty of the assignee to inquire of the mortgagor as to its liability thereon. *Gierth v. Fidelity, etc.*, 115 Atl., page 397; *Walz v. Oser*, 116 Atl., page 16.

It is well here to note that the assignment from Joachimsthal to the bank was not an outright assignment, but "as collateral security for any and all notes given or to be given by the said Julius Joachimsthal to the said party of the second part, etc.," in realty for a past due debt. (State of Case, page 10, lines 33-40, inclusive.)

Joachimsthal assigned the mortgage under foreclosure, to the Federal Trust Company on October 1st, 1928 (State of Case, page 11, lines 30-34, inclusive), and the Federal Trust Company assigned to the complainant on April 29th, 1930 (State of Case, page 14, lines 15-20, inclusive). The two bonds and mortgages, made by Colonial, and which are at issue in this cause were due on September 24th, 1928, and September 1st, 1928, respectively (State of Case, page 71, lines 36-40, inclusive; page 84, lines 20-28, inclusive; page 125, lines 20-24, inclusive). Demand for the payment of both second mortgages was made on the due dates of the mortgages (State of Case, page 126, lines, 20-23, inclusive), so that not only the collateral assignment from Joachimsthal to the

bank, but the assignment to the complainant, who is a straw man for the bank, were made and delivered subsequent to the maturity of the aforesaid two bonds and mortgages. It stands admitted that Colonial paid \$2,525.00 on account of the second mortgage held by Angelo Ruggiero and \$2,544 on account of the mortgage held by Southern Lumber Company. The first amount was paid on October 6th, 1930, after litigation and appeal (State of Case, page 106, lines 5 to 15, inclusive), (State of Case, page 125, lines 32-36, inclusive), and the second amount was paid on September 15th, 1928 (State of Case, page 125, lines 36-39, inclusive).

## POINT II.

### *Proposition of Law.*

Complainant-Respondent's mortgage, which he is seeking to foreclose, is subject to the same equities and defenses that existed against it in the hands of Joachimsthal.

### *Argument.*

Chancellor Zabriskie in *Conover v. Van Mater*, 18 N. J. Equity, page 481, at bottom of page 484, states the law to be thus:

"It is the established rule, that the assignee of a bond or mortgage takes them subject to all equities between the assignor and other parties, whether these equities be latent or not. Bonds and mortgages have never been placed upon the footing of commercial paper, and purchasers deal in them at their own risk."

Where a bond and mortgage are given as security, the bond is the primary obligation. The mortgage is a mere incident of the debt which

it is intended to secure, and a defense to the debt is a defense to the mortgage. Thus the assignee of a mortgage securing a bond continues subject to all defenses to the bond, whether with or without notice. *Magie v. Reynolds*, 51 N. J. Equity, page 113; *Voorhees v. Nixon*, 72 N. J. Equity, page 791; *State Mutual Building and Loan Association v. Millville Improvement Co.*, 74 N. J. Equity, page 721, affirmed in 76 N. J. Equity, page 336.

It therefore follows, that complainant-respondent holds the bond and mortgage which he is seeking to foreclose, subject to the same equities and defenses that existed against it in the hands of the original mortgagee, Julius Joachimsthal. This defendant-appellant can assert its rights and defenses irrespective of the assignment thereof. *Atwater v. Underhill*, 22 N. J. Equity, page 599; *De Witt v. Van Sickle*, 29 N. J. Equity, page 209; *Reddvide v. Laskowitz*, 99 N. J. E. 614, 133 Atl., page 719, affirmed by our Court of Errors and Appeals, 100 N. J. E. 588; 135 Atl., page 920.

**POINT III.***Proposition of Law.*

In a transactions of this kind, it is not necessary for an express covenant on the part of the vendee or grantee to pay the encumbrance. The law will render a grantee liable even though there was no express assumption of the encumbrance, but where the amount was allowed in the purchase price and proper credits given at the closing of title and delivery of deeds, the law will imply a promise.

*Argument.*

A brief examination of the original contract of sale and purchase entered into, will make evident the intention of the parties. It is also well here to refer to the affidavits filed in this cause, the closing statement and agreed state of facts.

The agreement of sale (State of Case, pages 27-32, inclusive), recites that Joachimsthal's parcel goes in at a valuation of \$20,000, and the defendant-appellant's parcels go in at a valuation of \$30,000.00. The stipulation as to facts (State of Case, page 126, lines 18-20, inclusive) expressly states that the prices so stated (in the contract) represent the true valuations at the date of the said contract. The closing statement, which is appended to the State of Facts and therein referred to, verifies the intent of the parties, that the purchase price mentioned and agreed upon by each, was the true purchase price the respective parties agreed to pay. Thus the statement in reference to the defendant-appellant's property, recites, "purchase price \$30,000." Then proper credits were given, such as are usual in the closing of a title, and the same procedure is followed with the Joachimsthal parcel, but the purchase

price is \$20,000. In the Joachimsthal statement, the purchase money mortgage under foreclosure is set out, still leaving a credit in favor of Joachimsthal of \$1,558.32, which the defendant-appellant paid.

The intention of the parties becomes even more evident when we find them in complete accord as to what they intended when we read the affidavit made by Joachimsthal and the four affidavits made on behalf of the defendant-appellant. In his affidavit, Carl Goldberg, president of the Colonial Woodworking Co. Inc. (State of Case, page 44, lines 36-40, and page 45, lines 1-2), says that the parties entered into an agreement wherein the defendant, Julius Joachimsthal purchased the premises from Colonial Woodworking Co. Inc., and Colonial Woodworking Co. Inc. in turn purchased the premises from Julius Joachimsthal, and at page 45, State of Case, lines 4 to 15, inclusive, paragraph four, to be exact, of the same affidavit, by agreement, in writing, Colonial Woodworking Co. Inc. agreed to pay \$20,000 for said premises, and Julius Joachimsthal, in turn, agreed to pay \$30,000 for the Colonial premises. Said agreements were signed by the parties, a true copy being attached by the complainant in his notice of motion.

The same affidavit further states in essence, that Joachimsthal agreed to pay the \$30,000 as and for the purchase price, by having applied against it in the mortgages on the Colonial premises, and at the closing, Colonial allowed Joachimsthal the mortgage encumbrances affecting these premises on account of the purchase price, and Joachimsthal accepted the conveyance of the same with the allowance.

The affidavit of Samuel D. Goldberg (State of Case, pages 51-53, inclusive) reiterates the intent of the parties as to it being a purchase and sale, the arrangements calling for the assumption of the mortgages on the part of Joachimsthal.

The affidavit of Jack Goldman, the Vice President of the Colonial Woodworking Co. Inc. (State of Case, pages 54-56, inclusive) recites that the actual specific purchase price at which the houses were to go was the sum of \$30,000. That the agreement was consummated on the basis that Joachimsthal was to pay the mortgage encumbrances, including interest thereon, which were deducted at the time of closing and credit therefor given to Joachimsthal on account of his purchase price of \$30,000.00.

The affidavit of the bookkeeper, Grace Kirk (State of Case, pages 57 to 58) verifies the purchase and sale and reiterates that the assumption on the part of Joachimsthal was a point insisted upon by the officers of the Colonial in making the deal.

The only affidavit made in this cause on the part of complainant-respondent, was made by Julius Joachimsthal, one of the original parties to the transaction (State of Case, page 42, lines 33-40, inclusive, and page 43, lines 1-25, inclusive). In his affidavit he says, "that attached hereto is a true copy of the agreement and contract for sale entered into between deponent and Colonial Woodworking Co. Inc., a corporation" (State of Case, page 43, lines 5-9, inclusive), and further on, that "deponent did not agree to undertake to pay, excepting in the manner as stated in said contract of sale and deed."

Joachimshal agreed to pay \$30,000 for the Colonial houses. Instead of paying that amount

in cash, he accepted the deed of conveyance subject to mortgage encumbrances and retained from the purchase price, a sufficient amount in cash to meet them. He not only impliedly assumed their payment, and is liable therefor, but he actually withheld the cash money with which to meet those obligations as they matured. He, therefore, becomes principally liable for their payment, and Colonial is placed in a position of a surety. *Jones on Mortgages*, Book 2, 7th Edition, page 166, says:

“In case the terms of the deed leave it doubtful whether the grantee is personally bound to pay the existing encumbrance, evidence of the value of the premises or of the agreed consideration for them, as also evidence as to whether the grantee retained any of the consideration to pay the debt and is admissible to aid in construing the deed.”

In the instant case, it is admitted the prices stated in the contract represented the true valuations (of the premises) at the date of the said contract (State of Case, page 126, lines 18 to 20, inclusive).

Lord Eldon, in *Waring v. Ward*, 7 Ves. 332, states the law to be thus:

“If he entered into no obligation with the party from whom he purchases, neither by bond nor covenant of indemnity, to save him harmless from the mortgage, yet this Court, if he receives possession and has the profits, would, independent of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor’s transaction of mortgage; for, being become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage. \* \* \* But the purchaser in such case, does not assume any liability beyond the value of the land conveyed to him. *If*

*the mortgage debt be afterwards paid by the mortgagor, equity will compel the purchaser by way of subrogation to refund the money so paid or to give up the property.*" (Italics are ours.)

Neither Joachimsthal, nor complainant-respondent, can at this time give up the property, because neither of them now own it. Nevertheless Colonial has paid the debts. The purchase price was agreed upon. Joachimsthal withheld the encumbrance moneys. It is only equitable that a proper allowance be made to this defendant-appellant on its counterclaim for the moneys paid by it, the same to be deducted from the mortgage under foreclosure.

The law in this case is neither novel nor extraordinary, but is well established that it will render the grantee liable, either where there was an express assumption of the indebtedness or the amount was allowed in the purchase price, so that the law will imply a promise. Such is the law in the various English-speaking jurisdictions. *Stephens v. Hall*, 39 Barb. (N. Y.), 254; *Seigel v. Borland*, 60 N. E. (Ill.), 863; *Richardson v. Venn*, 84 Ill. App. 601; *Cooper v. Foss*, 19 N. W. (Neb.), 506.

A case in Illinois, wherein the facts are practically identical, is that of *Metzger v. Emmel*, 124 N. E. 360, affirmed 212 Ill. App. 163, wherein the Court held:

"Where in purchasing incumbered premises, the amount of the incumbrance is considered in fixing the consideration, and becomes part thereof, the purchaser becomes liable for the amount of the incumbrance."

Such is also the law in this state. The earliest case in this jurisdiction, wherein the law is applied, is the case of *Stevenson v. Black*, 1 N. J.

Equity, page 338, wherein, upon a similar state of facts, Chancellor Vroom held:

*“As between the mortgagor and the purchaser of a simple equity of redemption, where the mortgage money constitutes, in fact, a part of the actual consideration of the purchase, the mortgagor has a just right to be indemnified by the purchaser against all personal liability on the bond.”* (Italics are ours.) “The uniform language of a court of equity is, that where the purchaser is in possession, and receives the rents and profits, that there is raised upon his conscience, independently of any contract, an obligation to indemnify the vendor against the personal obligation to pay the mortgage money; for having become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage.”

It is well here to refer to the Warranty Deed of conveyance from Colonial Woodworking Co. Inc. to Joachimsthal, and to note particularly the mortgage clause or covenant as the encumbrance, which is as follows:

“The first tract above described is subject to a mortgage for \$12,000.00 held by the Manhattan Building and Loan Association, recorded in Book M-56, page 326, and to mortgage for \$2,307.14 held by Angelo Ruggiero, recorded in Book C-59 of Mortgages on page 184.

The second tract above described is subject to a mortgage of \$10,000 held by the West End Building and Loan Association, recorded in Book V-56 of Mortgages on page 552, and a mortgage for \$2,400 held by Harry Kaplan, recorded in Book I-58, page 595.”

What other purpose can be ascribed to that paragraph in the deed of conveyance, except to show what obligations were assumed by the vendee to whom allowances therefor were made,

and who, by his acceptance of the deed and retention of the moneys on account of the encumbrances, agreed to liquidate those obligations as they matured? That clause lends itself to only that construction, particularly in the light of the statement of closing of title, and the affidavits referred to, which must be at all times considered together with this paragraph, and wherein it appears that proper credits and allowances were made on account of the encumbrances, and Joachimsthal withheld a sufficient amount in cash with which to pay the mortgage obligations when they become due.

The next decision in New Jersey, wherein the same question of law is involved, and which follows *Stevenson v. Black*, is that of *Tichenor v. Dodd*, 4 N. J. Equity, page 454. There the complainant conveyed to defendant certain land, and the deed of conveyance recited that it was made subject to certain mortgage encumbrance on the premises. The defendant paid complainant the amount of purchase money over and above the amount of the mortgage, and held out the amount of the mortgage moneys. The mortgage was subsequently foreclosed and a deficiency resulted. The Chancellor in deciding the case, reviewed the various reported decisions and definitely decided that, where by the terms of a transaction, the mortgage money was to be taken as part of the consideration, that is to say, where the purchaser agrees to pay a certain definite purchase price, but instead takes a credit for the amount of existing mortgages, and a conveyance is made to him, subject to encumbrances, that under such circumstances, equity raised upon the conscience of the purchaser, an obligation to indemnify the mortgagor, and it is in accordance with sound justice to compel the purchaser

to make good his obligation. The reasoning being that the purchaser agrees to pay a definite sum of money for the premises; a part of that sum is applied to the discharge of the mortgage. Had he paid the whole sum to the mortgagee, he would have had the means with which to pay the mortgage. If he withheld the money until the premises are sold away from him, he has no ground of complaint if the mortgagor asks him to pay the amount remaining due and which he withheld.

The complainant-respondent and the defendants, Julius Joachimsthal and Federal Trust Company (Springfield Avenue Branch), in their respective replication and answers to defendant-appellant's counter-claim, do not dispute the purchase price, nor do they deny the same, nor do they deny that the mortgage moneys were deducted from the purchase price as is evidenced by the statement of closing. Furthermore, in the stipulation as to facts, the contract between Joachimsthal and Colonial Woodworking Co. Inc. and the deeds between the parties are referred to as being annexed to the papers and the closing statements are incorporated therein. There, a detailed statement of the transaction appears. There exists therefore no disagreement that the \$30,000 purchase price for the Colonial houses was the true value of the houses at the time of the sale.

Another case in this state which is exactly in point, is *Heid v. Vreeland*, 30 N. J. Equity, page 591. There, in the deed of conveyance, under covenants against encumbrances, mention is made of a Two Thousand Dollar mortgage. Vice-Chancellor Van Fleet, who decided the case, said:

“There can be no doubt at this day that where the purchaser of land encumbered by

a mortgage, agrees to pay a particular sum as purchase-money, and, on the execution of the contract of purchase, the amount of the mortgage is deducted from the consideration, and the land conveyed subject to the mortgage, that the purchaser is bound to pay the mortgage debt, whether he agreed to do so by express words or not. This obligation results necessarily from the very nature of the transaction. Having accepted the land subject to the mortgage, and kept back enough of the vendor's money to pay it, it is only common honesty that he should be required either to pay the mortgage or stand primarily liable for it. His retention of the vendor's money for the payment of the mortgage, imposes upon him the duty of protecting the vendor against the mortgage debt. This must be so even according to the lowest notions of justice, for it would seem to be almost intolerably unjust to permit him to keep back the vendor's money with the understanding that he would pay the vendor's debt, and still be free from all liability for a failure to apply the money according to his promise."

And the Vice-Chancellor cited *Stevenson v. Black*; *Tichenor v. Dodd*, *supra*, both cases decided in this State, as well as cases from other jurisdictions.

The purchaser is really a trustee who holds the mortgage money allowed him to pay it to the mortgagee. *Clark v. Davis*, 32 N. J. Equity, page 530; *Mount v. Van Ness*, 33 N. J. Equity, page 262.

Mr. Justice Scudder, in delivering the opinion of the Supreme Court in *Thayer ads Torrey*, 37 N. J. Law, page 339, where similar facts were involved, went so far as to say:

"Where the amount of the mortgage is by contract, to be paid as part of the purchase

money, it is an assumption of payment between the grantor and the grantee, and not merely a taking subject to the mortgage."

This Honorable Court long ago held, that express words of assumption are not necessary in order to hold a purchaser of land on his undertaking, when he withheld part of the consideration money. *Woodbury Heights Land Co. v. Loudenslager*, 60 N. J. Equity, page 403, wherein Mr. Justice Garrison, speaking for the Court, reaffirms the soundness of Mr. Justice Depue's summary of the authorities in *Crowell v. St. Barnabas, etc.*, 27 N. J. E., 650, and his maxim, that "in equity a stipulation of this kind is regarded as a contract to indemnify the grantor against the mortgage debt."

In the instant case, Joachimsthal held out the mortgage money which was allowed him on account of the purchase price to pay Colonial's obligations. Equity therefore raises upon his conscience an obligation to indemnify Colonial against the mortgage debt.

In *Loudenslager v. Woodbury Heights Land Co.*, 64 N. J. Law, page 405, the Supreme Court raises the question, whether or not, upon such a state of facts, an action at law can be maintained in the law courts.

It would seem from the cases, that the only Court in which Colonial could seek relief in the instant case, is the Court of Chancery.

In *Friedman v. Zuckerman*, 145 Atl. page 541, certain of the mortgage moneys were retained from the purchase price, and conveyance made subject to the mortgages. Vice-Chancellor Ingersoll carefully reviews the authorities, and while on motion, an order was made to strike out the bill, nevertheless the prior decisions herein cited

were re-affirmed and the law involved was held to be sound, so that from all those opinions it seems beyond a doubt that Colonial, as the original mortgagor, should be indemnified by an allowance on account of the mortgage under foreclosure, and a deduction from the debt owed to Julius Joachimsthal, or his assignees, and it should be so ordered, because this defense followed the mortgage no matter in whose hands it may be.

Vice-Chancellor Lewis in the recent case of *Reeves v. Cordes*, 155 Atl., page 547, while he denies the relief sought by the complainant in that case by reason of faulty pleadings, reiterates the law as settled in *Tichenor v. Dodd*, *Heid v. Vreeland*, *Freedman v. Zuckerman* and *Thayer* vs *Torry*, *supra*.

#### POINT IV.

##### *Proposition of Law.*

Where property is transferred for a valuable consideration and the bargain is made, and the value measured in money terms, and paid or agreed to be paid in something which the parties agree to treat as a specified amount of money, such a transaction is a sale and not an exchange.

##### *Argument.*

Before proceeding with the examination of the authorities, it may be in place to define the terms "sale," "convey," "grant" and "exchange."

"It has been generally held, where the question has arisen, that any transaction whereby property is parted with for a valuable consideration, whether there be a money payment or not, provided the bargain is made and the value measured in money

terms, and paid or agreed to be paid in something which the parties agree to treat as a specified amount of money, is a sale, but that where property is transferred for property, **NO PRICE BEING SET UPON EITHER PIECE**, the transaction is an exchange." 23 Corpus Juris, page 185.

"To 'sell' a thing, is to part with the ownership thereof to the buyer for a compensation" (Words & Phrases, First Series VII, page 6406, paragraph 3).

"To constitute a sale there must be a price agreed upon. (Bouvier's Law Dictionary, page 493, heading 'Price'.)"

Corpus Juris, Volume 13, page 899, Reference 88 a, heading "sale compared," has this to say:

"The words 'sale' and 'conveyance' when applied to real estate, are in common parlance in judicial decisions, and by the law writers often used interchangeably. It seems, therefore, that a deed of conveyance of real estate, answers to a sale of real estate."

The word "sell" is correlative to the word "buy" the same as "seller" is correlative to "purchaser."

To purchase means to buy. *Griffith v. Trenton*, etc., 76 N. J. Law, page 23.

It is self evident that there cannot be a purchaser or a buyer unless there is a seller.

Paragraph 108, Section 10 of "An Act respecting conveyances," Revision of 1898, Compiled Statutes of New Jersey, Vol. 2, page 1571, paragraph 108, certainly settles the meaning of the term "convey." The Act referred to says:

"A covenant by the grantor in a deed for land 'that he has the right to convey the said land to the grantee' shall have the same affect as if the grantor had covenanted that he has good right, full power and absolute

authority to grant, bargain, sell and convey the said land, with all the buildings thereon, etc." Ph. Laws, 1899, page 533.

Convey is therefore a generic term, which may be used interchangeably with "grant," "bargain" and "sell."

We note as a matter of law, and the authorities are in harmony, that in equity, the equitable title vests in the purchaser or vendee immediately upon the execution of the contract to convey, and the seller or vendor, thenceforth, and until the delivery and acceptance of the deed of conveyance, becomes the trustee for the vendee. *Saldutti v. Flynn*, 65 Atl. 246.

In *Berger v. United States Steel Corporation*, 63 New Jersey Equity, page 809-53, Atl. Rep., page 68, this Court has said in essence, that there exists no substantial difference between a sale and an exchange, and at page 817 of the Equity Rep. and page 71 of the Atl. Rep. the Court continued:

"There is a technical meaning given in the law to the word 'purchase' as applied to real estate, wider than its general signification; it is the acquisition of lands by other means than descent or inheritance.

As applied to personalty, it is the acquisition of anything for a price, by the payment of money or its equivalent.

Sale and exchange are used interchangeably in the law, and is a transmutation of property from one party to another in consideration of some price or recompense in value.

By the settled rule of interpretation, in the absence of any expression to narrow its significance, the word 'purchase' must be given its ordinary well-understood meaning as accepted in the daily transactions of the business world, and that carries the right to

buy for cash, for any equivalent agreed upon, or on the credit of the buyer. The right to buy on credit must necessarily include the right of the purchaser to give the vendor evidence of the credit, by note, or bond, or other way agreed upon, as well as the right of the purchaser to pledge his credit, by note or bond, to a third person, and thereby secure the cash to pay the vendor."

It seems quite apparent that the above decision expresses really what happened in our case.

Colonial executed its bond and mortgage as well as a promissory note, which it subsequently paid, so that it becomes an undisputed fact that Joachimsthal and Colonial did not exchange one thing for another, but Colonial paid money and gave its bond in order to make up the agreed upon purchase price.

"Grant" has been defined to give over, to make conveyance of, to give the possession or title to (Words and Phrases, First Series, Volume 4, page 3151, paragraph 1).

The term "convey," which is in signification and effect sufficient to answer the requisites of a grant at common law, is used as synonymous with "to sell." Corpus Juris, Volume 13, page 894, Note 51-A.

The authorities are in accord, that common law exchanges are practically unknown presently, and instead we have what are known as "cross sales." *Silidiker v. Mechanick*, 145 Atl. 629.

Authorities are agreed that the payment of money in addition to the exchanges, or the giving of something else besides, or in addition to property, renders the transaction as a sale and not as an exchange. *Lingerman v. Shick*, 15 Indiana A. 432-43 N. E. 33. *Sternberger v. McGovern*, 56 N. Y. 12.

The learned Vice-Chancellor based his entire opinion on the ground that this was an exchange of properties, and his Honor refers to the printed form of the contract, which is entitled "contract of exchange" as well as the agreed state of facts, which characterizes the deed as an exchange, whereas in law and in fact it was an actual outright sale of real estate by one party to the other, both transactions having been consummated simultaneously. It is immaterial what the printer of the form of contract saw fit to label it, nor is it material what counsel for the litigants saw fit to call such a transaction. It is only material what the law terms such a contract to be, what your Honors have decided such a contract to be, and what the parties to the contract intended it to be.

Notice should here be taken of the fact that in different parts of the original contract itself the verb "sold" and the noun "sellers" appear, and it is only from an examination of the written acts of the parties, that their true intent regarding this transaction may be determined. Thus, on page 30 of the State of Case, beginning with line 31, the contract provides:

"each of the parties to these presents hereby agrees to convey the property above-described, as SOLD by that party, etc."

Again on page 31, beginning with line 19,

"If there be water meters on the premises, **THE RESPECTIVE SELLERS** shall furnish, etc."

on line 28, there again appears,

"**RESPECTIVE SELLERS.**"

beginning with line 30,

"this contract covers all rights, title and interest of the **RESPECTIVE SELLERS.**"

again on line 35, same page,

“all right, title and interest of the RESPECTIVE SELLERS, etc.”

line 37,

“AND THE SELLERS WILL EXECUTE AND DELIVER TO THE PURCHASERS.”

We have also paragraphs two and three of the Notice of Motion to Strike Out Amended Answer and Counter-claim, page 42, State of Case, lines 1 to 17,

“that the agreement between the parties RELATING TO THE PURCHASE and exchange of properties was CONTAINED IN THE CONTRACT OF SALE AND IN A DEED, etc.”

“that the agreement attempted to be set up is in direct contradiction of the terms of THE AGREEMENT OF SALE AND TO THE TERMS IN THE DEED, etc.”

In the affidavit made by Julius Joachimsthal, who was one of the original parties to the transaction, he states under oath,

“THAT ATTACHED HERETO IS A TRUE COPY OF THE AGREEMENT AND CONTRACT FOR SALE ENTERED INTO BETWEEN DEPONENT AND COLONIAL WOODWORKING CO. INC. (State of Case, page 43, lines 2-6, inclusive).

Again in the same affidavit, lines 17 to 19,

“EXCEPTING IN THE MANNER AS STATED IN SAID CONTRACT OF SALE AND DEED.”

All of the parties to the original contract are in harmony that it was a sale, and not an exchange. The affidavits of the defendant-appellant substantiate the statement of Joachimsthal in his admission under oath, that this transaction was not an exchange, but an outright sale made

by each of the parties to the other, both transactions being incorporated in one contract, and consummated at the same time. Thus the president of the defendant-appellant, in his affidavit, says:

“the parties entered into an agreement, wherein the defendant, Julius Joachimsthal purchased the premises from Colonial, and Colonial in turn purchased the premises from Julius Joachimsthal. By agreement in writing, Colonial agreed to pay \$20,000 for said premises, and Julius Joachimsthal in turn agreed to pay \$30,000 for the Colonial premises, etc.” Pages 44 and 45, State of Case, lines 36-40 and 1 to 15, both inclusive, and the same deponent continues:

“The said sum of \$30,000, Julius Joachimsthal agreed to pay as follows: By having applied against the purchase price for the said premises, a first mortgage of \$10,000 and a second mortgage of \$2,500, on one of the tracts, and a first mortgage of \$12,000 and a second mortgage of \$2,500 on the other tract” (State of Case, lines 15 to 27, inclusive).

Samuel D. Goldberg, in his affidavit, states that he is well-acquainted with the matter because he was one of the parties who helped make the deal, and then he says:

“I know of my own knowledge of all of the facts leading up to the purchase and sale of premises between Colonial Woodworking Co. Inc. and Julius Joachimsthal” (State of Case, page 51, lines 9-14, inclusive).

The affidavit of Jack Goldman, the Vice-President Colonial Woodworking Co. Inc. (State of Case, page 54, lines 14-20), recites under oath:

“I know of my own knowledge that the defendant, Julius Joachimsthal, agreed to pay for the two houses conveyed to him by the Colonial Woodworking Co. Inc., the sum of \$30,000, that having ultimately been agreed

upon as the actual specific purchase price at which the houses were to go.”

and at page 55, lines 1-12,

“It was a part of the agreement and the contract was consummated on that basis that Julius Joachimsthal was to pay the mortgage incumbrances affecting the said premises, which were conveyed to him by Colonial Woodworking Co. Inc., and the mortgage incumbrances including interest thereon were deducted at the time of closing, and a proper credit given Julius Joachimsthal on account thereof.”

Also Grace Kirk, the bookkeeper of Colonial Woodworking Co. Inc., in her affidavit (State of Case, page 57, lines 12-20), says:

“I remember distinctly the negotiations leading up to the purchase from Julius Joachimsthal of his premises and the sale to him by Colonial Woodworking Co. of its two houses, because the negotiations were carried on in the office of the Colonial Woodworking Co. Inc. within my hearing.”

From the above it seems beyond a doubt that the parties meant a contract for the sale and purchase of lands and not a common law exchange. Neither of them had any thought or intention of an exchange until the learned Vice-Chancellor brought forth that point. It seemed obvious that neither counsel for the litigants nor the printer of the form can substitute their meaning and intent for the meaning and intent of the original parties to the contract.

The word “exchange” is a technical term used to denote a particular method of transferring property, with certain conditions and warranties in law incident and annexed to it. It is absolutely essential to this mode of conveyance that the estates exchanged be equal in interest, and

be given one for the other, and that the transfer, that is to say, the instrument by each of the parties transferring the title to the other, be made by the use of the word "exchange." No other word is regarded as equivalent thereto, nor does an averment that it was an exchange avail. In other words, if in the instant case, the parties to the transaction had actually intended for it to be a common law exchange, the only way that they could have transferred the title, each to the other as a common law exchange, would have been by a single deed of exchange instead of by deeds of warranty executed each to the other for a money consideration. However, when parties to a transaction of this kind transfer the titles by separate and distinct deeds, whether Bargain and Sale or General Warranty, the transaction is not an exchange, but a sale. Particularly is it true in the instant case, where, in addition to the property conveyed by each party to the other, the defendant-appellant gave back the purchase money mortgage, under foreclosure, and paid as the balance due Joachimsthal, in cash. Thus, there was no technical exchange where a parole agreement was entered into to make an equal exchange of parcels of land, but that agreement was consummated, not by a deed of exchange, but by mutual deeds of Bargain and Sale, each expressed to be for pecuniary consideration. (Words and Phrases, First Series, Volume 3, page 2547, paragraph 3, citing *Gamble v. McClure*, 69 Penn. 282.)

This Honorable Court, in the case of *Haber v. Goldberg*, 92 N. J. Law, page 367, construed the exact form of the contract involved in this transaction, Court of Errors and Appeals, 1919, Volume 748, to be found in State Library. That was a suit by a broker for commissions in a real es-

tate transaction, and the plaintiff's right to recover depended upon whether it was a sale or an exchange. The plaintiff recovered judgment in the lower courts and an appeal was taken to your Honors. The defendant-appellant contended that, what the parties agreed to do was to exchange and not to sell their respective properties, and that as plaintiff had no agreement for commissions, on an exchange, he could not recover.

Chancellor Walker, in delivering the unanimous opinion of the Court, adopts Blackstone's definition of a common law exchange, that

“An exchange is a mutual grant of equal interests, the one in consideration of the other. The word ‘exchange’ is so individually requisite and appropriated by law to this case that it cannot be supplied by any other word or expressed by any circumlocution. The estates exchanged must be equal in quantity; not of value, for that is immaterial, but of interest; as fee simple for fee simple, a lease of twenty years for a lease of twenty years, and the like.”

At page 370, the Chancellor in his usual thorough way, outlines the form of a common law conveyance, and says:

“Only one conveyance is required,”

and he proceeds with an explanation, citing the authorities, why common law exchanges are practically unknown today, and why mutual deeds are preferred and adopted, and he comes to the inevitable conclusion that the transaction was not an exchange of land, but a sale and at page 371, he proceeds:

“Now, if the transaction involved in this case was not that of an exchange of land, it must be apparent that it was a sale. Because part of the consideration of a sale of

land is the conveyance to the grantor of certain other land, the transaction does not thereby become one of exchange of estates at common law. The fact that part of the consideration, or all of it, is land, does not in and of itself amount to a technical exchange. That occurs only, as we have seen by the authorities above quoted, when the exchange is of equal interests (not of value, but estates), and when the conveyance, whether by a single deed or by deeds exchanged between the parties—if that be allowable, and doubtless it is, although only one deed is required—and the conveyance, or conveyances, provide for re-entry upon ouster or eviction. A glance at the articles of agreement signed by the defendant and his wife and the third party and his wife, clearly shows that the transaction in question was a sale and not an exchange of lands. The party of the first part agrees to convey certain lands and premises to the party of the second part, at a certain valuation; and the party of the second part agrees to convey to the party of the first part certain land and premises at a certain valuation. The premises to be conveyed by the defendant are to be subject to certain mortgages, and the difference in value of the respective premises, over and above encumbrances, the party of the second part agrees to pay by giving the defendant a bond and mortgage on the premises to be conveyed by him, in a sum the exact amount of which is to be ascertained. Each of the parties to convey the property described "as sold by that party" free from all encumbrances, except as specified, and to deliver a proper warranty deed containing full covenants to convey and assure to the grantees and absolute fee.

It will be observed that there is here no agreement for an exchange of lands, but one for a sale in fee-simple, subject to certain encumbrances. And it is significant, too, that the word "sold" is used in the agreement,

which indicates that the parties meant a sale and not an exchange.

This disposes of the contention that the agreement was for an exchange. It was not; it was for a sale. The deeds agreed to be executed and delivered by and between the parties were not those of an exchange, but of bargain and sale, which is a contract or bargain by the owner of lands, in consideration of money or its equivalent, to sell land to another person, whereupon a use arises in favor of the latter, to whom the seisin is transferred by force of the statute of uses; and by such a deed an estate may be granted in fee. See Bouv. Dict. (Rawle's rev.) 1198, and authorities cited.

When in modern practice mutual conveyances are used, the one in consideration of the other, the incidents of a common law exchange do not apply, and there is no need of using the word 'exchange.' Technical exchanges of land are practically obsolete in modern conveyancing, mutual deeds of bargain and sale being substituted therefor. Burd. Real Prop. (1914) 607."

That is exactly our case. The form of the contract is identical, and this disposes of the learned Vice-Chancellor's contention, that the transaction was an exchange and becomes authority for the proposition that the transaction before this Court was a sale of real estate, pure and simple, and lends itself to no other construction, but that it was an outright sale, since as the learned Chancellor, in the *Haber v. Goldberg* opinion states at page 372,

"It will be observed that there is here no agreement for an exchange of lands, but one for a sale in fee-simple, subject to certain encumbrances. And it is significant, too, that the word 'sold' is used in the agreement, which indicates that the parties meant a sale and not an exchange."

Furthermore, the deeds agreed to be executed and delivered, and which were executed and delivered by and between the parties, were not those of common law exchange, but "a proper Warranty Deed, containing full covenants duly executed and acknowledged to convey and assure to the grantees an absolute fee of said premises (State of Case, page 30, lines 38 to 40, inclusive, and page 31, lines 1 and 2)" for a pecuniary consideration lawful money of the United States of America. *Haber v. Goldberg, supra; Garabaldi v. Taub*, 127 Atl. 675; *Jones v. Hollander*, 3 Misc. page 973.

In the *Garabaldi v. Taub* case, the Supreme Court held that the transaction as consummated, involved both money and mortgages, and was therefore a sale and not the technical common law exchange.

There is no trading of equities in the instant case, for had that been the intention of the parties, they would have named the usual nominal consideration of One Dollar for the equity, \$1,558.32 in cash at closing, and the purchase money mortgage, under foreclosure, without naming a fixed price at which the properties were being sold. Instead they agreed upon and fixed a definite price for their properties, determined the transaction as a sale, and closed their titles in accordance with their intention of sales and purchase.

The authorities are unlimited and are in perfect harmony to substantiate defendant-appellant's contention, that the test for determining whether there has been a sale or exchange of property, is whether there was a fixed price at which the exchange was to be made. If there was a fixed price, the transaction is a sale. Such

is the harmonious opinion of the authorities, the following being a few of them:

- Alabama—Fuller vs Duren, 36 Al. 73  
 Alaska —Territory vs Toppela, 6 Alaska, 573  
 Fla. —Edwards vs Baldwin etc., 79 Fla. 143  
 Ind. —Herring, etc. vs Aetna etc., 154 N. E. 29  
 Iowa —Hawn vs Malone, 176 N. W. 393.  
 Ky. —Barton vs Jones, 206 Ky. 238  
 Maine —Heywood vs Heywood, 42 Maine 229  
 Mass. —Howard vs Harris, 90 Mass. 297  
 Mich. —Picard vs McCormick, 11 Mich. 68  
 Minn. —Westfield vs. Ellis, 141 Minn. 377  
 Neb. —Gill vs Eagleton, 108 Neb. 179  
 N. H. —Cass vs Thompson, 1 N. H. 65  
 N. Y. —Sternberger vs McGovern, 56 N. Y. 12  
 Ohio —Jenkins vs Mapes, 53 Ohio 110  
 Oregon —Grace vs McDowell, 60 Oregon 577  
 Pa. —Gamble vs McLure, 69 Penn 282  
 Texas —Thornton vs Moody, 24 S. W. 331  
 Vermont—Harrington vs Wells, 12 Vt. 505  
 Va. —Swan vs Va. etc., 144 S. E. 645  
 Wash. —Ross vs Kenwood etc., 73 Wash. 131  
 Wis. —Long vs Fuller, 21 Wis. 122

The Massachusetts courts have held, that the legal distinction between a sale and exchange of property, is purely artificial. *Howard v. Harris*, 90 Mass. page 297. *Barton v. Jones, supra*. And the Virginia courts have held that in law an exchange of real estate is as to each one of the parties, a sale and purchase of the property of the other. *Swain v. Virginia, etc.*, 144 S. E. 145.

Invariably, the Courts in other English speaking jurisdictions, have held that the word "exchange" is essential to that mode of conveyance, so that the deed of conveyance in order to stand the test of an exchange, must recite therein that the consideration for the conveyance is an exchange of properties, and not a pecuniary consideration actually paid. *Cass v. Thompson*, 1 N. H. page 165.

The word "sell" when accompanied with delivery or passing of title means exactly what it says. *International etc. v. Marconi, etc.*, 89 N. J. Equity, page 319.

#### POINT V.

##### *Proposition of Law.*

A deed of conveyance is the deed of both parties. Each of the parties are bound by its terms fully as well as if they both executed the same. Upon the delivery and acceptance of a deed of conveyance for land, the agreement becomes void, and the rights of the parties are to be determined by the deed, and not by the agreement.

##### *Argument.*

It is a general rule that the acceptance of a deed for land is to be deemed prima facie; full execution of an executory agreement to convey. The delivery and acceptance of a deed binds the acceptor to its terms, and the act of acceptance merges the prior contract to sell land unless fraud or mistakes enables him to rescind the contract. Upon the delivery and acceptance of a deed of conveyance for land, the agreement becomes void, and the rights of the parties are

to be determined by the deed, and not by the agreement. *Long v. Hartwell Adm'r of Carpenter*, 34 N. J. Law, page 116.

Mr. Justice Van Syckel in delivering the opinion of our Supreme Court said:

“So, where in the deed, there is an absence of covenants against encumbrances, the vendee cannot resort to the contract. Until consummated, an executory contract is subject to modification. In all cases, the deed when accepted is presumed to express the ultimate intent of the parties with regard to so much of the contract as it purports to execute.”

The deed of conveyance from Colonel to Joachimsthal contains a similar provision as to the encumbrances, subject to which the conveyance was made as was contained in the original contract for the sale of the same.

Your Honors unanimously affirmed the Supreme Court decision in *Long v. Hartwell*, and approved the rule of law as laid down by Mr. Justice Van Syckel quoted above.

It is an elementary rule of law, that the provisions of the contract for the sale of land, are as a general rule merged with the deed subsequently made, in full execution of the contract of sale.

It therefore follows, that where an executory contract is carried out by a conveyance which is executed by the purchaser, this, in the absence of fraud, accident or mistake, operates as a satisfaction and discharge of the executory contract, and regulates the rights and liabilities of the parties, and thenceforth, the covenants of the contract which are taken care of in the deed, are non-existent insofar as the law is concerned, for

the deed thereby sounds the death knell of those provisions in the contract, and it, the deed, thenceforth regulates the rights and liabilities of the parties. 27 R. C. L., page 529; *Blum v. Parson Mfg. Co.*, 80 N. J. Law, page 390; *Goldsmith v. Meyer*, 94 N. J. Law, page 4; *Merchants and Traders Dev. Co. Inc. v. Mercer Realty Co.*, 123 Atl., page 875; *Brownback v. Spangler*, 139 Atl., page 524.

In the latter case, Vice-Chancellor Leaming says:

“The only exception to this rule appears to be in cases of covenants which are collateral to the deed and in cases in which the deed would be considered only in part execution of the executory contract.”

The instant case does not come under the learned Vice-Chancellor's exception. In law and in fact the contract merged in the deed. *Ireland v. Penn. Motors Corp.*, 100 N. J. Equity, 166.

The deed from Colonial to Joachimsthal conveys subject to the mortgage encumbrances, and Joachimsthal is bound by everything that appears in his deed. *Crowell v. St. Barnabas etc., supra; Lembeck, et als., Co. v. Barbi*, 90 N. J. Equity, page 373, affirmed 91 N. J. Equity, page 533.

**POINT VI.***Proposition at Law.*

There is authority, that where lands are exchanged subject to a mortgage, or other encumbrances, the party receiving them in the exchange, is bound to pay the mortgage or encumbrances to protect the other party from liability thereon.

*Argument.*

We have seen from the various authorities cited in this brief, that certain jurisdictions have held, that the words "exchange" and "sell" are synonymous and may be used interchangeably. We have also endeavored to point out, that where premises in a sale are valued in money terms, and a conveyance is made subject to mortgages or encumbrances, for which allowances have been made to the purchaser, that the vendee is liable therefor, and that in equity he is considered a Trustee for the mortgagor-vendor.

There is authority for the proposition, that even though a transaction was an actual exchange, instead of a sale, and the lands exchanged are subject to a mortgage or other encumbrances, and the vendor is the original obligor, that in such case, the vendee, that is to say, the party receiving the exchanged lands subject to such mortgage or other encumbrances, is bound to pay and satisfy the same and must protect the other party from liability thereon.

Such appears to be the law in England and its possessions. American & English Encyc. of Law, Second Edition, Volume 11, entitled "Exchange & Sale Distinguished" paragraph 6, sub-

title "Liability to pay encumbrances on Lands Exchanged."

23 Corpus Juris, page 204, paragraph 33-C, entitled "Exchange of Property" sub-title "Encumbrance" says:

"Under a contract providing for the exchange of the equities of redemption in certain real property, a party receiving a conveyance subject to a mortgage on the land conveyed is bound as between him and his grantor to discharge such mortgage."

Your Honors' attention is respectfully called to these authorities in order to show how far the law has progressed in such matters and how it is being moulded and made to keep abreast with modern business. It is only just that the vendee who takes title in an exchange, subject to mortgages on the land conveyed to him, should be bound to discharge the debts of his grantor, for after all, money is merely a medium of exchange and is used as a yardstick for the measuring of values. If a purchaser of lands desires to be relieved from obligations by reason of mortgage encumbrances on the premises conveyed to him, such agreement should be definite and incorporated in his deed.

A re-reading of the opinion by the Chancellor in *Stevenson et al. v. Black*, 1 N. J. E. 338, raises a grave doubt if even in this State, a purchaser of a simple equity of redemption, where the mortgage money constitutes, in fact, a part of the actual consideration of the purchase, is not liable to indemnify the mortgagor and save him harmless from all personal liability on the bond.

It is significant to note at this time that a century ago, when the *Stevenson* case was de-

cided and when life in general and business in particular was less complicated, the courts were even then called upon to decide such matters.

### CONCLUSION.

From the foregoing it seems quite obvious that the Court below erred in its decision. A careful examination of the facts in this case leads us to the only and inevitable conclusion that Colonial should succeed in its counter-claim and set-off. The facts stand undisputed that it was the intention of the parties when they entered into the agreement to purchase and sell and they did not mean to enter into a common-law exchange.

The proofs in this case are clear and convincing to substantiate Colonial's position with Joachimsthal and therefore, complainant is attempting to unjustly enrich himself at the expense of the defendant-appellant.

A careful examination of the law, again leads us to the only conclusion that the authorities are on the side of the defendant-appellant.

It is, therefore, respectfully urged that Colonial should be granted the relief prayed for by a credit on account of complainant's mortgage of the amounts paid by Colonial which were the debts of Joachimsthal, to which should be added interest, costs and fees and in addition thereto Colonial should be called upon to pay interest on the difference due the complainant from July 18, 1931, being the date when it tendered itself to make such payment less the moneys paid by it.

IT IS THEREFORE, RESPECTFULLY  
SUBMITTED THAT THE SAID FINAL DE-  
CREE OF THE SAID CHANCELLOR MAY  
BE IN THE PARTICULARS PRAYED FOR  
BY COLONIAL IN ITS PETITION OF AP-  
PEAL TO THIS HONORABLE COURT AS  
WELL AS IN THE COUNTER-CLAIM IN  
THE LOWER COURT, REVERSED, SET  
ASIDE AND FOR NOTHING HOLDEN AND  
THAT THIS DEFENDANT-APPELLANT  
MAY HAVE SUCH OTHER, FURTHER AND  
ADDED RELIEF IN THE PREMISES AS TO  
YOUR HONORS SHALL SEEM MEET AND  
PROPER.

Respectfully submitted,

ZUCKER & GOLDBERG,  
LOUIS D. GOLDBERG,

On Brief.

*Attorneys for and of Counsel with  
Defendant - Appellant.*

## New Jersey Court of Errors and Appeals

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Between	}	On Bill, &c.
FRANK R. SMITH, Complainant-Respondent,		
and	}	On Appeal from the Court of Chancery.
COLONIAL WOODWORKING Co., INC., a corporation of New Jersey,		
Defendant-Appellant.		

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### BRIEF OF COMPLAINANT-APPELLEE.

The statement of facts presented by the Defendant-Appellant is not quite correct. The agreement between the parties is in writing and under the terms of the writing Julius Joachimsthal agreed to "grant and convey," and the Appellant agreed to "grant and convey." There is nothing in the agreement that either party will either sell or purchase. The first clause of the contract reads:

" \* \* \* . The parties of the first part, in consideration of one Dollar, paid by the party of the second part, the receipt of which by the parties of the first part is hereby acknowledged, and also in consideration of the conveyance by the party of the second part of the real property hereinafter mentioned, hereby agree to grant and convey to the party of the second part, at a valuation for the purpose of this contract of \* \* \* \* ."

Page 27, lines 30 to 39, State of Case; and the second part of the contract reads:

“And the party of the second part, in consideration of One Dollar paid by the party of the first part, the receipt of which by the party of the second part is hereby acknowledged and also in consideration of the conveyance by the parties of the first part of the real property hereinbefore mentioned, agrees to grant and convey to the parties of the first part, at a valuation for the purposes of this contract of \* \* \* ”.

Page 28, lines 30 to 38, State of Case. The contract further reads:

“The difference between the values of the respective premises, over and above incumbrances shall be deemed for the purposes of this contract to be SEVENTEEN THOUSAND (\$17,000.00) Dollars in favor of the parties of the first part, and the said party of the second part agrees to pay the same as follows:”

Pages 29, lines 39 to 41, and Page 30, lines 1 to 4, State of Case.

The language seems clear and concise and it becomes difficult to reconcile it with the Appellant's interpretation of it that “Julius Joachimsthal took a credit for the mortgage in Colonial properties, was given the mortgage under foreclosure, plus a note, which was paid, and is therefore cash.” Julius Joachimsthal received a mortgage for \$17,000.00 and a note representing the difference in values “over and above incumbrances.” Page 29, line 39, State of Case.

Of course, it is not a “fact” relevant to anything to be demonstrated, or supported by any evidence, what the Appellant claims it is entitled to.

The deed to Joachimsthal was made subject to the mortgages. It contained no assumption clause.

"The first tract above described is subject to a mortgage for \$12,000.00 held by Manhattan B. & L. Association recorded in M-56-326, and to a mortgage for \$2307.14 held by Angelo Rugiero recorded in Book C-59 of Mortgages, on page 184. The Second tract above described is subject to a mortgage for \$10,000.00 held by the West End B. & L. Association recorded in Book V-56 of Mortgages, on page 552 and a mortgage for \$2,400.00 held by Harry Kaplan, recorded in Book I-58 on page 595."

Page 35, lines 39 to 41 and Page 36, lines 1 to 12, State of Case.

The contract between the parties contained no assumption clause.

"Said premises which are to be conveyed by the party of the second part are to be conveyed subject to the following incumbrances:  
 #231 Wainright St., Newark,  
     N. J. a B. & L. mtge of           \$10,000.00  
     a second mtge two yrs. to run    2,500.00  
 #244 Wainright St., Newark,  
     N. J. a B. & L. mtge of           \$12,000.00  
     a second mtg of yrs. to run      2,500.00"

The above is the language of the contract. There is no provision in the contract for the payment of any sum by Joachimsthal, his agreement was to grant and convey. The contract reading:

"The parties of the first part, in consideration of one dollar, paid by the party of the second part, the receipt of which by the parties of the first part is hereby acknowledged, and also in consideration of the conveyance by the party of the second part of the real property hereinafter mentioned, hereby agree to grant and convey to the party of the second part, at a valuation for the purpose of this contract of

Twenty Thousand (\$20,000.00) Dollars"

Page 27, lines 30 to 40, State of Case.

The only provision in the contract with reference to paying applies to the party of the second part (the Appellant).

“The difference between the values of the respective premises, over and above incumbrances shall be deemed for the purposes of this contract to be SEVENTEEN THOUSAND (\$17,000.00) Dollars in favor of the parties of the first part, and the said party of the second part agrees to pay the same as follows:”

Page 27, lines 39 to 40, Page 30, lines 1 to 11, State of Case.

The statement of closing is a calculation designed to ascertain the amount due from one to the other and reflects a method of convenience rather than a purpose to regulate the rights of the parties. At any rate, there is no evidence that Joachimsthal even saw the paper. Page 127, lines 17 to 40 and Page 128, lines 1 to 35, State of Case.

### POINTS ONE AND TWO.

are covered by stipulation, Page 125, lines 21 to 30, State of Case:

“1. The second mortgages on the properties conveyed to Julius Joachimsthal came due respectively on September 24, 1928, and September 1, 1928.

2. The mortgage given by the Colonial Woodworking Co., Inc., a corporation to Julius Joachimsthal, the subject matter of the foreclosure suit, was assigned to the Federal Trust Company (Springfield Avenue Branch), a corporation on October 1, 1928.”

### POINT THREE.

**The law will imply a promise on the part of the grantee to pay the encumbrance only where he agreed to pay the full purchase price and part of it was withheld to pay the mortgage.**

The statement under point three "Proposition of Law" of Appellant's brief is not correct.

The vice consists in the failure to include in the statement the essential term of an agreement by the grantee to pay the purchase price and that part of it was withheld at the time of settlement to pay the mortgage.

Appellant's statement is framed antithetically without any antithesis, yet if what he means to say is that where there is an allowance at the settlement for the mortgage incumbrance the grantee is bound to pay the incumbrance, then the grantee would in every case be liable to pay unless he expressly contracts for the equity and eliminates all reference to value. If Appellant's proposition is correct then a provision in the contract that the purchase price shall be subject to an adjustment for incumbrances and only the net amount paid then the purchaser would still be liable to pay the incumbrances, for "the amount was allowed in the purchase price." With diffidence it is suggested that the uniform practice in conveyancing is predicated upon a different rule. But in the instant case there is no "purchase price." The agreement of Joachimsthal is to grant and convey not to pay any purchase price. For the purpose of this contract the valuation of Joachimsthal's property was \$20,000.00 and he agrees to grant and convey it to the Appellant, and for the purpose of the contract the valuation of the Appellant's property was \$30.-

000.00 subject to mortgages and it agrees to convey that to Joachimsthal and

“ \* \* \* the difference between the values of the premises over and above incumbrances shall be deemed for the purpose of this contract to be Seventeen Thousand Dollars (\$17,000.00) in favor of the parties of the first part and the said party of the second part agrees to pay the same as follows:”

Page 29, lines 39 to 41, and Page 30, lines 1 to 10, State of Case. The statement in Appellant's brief that Joachimsthal “actually withheld the cash money” is an assertion without any pretence of evidence to support it.

“ \* \* \*, but he actually withheld the cash money with which to meet those obligations as they matured.”

Page 11, lines 5 and 6, Appellant's brief.

Waring vs. Ward, 7 Ves. 332, is the first case cited by Appellant. Referring to this case, the Chancellor in Tichenor vs. Dodd, 3 N. J. Eq. 454, at page 457, says:

“In Waring vs. Ward the liability of the purchaser is placed expressly upon the ground of his taking possession and receiving the profits, and is entirely consistent with his discharge upon yielding up the possession and profits.”

This rule finds reflection in our act respecting mortgages where proceedings upon the mortgage must first be bought, where there is a bond and mortgage, and does not affect the question of personal liability of the grantee. Sec. 48 of the act respecting mortgages, 3 S. C. page 3421.

The first New Jersey case cited by the Appellant is Stevenson vs. Black, 1 N. J. Eq. 338. Referring

to the above case, the Chancellor in *Tichenor vs. Dodd*, 3 N. J. Eq. 457, says:

“In *Stevenson and Woodruff vs. Black, Saxton* 342, the principle of the case of *Waring vs. Ward* and *Tweddell vs. Tweddell* is recognized; and the Chancellor there cannot be supposed to have meant to charge the purchaser beyond the value of the land; which value, if the purchaser retains the land, will be equal to the whole amount of the incumbrance”.

In the above case Black bought at a Sheriff's sale. The articles of sale recited:

“The foregoing described property is sold subject to the payment of a mortgage from Samuel L. Howell to Samuel Whitall, dated the 22nd of March, 1817 \* \* \*”

and there was added by the Sheriff:

“and the several bonds secured under the said mortgage.”

It was sought to hold Black under this provision. The Chancellor denied relief. On page 343, the court says:

“Have they, then, any claim against Black personally, growing out of his situation as purchaser of the equity of redemption? We have seen that by such purchase his own claim was extinguished; but did he thereby make the whole mortgage debt his own, and become personally liable to the mortgagee, or his assigns? I am not able to perceive how such a result is to spring out of the transaction. The claim is upon the estate, not upon the purchaser; and the claim remains, no matter in whose hands the estate may be.”

Quotation out of context may tell part of the story,

but the fact is, so far as this case is concerned, the Chancellor dismissed the bill.

Tichenor vs. Dodd, 4 N. J. Eq. 454, is brought forward by Appellant to support its case, and the statement is made that "the complainant conveyed to defendant certain land, and the deed of conveyance recited that it was made subject to certain mortgage encumbrances on the premises." Appellant's paraphrasing omits an essential element of the case. The clause in the deed considered in Tichenor vs. Dodd, reads:

"The above lots are conveyed subject to the payment of a certain mortgage thereon, given by the said David H. Tichenor to Oliver S. Halstead, James Dawes and Enoch Bolles, for five hundred and twenty-five dollars and thirty cents, which said mortgage, or the amount thereof, is computed as so much of the consideration to be paid to the said David H. Tichenor."

In this case the grantee was held personally liable. But why? Here is what the Chancellor says:

"By the terms of the deed, the mortgage money was taken as a part of the consideration; and hence, the second proposition of the counsel, that under such circumstances equity raises upon the conscience of the purchaser an obligation to indemnify the mortgagor, is correct."

To say that this case applies to the case under consideration is plain nonsense. Joachimsthal did not agree to pay any purchase money, and he did not withhold any. The pretended statement of fact as to purchase money, and withholding of purchase money by Joachimsthal are not supported by any evidence.

The closing statement is a compilation of figures

got together for the purpose of arriving at a balance and not to bind anyone contrary to the terms of the agreement and deed. There is no evidence that Joachimsthal even saw it or who prepared it.

The affidavits annexed to the original answer were stricken out with the answer and fall with it. The facts of the case are stipulated and the affidavits form no part of the stipulation.

Heid vs. Vreeland, 30 N. J. Eq. 591, is the next case presented. In order to complete the record it may be of interest to quote the clause out of which the case arose and upon which it was decided. The covenant in the deed reads:

“And that the said land and premises are now free, clear, discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and encumbrances of what nature or kind soever, except mortgage of \$2,000, part of consideration money.”

In this case the bill was dismissed. The Vice-Chancellor held that the deed from the mortgagor to the grantee recited the payment of the whole consideration, and he held the clause in the deed too feeble to overcome the admission in the deed. The Vice-Chancellor at page 594 says:

“But it is obvious, at a glance, that the proofs here entirely fail to show the retention of a single penny of the purchase-money. It is not even pretended in the bill that any part of it was kept back.”

In the present case Joachimsthal did not even agree to pay any purchase money and there is certainly nothing in the proof that he held it back. See Stipulation, Page 125, State of Case. But let us quote the Vice-Chancellor a little more at length:

“A different view was expressed in Belmont vs. Coman, 22 N. Y. 438. It was there held that where lands are conveyed subject to a mortgage, and the amount of the mortgage is deducted from the purchase-money agreed upon, no personal liability is thereby created against the purchaser, but that the true exposition of the intent of the parties under such an arrangement is, that so much of the purchase-money as is represented by the mortgage is not to be paid by the purchaser to anybody, but shall be paid out of the land, and in that manner only. Such interpretation would undoubtedly carry into effect the intention of the parties where the interest sold is merely the equity of redemption, and the purchase-money agreed upon represents simply the value of the mortgagor's interest in the mortgaged premises over the mortgage debt; but where the purchase-money agreed upon represents the whole value of the premises free from the mortgage, and one of the mortgagor's objects in selling is to relieve himself from the mortgage debt, the vendor would seem, according to the plain meaning of the arrangement, to have a clear right to the whole sum agreed to be paid, or, if part is kept back to pay the mortgage, that the purchaser shall be required either so to apply it, or to indemnify the mortgagor against the mortgage debt; such I understand to be the principle established by the adjudications of this state, and in my view there can be no doubt it is founded on justice and reason.”

Thayer vs. Torrey, 37 N. J. Law 339, was an action at law. There was objection to the deed on the ground that it contained an assumption clause of the mortgage and the court referring to the agreement held the assumption clause justified because the agreement stipulated:

“said real estate being subject to a mortgage

for \$2080," "the consideration of \$16,080, shall be payable as follows: \$2080 in said mortgage \* \* \*".

The court says:

"Instead of paying him the entire consideration money, out of which the mortgage may be paid, so much of the consideration as may be needful is appropriated by the parties for that purpose. The mortgage is charged upon the purchase money, and not upon the land only, by the agreement, and it is rightly so stated in the deed. *Tichenor v. Dodd*, 3 Green's Ch. R 454; 1 Hilliard on Mortgages 329; *Russel v. Pistor*, 3 Seld, 171; *Belmont v. Coman*, 22 N. Y. 438."

*Crowell vs. Hospital of St. Barnabas* is cited. The bill was filed to compel the defendant, Currier, to answer for a deficiency upon a sale of mortgaged premises. The relief sought being based upon a provision in the deed of conveyance that the premises were conveyed subject to the complainant's mortgage "which the grantees therein assumed and agreed to pay, the amount thereof having been deducted from the consideration money."

The quotation in Appellant's brief from Justice Depue's opinion applies exactly to the facts of the case. But they are different from the facts in this case.

In *Woodbury Heights Land Co. vs. Loudenslager*, 60 N. J. Eq. 403, the deed contained this clause:

"The above premises are conveyed under and subject to the payment of the principal amounts of the several mortgages hereinafter mentioned and the interest on the same from the date hereof."

And in the bill upon which the decree was based this clause appears:

“eighty thousand dollars in money, said premises being conveyed subject to mortgages amounting in the aggregate to \$41,100.00, which mortgages are stated in said deed to be a part of the consideration money therein mentioned.”

The petitioner sought relief against a decree which charged him with the payment of \$7,635.43 as a profit on a sale to the complainant. But in the profit was included the \$5,000.00 mortgage and when the decree was taken the \$5,000.00 mortgage was also included. The Court of Errors held that the petitioner was entitled to have the decree stayed pending a suit at law upon the agreement.

There is a clear distinction between the Loudenslager case and the instant case. In the Loudenslager case the complainant already had the \$5,000.00 in the form of a decree so there could not be any question about withholding, while in the present case Joachimsthal never withheld because he never agreed to pay. Justice Garrison speaking for the court summarizes the rules applicable as follows:

“In support of this argument the petitioner might cite the language of Chancellor Haines in *Tichenor vs. Dodd*, 3 Gr. Ch. 457; ‘By the terms of the deed, the mortgage money was to be taken as a part of the consideration, and hence, the proposition that under such circumstances equity raises upon the conscience of the purchaser an obligation to indemnify the mortgagor is correct. If he withhold the money till the premises are sold away from him, he has no ground of complaint if the mortgagor asks him to pay the amount remaining due’. In *Crowell vs. Hospital of Saint Barnabas*, Mr.

Justice Depue, speaking for the Court of Errors and Appeals, summarized the authorities upon such stipulation as follows:

'1. In equity a stipulation of this kind is regarded as a contract to indemnify the grantor against the mortgage debt.

'2. The mortgage debt does not thereby become a personal debt of the grantee.

'3. The equity is operative between the parties to the deed only.

'4. If the purchaser buy the mere equity of redemption, he may discharge his equity to the mortgagor by releasing the lands.

'5. If by the terms of the purchase the mortgage debt is by agreement taken as part of the consideration money, equity raises upon the conscience of the purchaser an obligation to indemnify the mortgagor against the mortgage debt.'

In other words, the mortgage debt may by agreement, if so stated in the deed, be charged upon the unpaid purchase-money, which is a different thing from the legal assumption of the mortgage debt by the grantee."

In *Reeves vs. Cordes, et al*, 155 Atl. 547, Vice-Chancellor Lewis struck out the bill because there was no allegation "that said properties were sold by complainant at a certain fixed price, from or out of which the grantee deducted or retained a sum equal to the amount of the said mortgage debts, subject to which the properties were sold."

There is no allegation in this counterclaim that the properties were sold by Appellant at a certain fixed price, and there is no allegation that the grantee deducted or retained a sum equal to the amount of the mortgages.

The counterclaim alleges that the agreements were reduced to writing and a copy is attached. That agreement certainly stipulates no fixed price. A valuation for the purpose of the exchange is put

upon the property, but Joachimstral does not agree to pay that. The Appellant agrees to pay the difference in values.

The nearest approach to anything bordering upon an allegation that the mortgage monies were "deducted and returned" is retained in paragraph 6 of the counterclaim, Page 98, lines 39 to 40 and Page 99, lines 1 to 15, State of Case, wherein the Appellant says:

"And after receiving credit for said sums and deducting the amount due upon said encumbrances from the said sum of \$30,000.00, the balance then due for the sale of the said premises at Nos. 231 and 244 Wainright Street, Newark, New Jersey, from the said Julius Joachimsthal and Emma Joachimsthal, his wife, to Colonial Woodworking Co. Inc., shall be applied against the purchase price of the premises described in paragraph three of the bill of complaint from the said defendants, Julius Joachimsthal and Emma Joachimsthal, his wife, as more fully set forth in said contract annexed hereto and marked Schedule A."

If this is an allegation of retention it appears to be completely lost in a maze of meaningless verbiage. But it is added "as more fully set forth in said contract annexed hereto and marked Schedule A." Very well, then let us refer to the contract and see where there is anything about retention. But perhaps it is not even intended to allege there was a retention of the money. This would bring the case directly within the case decided by Vice-Chancellor Lewis, *supra*, and *Heid vs. Vreeland, supra*.

**POINT FOUR.**

Vice-Chancellor Backes held that the contract was a contract of exchange and he based his opinion upon the form of the contract and the language of the stipulation of facts. Paragraph 7 of the Stipulation of Facts reads:

“7. It is admitted that the valuations for the purpose of the exchange from one party to the other are as stated in the contract, and that the prices so stated represent the true values at the date of the said contract.”

Page 126, lines 15 to 20, State of Case.

The affidavits of Jack Goldman and Grace Kirk were submitted in response to a motion to strike out the answer and counterclaim which was granted and fell with the answer and counterclaim. They are moreover not part of the stipulation of facts. The stipulation of facts refers to “documents and instruments” and does not include affidavits supporting an answer and counterclaim stricken out. The order striking out is found on page 94 of the State of Case.

Respectfully submitted,

ROSSBACH & CRUMMY,  
Solicitors for Complainant-Respondent.

A. J. ROSSBACH,  
Of Counsel.

3-0951

