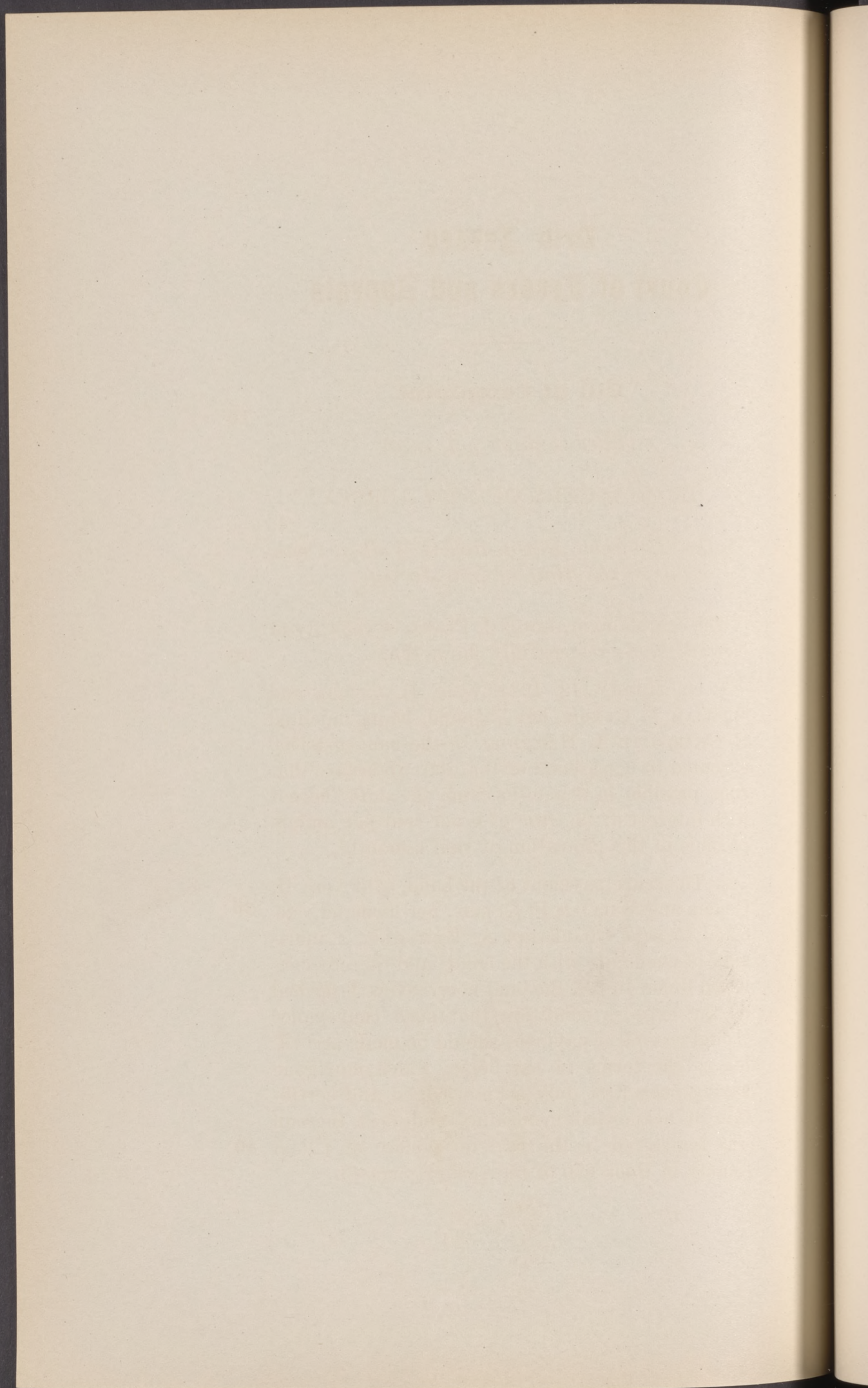


INDEX

	Page
Bill of Complaint	1
Answer	6
Notice of Motion	8
Affidavit of Louis Platt	9
Affidavit of Lionel L. Meyers	12
Affidavit of Frank Calabrese	14
Affidavit of Anthony C. Lonzello	16
Petition of Appeal	17
Answer of Petition of Appeal	19



New Jersey

Court of Errors and Appeals

Bill of Complaint.

10

(Filed, February 5, 1926)

IN CHANCERY OF NEW JERSEY

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

The complainant, LOUIS J. PLATT, of the City of Newark, N. J., respectfully shows that:

20

1. On August 12, 1924, NORA H. CURRIE and WILLIAM F. CURRIE, her husband, being indebted to CHARLOTTE A. HEMPHILL in the sum of \$3500 executed to her a bond of that date to secure that sum, payable in 6 months from the date thereof with interest at the rate of 6 per cent per annum payable at the expiration of said 6 months.

2. To secure payment of the bond, said NORA H. CURRIE and WILLIAM F. CURRIE, her husband, executed to said CHARLOTTE A. HEMPHILL, a mortgage of even date with the bond; and thereby conveyed to her in fee, the land hereinafter described on the express condition that such conveyance should be void if payment should be made according to the terms of the bond; which mortgage having been first duly acknowledged and certificate of acknowledgment duly endorsed thereon was registered in the register's office of Union County in Book 670 of mortgages page 43.

30

40

Bill of Complaint

3. The mortgaged premises are described as follows:

10 All that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Cranford, in the County of Union, and State of New Jersey.

Beginning on the Northwestern side of Retford Avenue six hundred and three (603) feet Northeastly from its intersection with the northeastly side of William Street; thence Northwestly at right angles to Retford Avenue one hundred (100) feet; thence Northeastly parallel with Retford Avenue Fifty-seven (57) 20 feet to the Southwestly side of Lincoln Avenue; thence Southeastly along said side of Lincoln Avenue sixty-five (65) feet and curving to the right around the corner with a radius of thirty-five (35) feet fifty-four 98/100 (54.98) feet and Southwestly along the Northwestern side of Retford Avenue twenty-two (22) feet to the Beginning.

30 Being part of lots Numbered 218 and 219 as laid down on a Map entitled, "Lexington Heights, Cranford, N. J., Section One," which map is on file in the Union County Register's Office.

Together with the rights of the mortgagors to the center lines of Retford and Lincoln Avenues.

4. By deed dated August 12, 1924 and duly acknowledged on the same day and recorded in the Register's Office of Union County in Book 957 of Deeds, page 398 on the following day said 40 Nora H. Currie and William F. Currie, her hus-

Bill of Complaint

band, conveyed said mortgaged premises to Frederick A. Hemphill.

5. By deed dated August 29, 1924, duly acknowledged, on the same day and recorded in the Register's Office of Union County on August 31, 1924 in Book 962 of deeds, page 43 said Frederick A. Hemphill (unmarried) conveyed said mortgaged premises to Sophia L. Maltby. 10

6. By deed dated August 29, 1924, duly acknowledged on the same day and recorded in the Register's office of Union County on August 30, 1924, said Sophia L. Maltby and Wilburt S. Maltby, her husband, conveyed said mortgaged premises to Frank Calabrese, who is now the owner thereof. Said Frank Calabrese is married and his wife's name is Dominica Calabrese. 20

Any interest which the said Frank Calabrese and Dominica Calabrese, his wife may have in said mortgaged lands or premises is subject to the lien of the mortgage described in second paragraph.

7. By assignment dated November 26, 1924, duly acknowledged on the same day and recorded in the Register's Office of Union County on November 29, 1924 in Book 84 of Assignments of Mortgages page 317, said Charlotte A. Hemphill assigned said bond and mortgage to the complainant herein. 30

8. Subsequently to the execution, delivery and recording of said mortgage one Erwin E. Franz entered into possession of the mortgaged prem- 40

Bill of Complaint

ises as the tenant of then owner of said premises. Any interest which the said Erwin E. Franz may have in said premises is subject to the lien of complainant's mortgage.

10 9. By agreement between complainant and said Frank Calabrese the complainant extended said mortgage so that the principal sum secured thereby should mature and be paid on August 12, 1925; the consideration therefore being a guaranty by Frank Calabrese of the payment of the principal & interest of said bond & mortgage.

20 10. The said Nora H. Currie and William F. Currie her husband, Frederick A. Hemphill, Sophia L. Maltby, Frank Calabrese and Erwin E. Franz or some one or more of them has always been in possession of the mortgaged premises.

11. The whole amount of principal with interest thereon from August 12, 1925 at the rate of 6 per cent per annum is due upon complainant's bond and mortgage.

30 Complainant is without adequate remedy in the courts of Law and therefore prays:

1. That Nora H. Currie and William F. Currie her husband, Frank Calabrese and Domineca Calabrese, his wife and Erwin F. Franz who are the defendants to this suit, may answer this bill of complaint without oath and each statement therein made.

40 2. That the account may be taken of the amount due on complainant's mortgage:

Bill of Complaint

3. That the defendants, or one of them, may be decreed to pay complainant the amount so found due, with interests and costs, by a short day, to be appointed by this Court; and that in default of such payment, they and each of them, be debarred and foreclosed of all equity of redemption in said land: or 10

4. That a decree may be made for the sale of the mortgaged premises to raise and pay to the complainant the amount so found due on his mortgage, with interest and costs:

5. That a writ of subpoena may issue, commanding said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises. 20

OSBORNE, CORNISH & SCHECK,
Solicitors and Counsel with
Complainant.

Answer.

IN CHANCERY OF NEW JERSEY

10	Between, LOUIS J. PLATT, <p style="text-align: right;">Complainant,</p> and NORA H. CURRIE <i>et als.</i> , <p style="text-align: right;">Defendants.</p>	}	On Bill &c.
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Frank Calabrese & Domenica Calabrese, his wife, defendants, answering the Bill of Complaint filed in the above cause, say:

20

1. They admit Paragraphs 1, 2, 3, 4, 5 and 6 of the Bill of Complaint.

30

2. They have no sufficient information about the contents of Paragraph 7 of the Bill of Complaint, but they say that the mortgage mentioned in the Bill of Complaint by reason of the sale of premises became their property and they caused the same to be assigned to the complainant and the complainant paid to them on account, the sum of Twenty-five Hundred (\$2500.00) Dollars holding in his hands for security the balance of One Thousand (\$1000.00) Dollars which balance has never been paid to these defendants by the complainant.

40

3. They have no sufficient information about the contents of Paragraph 8 of the Bill of Complaint.

Answer

4. They admit the contents of Paragraphs 9 and 10 of the Bill of Complaint.

5. They admit that the whole amount of the principal with interest thereon from August 12th, 1925, at the rate of six per cent per annum, is due upon the said bond and mortgage, but that the complainant is only entitled to the sum of Twenty-five Hundred (\$2500.00) Dollars and interest and the sum of One Thousand (\$1000.00) Dollars and interest as aforesaid is due to these defendants. 10

EGIDIO W. MASCIA,
Sol'r. for the Defendants,
Frank Calabrese & Domenica Calabrese. 20

Notice of Motion.*(Filed, Apr. 28, 1926)*

IN CHANCERY OF NEW JERSEY

Docket 60—page 30

10

Between, LOUIS J. PLATT, <div style="text-align: right;">Complainant,</div> and NORA H. CURRIE, <i>et al.</i> , <div style="text-align: right;">Defendants. </div>	}	On Bill, etc.
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*To Egidio W. Mascia, solicitor for defendants,
 Frank Calabrese and Domenica Calabrese:*

PLEASE TAKE NOTICE that we shall apply to the
 Chancellor at the Chancery Chambers, Newark,
 New Jersey, on Tuesday, May 11th, 1926, at 10
 o'clock in the forenoon or as soon thereafter as
 30 the matter can be heard, for an order striking
 out the answer filed by you in the above entitled
 cause, on the ground that the said answer does
 not allege facts which constitute a defense to the
 said action; that paragraphs two and five of the
 answer are not only sham but also frivolous; and
 that the entire answer has been filed only for the
 purpose of delay. Attached hereto are affidavits
 on which the said application will be based.

40

OSBORNE, CORNISH & SCHECK,
 Solicitors for Complainant.

Affidavit of Louis J. Platt.

IN CHANCERY OF NEW JERSEY

Docket 60—page 30

Between, LOUIS J. PLATT, <div style="text-align: right;">Complainant,</div> and NORA H. CURRIE, <i>et al.</i> , <div style="text-align: right;">Defendants.</div>	}	On Bill, etc.	10
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State of New Jersey, County of Essex.	}	ss:	20
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Louis J. Platt, being duly sworn on his oath, according to law, deposes and says:

1. I am the complainant in the above entitled matter.

2. On or about December 4th, 1924, I purchased from Charlotte A. Hemphill, the bond and mortgage sought to be foreclosed in this action. The said Charlotte A. Hemphill executed and delivered to me a written assignment of the said bond and mortgage, which assignment was dated and acknowledged November 26th, 1924, and recorded on November 29th, 1924, in Book 84 of Assignments of Mortgages for Union County, page 317. The purchase price was not paid to the said Charlotte A. Hemphill until December 4th, 1924.

3. At the time of the execution, delivery and recording of the said assignment and of the pay-

Louis J. Platt

ment by me of the consideration, the premises described in the said mortgage were owned by the defendant Frank Calabrese. He had purchased them from Sophie L. Maltby and Wilbur S. Maltby, her husband, by deed dated August 29th, 1924, and recorded August 29th, 1924, in the Union County Register's Office in Book 962 of Deeds, page 47. The said deed recites that the purchaser, the said Frank Calabrese, takes the said conveyance subject to two mortgages, one for \$7000 held by the Fidelity Union Trust Co., and the other, the said mortgage of \$3500 herein sought to be foreclosed.

4. I was represented in the transaction by Lionel Meyers, an attorney practicing in Newark, and I turned over to him the sum of \$2800, with which to purchase the said mortgage; and I authorized him to agree to an extension of the time for the payment of the principal indebtedness secured by the said mortgage from February 12th, 1925 to August 12th, 1925.

5. The said agreement of extension was made with defendant, Frank Calabrese, the then owner of the premises, who agreed, in consideration for such extension, to become personally liable for the payment of the entire principal of \$3500 in the same manner as if he had executed the bond in the first instance.

6. The said Frank Calabrese executed a bond, as I have alleged in paragraph nine of the bill of complaint filed herein, guaranteeing payment of the entire principal sum of \$3500 with interest;

Louis J. Platt

and in his answer he admits that he executed such bond.

7. I never made an agreement of any kind whatsoever to hold \$1000 for security. I do not know what the defendant means by that allegation. I did not deal with him in purchasing the mortgage, and did not make a payment of \$2500, or any other sum to the defendant on account. It is not true that I am entitled to only \$2500. The entire sum of \$3500 is due to me with interest from August 12th, 1925. The bond and mortgage were sold to me direct by Charlotte A. Hemphill; the defendant, Frank Calabrese, was given credit for the full amount thereof on account of the purchase price when he bought the property described in the mortgage from Sophie L. Maltby and her husband; and in addition he executed a bond, personally obligating himself to pay the said entire sum to me.

8. I believe that the said defendant has no defense to this action, and that he has interposed his answer for the purpose of delay.

LOUIS J. PLATT. 30

Sworn and subscribed to
before me, this 1st
day of May, 1926.

Theodore R. Hare,
A Notary Public of N. J.

Affidavit of Lionel L. Meyers.

IN CHANCERY OF NEW JERSEY

10	Between, LOUIS J. PLATT, Complainant, and NORA H. CURRIE, <i>et al.</i> , Defendants.	}	On Bill, etc.
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State of New Jersey, } ss:
 County of Essex.

20 Lionel L. Meyers being duly sworn on his oath according to law, deposes and says:

1. I am an Attorney-at-Law of the State of New Jersey, and represented LOUIS J. PLATT, the complainant in this cause, in connection with the purchase by him of the bond and mortgage sought to be foreclosed in this action.

30 2. The mortgage was owned by Charlotte A. Hemphill and was due on February 12th, 1925. The said Frank Calabrese who owned the property asked me to find a purchaser for the said mortgage and to arrange for an extension of time of payment thereof. He told me that the mortgage could be bought for \$2500 net. I therefore presented the proposition to the complainant who bought the mortgage, paid the sum of \$2500 and agreed to extend the time of payment thereof until August 12th, 1925.

Lionel L. Meyers

3. To induce the said LOUIS J. PLATT to buy the aforesaid mortgage and to extend the time of payment thereof Frank Calabrese executed and delivered to him a bond in which he guaranteed payment of the full principal \$3,500 secured by said mortgage.

10

4. There were no arrangements of any kind between the complainant and said defendants under which the complainant was to have an interest of only Twenty Five Hundred Dollars (\$2500) in the said mortgage, and to retain or hold One thousand Dollars (\$1,000) for the said defendants.

5. I never heard of that or any similar arrangements, and the said Frank Calabrese and Domenica Calabrese have no interest in said sum or the mortgage to secure the said sum.

20

LIONEL L. MEYERS.

Sworn and subscribed to

before me, this 4

day of May, 1926.

Isidore U. Solion

A. M. C. C. of N. J.

30

40

Affidavit of Frank Calabrese.*(Filed, May 11, 1926)*

IN CHANCERY OF NEW JERSEY

10	Between, LOUIS J. PLATT, <div style="text-align: right; padding-right: 20px;">Complainant,</div> <div style="text-align: center; padding: 0 20px;">and</div> NORA H. CURRIE <i>et als.</i> , <div style="text-align: right; padding-right: 20px;">Defendants.</div>	}	On Bill &c.
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20 State of New Jersey, } ss:
 County of Essex.

Frank Calabrese, of full age, being duly sworn according to law on his oath deposes and says:

That he is the husband of the other defendant, Domenica Calabrese. Deponent says that his wife is a patient in a hospital and her attending physician has prescribed rest and cannot be disturbed for the purpose of making affidavit.

30 Deponent further says it is true that by deed of conveyance dated August 29th, 1924, Sophie L. Maltby & Wilburt S. Maltby, her husband, conveyed the lands and premises described in the Bill of Complaint to this deponent.

Deponent further says that there is only due upon the complainant's mortgage, the sum of Twenty-five Hundred (\$2500.00) Dollars with interest on said amount from August 12th, 1925.

Frank Calabrese

Deponent further says that the remainder of \$1000.00 in order to make up the complete sum of \$3500.00, the principal sum mentioned in said mortgage is not due to the complainant because the said amount of \$1000.00 is to be deducted from the said principal sum of \$3500.00. 10

Deponent further says that at the time of the complaint taking the assignment of the mortgage in question, the complainant exacted this deponent's, Frank Calabrese, guarantee to pay the principal sum of said mortgage in consideration of the promise of the complainant made to this deponent, Frank Calabrese, that if this deponent would pay to the complainant, the sum of \$2500.00 and interest from August 12th, 1924, that he, the complainant, would re-assign the said bond and mortgage to this deponent or to his nominee upon request. 20

Deponent further says that he has requested the said complainant to make a re-assignment of the said bond and mortgage and offered to pay the complainant, the said sum of \$2500.00 and interest as aforesaid, and the complainant has refused to accept the said amount and to keep his said promise. 30

FRANK CALABRESE.

Sworn to and subscribed
before me this 10th day
of May, 1926.

Peter A. Sena,
Attorney-at-law.

Affidavit of Anthony C. Lonzello.*(Filed, May 11, 1926)*

IN CHANCERY OF NEW JERSEY

10 20	Between, LOUIS J. PLATT, <p style="text-align: right;">Complainant,</p> and NORA H. CURRIE <i>et als.</i> , <p style="text-align: right;">Defendants.</p>	}	On Bill &c.
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State of New Jersey, } ss:
 County of Essex.

20 Anthony C. Lonzello, of full age, being duly sworn according to law on his oath deposes and says:

30 I was present at the transaction between the complainant and the defendant, Frank Calabrese. What occurred was this: Frank Calabrese had the control and possession of the mortgage in question for \$3500.00, then he sold it to the complainant for \$2500.00. I did not see the money but I understand the check was made from Mr. Meyers, the attorney, to Mr. Calabrese. When the complainant exacted from Calabrese, the guarantee, it was said that the guarantee was to cover only the amount of \$2500.00 which was actually received by Mr. Calabrese with lawful interest and no more.

ANTHONY C. LONZELLO.

40 Sworn to and subscribed
 before me this 11th day
 of May, 1926.

Peter A. Sena,
 Attorney-at-law.

THE UNIVERSITY OF CHICAGO

IN THE DEPARTMENT OF CHEMISTRY

REPORT OF THE COMMITTEE ON THE
PROGRESS OF CHEMISTRY IN
THE UNITED STATES OF AMERICA
FOR THE YEAR 1900

The following is a list of the names of the members of the Committee on the Progress of Chemistry in the United States of America for the year 1900. The names are arranged in alphabetical order of their surnames.

FRANK W. CLARKE
Director of the
Bureau of Chemistry
Washington, D. C.

Members of the Committee:

ALFRED R. LEECH
OF CHICAGO, ILL.

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

(Filed May 11, 1926)

IN CHANCERY OF NEW JERSEY

Docket 60—Page 30

10

Between:

LOUIS J. PLATT,

Complainant,

and

NORA H. CURRIE, *et als.*,

Defendants.

On Bill etc.

20

This matter being opened to the Court by Osborne, Cornish & Scheck, solicitors for the complainant, in the presence of Egidio W. Mascia, solicitor for the defendants Frank Calabrese and Domenica Calabrese, upon motion to strike out an answer filed by Frank Calabrese and Domenica Calabrese on the ground that the said answer does not allege facts which constitute a defense to the said action, and that paragraphs two and five thereof are sham and also frivolous, and that the entire answer has been filed only for the purpose of delay; and the complainant having filed affidavits upon which the said application is based and served copies thereof upon the solicitor for the defendants; and the court having read the said affidavits and the answering affidavit of the said defendants and having heard and considered the argument of counsel and good cause therefor being shown;

Order Striking Out Answer Decree Pro Confesso

It is, on this 11th day of May, 1926, Ordered, that the said answer be stricken out for the reasons aforesaid; and it is

10 Further Ordered, that the complainant's bill of complaint be and is hereby taken as confessed against the said defendants, Frank Calabrese and Domenica Calabrese, to the end that such decree may be made against them as this Court shall deem equitable and just; and it is

Further Ordered, that the said defendants pay to the complainant his costs of this motion to be taxed by the Clerk of the Court.

20

E. R. WALKER,
C.

Respectfully advised,
ALONZO CHURCH,
V. C.

Petition of Appeal.

(Filed, June 4th, 1926)

NEW JERSEY COURT OF ERRORS AND
APPEALS

Between,

LOUIS J. PLATT,
Complainant-Respondent,

and

NORAH H. CURRIE, *et al.*,
Defendants-Appellants.

10

On Bill,
&c.

To the New Jersey Court of Errors and Appeals: 20

The Petition of FRANK CALABRESE and DOMENICA CALABRESE, appellants in the above stated cause, respectfully shows:

That your petitioners finds themselves aggrieved by a final decree made in the Court of Chancery bearing date May 11th, 1926, wherein the said Louis J. Platt was complainant, and the said Frank Calabrese, et als., were defendants, 30
in this respect, to wit: that the said decree adjudges that the answer of these appellants interposed in said cause was sham because palpably and inherently false and legally insubstantial, and presumably interposed for the purpose of delay; and, therefore, the Bill of Complainant should be taken as confessed against these appellants.

40

Petition of Appeal

And, your petitioners humbly appeal from the whole of the said order and decree upon the ground that the same is erroneous, for that the said answer was legally substantial and sufficient as a defense to the suit, and because the answering affidavits submitted by these appellants to the Court in answer to the affidavits submitted by the respondent, upon the hearing of the motion to strike out the answer, did show facts which entitled these appellants to defend the suit and be heard in accordance with the custom and practice of the Court of Chancery.

Your petitioners therefore pray that the said order and decree of the Chancellor may be reversed, set aside and for nothing holden; and, that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

EGIDIO W. MASCIA,
Solicitor of Appellant.

Anthony R. Finelli,
of Counsel with Appellant.

Answer to Petition of Appeal.

(Filed, Sept. 15, 1926)

NEW JERSEY COURT OF ERRORS AND
APPEALS

Between, LOUIS J. PLATT, Complainant-Appellee, and NORAH H. CURRIE, <i>et al.</i> , Defendants-Appellants.	}	On Bill, etc.	10
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The answer of LOUIS J. PLATT and EDNA M. PLATT, the above named appellees, to the petition of appeal of FRANK CALABRESE and DOMENICA CALABRESE, the appellants. 20

These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto, nevertheless admit that an order was made on May 11th, 1926, in the Court of Chancery of New Jersey, striking out the answer of the said FRANK CALABRESE and DOMENICA CALABRESE and directing that the complainant's bill of complaint be taken as confessed as against the said defendants; but as to the substance and form of the said order these appellees beg leave to refer thereto when the same shall be produced. 30

These appellees are advised and believe that the said order is agreeable to equity; and they 40

Answer to Petition of Appeal

pray that the same may be affirmed with costs to be taxed in favor of these appellees.

10 OSBORNE, CORNISH & SCHECK,
Solicitors for and of Counsel
with the Appellees.

20

THE
COURT OF APPEALS
IN THE STATE OF NEW YORK

IN SENATE
JANUARY 12, 1909

BRIEF OF APPELLANTS

THE APPELLANTS
ALLEGING THAT THE
COURT OF APPEALS
HAS MADE AN ERROR
IN THE FOLLOWING
CASE:

IN SENATE
JANUARY 12, 1909

Journal of the Proceedings of a Court

held at the Court House in the City of New York
on the 10th day of March 1888.

IN SENATE,

February 17, 1888.

REPORT OF THE

New Jersey
Court of Errors and Appeals

LOUIS J. PLATT,
Complainant-Respondent,

VS.

NORA H. CURRIE, *et als.*,
Defendants-Appellants.

BRIEF OF APPELLANTS.

This is an appeal by Frank Calabrese, defendant in a suit to foreclose a mortgage in the Court of Chancery. The property is in the Township of Cranford. The answer set up a partial failure of the consideration of the amount claimed by respondent on his bond and mortgage. The matter came on to be heard upon notice and affidavits to strike out upon the ground that no facts were stated constituting a valid defense to the suit, and that the allegations of the answer were not only sham, but also frivolous. The appellant read answering affidavits and the result was an order made by the Court of Chancery striking out the answer and directing that the bill of complaint be taken as confessed and final decree entered. From a bare enumeration of the particulars in a logical manner, it will appear clear that the order appealed from was based upon a false conclusion.

To warrant the Court in striking out an answer as false or sham, it must be so palpably false or insufficient in law as to enable the Court to conclude that the defendant is seeking delay or trifling with the process of the law. The appellant read the affidavit of one Lonzello (Case, p. 16), who was present at the transaction between the respondent and the appellant and that witness swore in his affidavit and when Calabrese made the agreement to indemnify the complainant, the guarantee was to cover only part of the sum secured by the bond and mortgage in suit.

In paragraph 9 of the bill of complaint (Case, p. 4) the respondent sets up an agreement which was in substance that the due date of the mortgage was extended in consideration of the appellant's guarantee to pay.

In the second paragraph of the answer (Case, p. 9) the appellant states that he caused or negotiated the assignment of the said bond and mortgage to be taken by the respondent, and that the amount advanced was only \$2500.00 and that the rest or balance of \$1000.00 was never advanced or paid out by the respondent to anyone.

In paragraph fifth of the answer, the claim was made by the appellant that the respondent is only entitled to receive \$2500.00. This was a tender of an issue of fact.

Was the statement of the appellant palpably false? Respondent, in paragraph two of his affidavit in support of his motion (Case, p. 9) admits that while the mortgage is dated August 12th, the money was not paid until December 4th, and that the transaction was effected through Lionel L. Meyers, Esquire (see his affidavit, Case,

p. 12) who corroborates the appellant in the statement that it was Calabrese who owned the property and who asked him to find a purchaser for said mortgage and to arrange for the extension of time of payment thereof and who informed Mr. Meyers that the mortgage could be bought for \$2500.00 net.

Was the answer so palpably insufficient in law as to enable the Court to conclude that the appellant was seeking delay? The answer tendered an issue of fact and it should have been tried by the Court after hearing the witnesses according to the usual manner and practice.

Mr. Meyers undoubtedly tells the truth in his affidavit and still he may not have been present at the transaction between the respondent and the appellant and to which the affiant, Lonzello, refers to, and whether the respondent's affidavit should have more weight than the appellant's affidavit was also a question of fact to be determined at a final hearing.

When the appellant took title to the property, he did not undertake or assume to pay the mortgage.

The respondent in his affidavit (Par. 7, No. 11 of the Case) states that Calabrese was given credit for the full amount, \$3500.00, on account of the purchase price, when he bought the property. The respondent does not disclose the source of his knowledge on this important point, and is volunteering a statement by hearsay. A charitable view is to charge defects of this kind to the errors and obstinacy of the mind which refuses to obey the nature of things.

In paragraph sixth of the respondent's affidavit (Case, p. 12) there is also a statement that Calabrese admits that he executed such guarantee, but that is a great mistake of fact because there is no such admission anywhere else contained in the papers. What Calabrese swears to in his affidavit (Case, p. 16) is that the consideration for his guarantee to pay the said principal sum of said mortgages was the respondent's promise to him, the appellant, that upon the payment of \$2500.00 and interest from August 12th, 1924, that the respondent would reassign the said bond and mortgage to Calabrese or his nominee upon request. Therefore if your Honors conclude that respondent's affidavit is based upon nothing more than probable conjecture, or that it is clearly based upon a dissimulation of knowledge, his statement being in paragraph seven, "I never made any agreement of any kind whatsoever to hold \$1,000.00 for security. I do not know what the defendant means by that allegation," by renouncing what he certainly must have known perhaps departing from the high road of truth for the private path of success in a litigation, it will be plain that the appellant was deprived of a substantial legal and equitable right and the respondent presented with an unconscionable advantage.

Appellant was entitled to be presented with the so-called guarantee. The paper is not in court.

If the arrangement was contained in a form of writing, the papers should have been set up and produced.

The appellant was not setting up an insufficient defense so to enable the Court to conclude that he was trifling with the process of the law. He

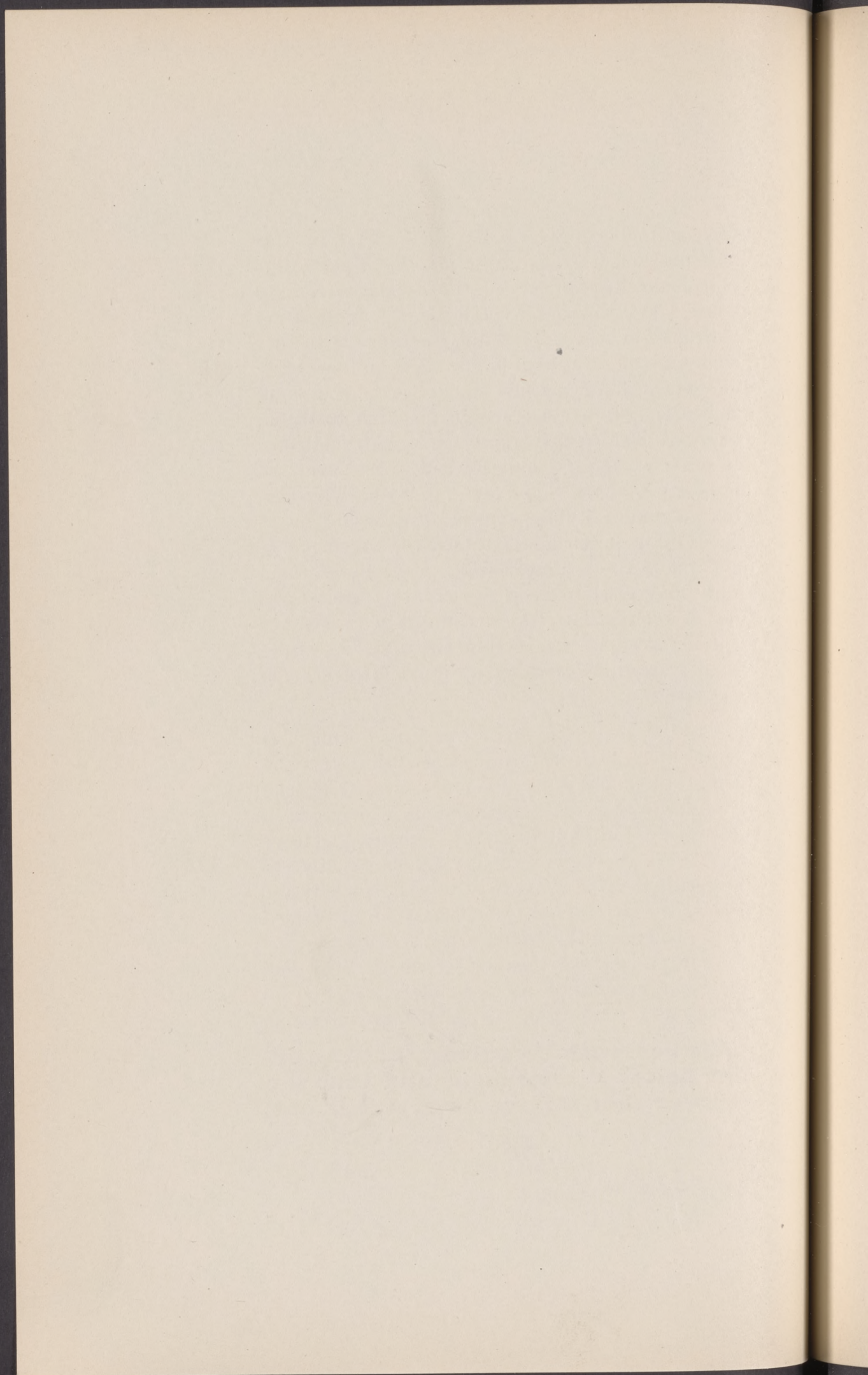
was entitled to have his day in Court. He was not precluded from litigating that particular point and it requires but little imagination to know how transactions relating to real estate mortgage loans are sometimes arranged; so that while possibly a person might make an inordinate or extraordinary profit under certain circumstances might not succeed in his high financing purposes unless a certain contingency happens. In other words, if Calabrese had turned over the property to some other purchaser who had, perchance assumed the payment of the said mortgage, Platt might have attained the full profit of his 31% deal, on his \$2500.00. If Calabrese had, as he did, elect to keep the property and to offer to repay Platt his investment with six per cent interest, he was within his rights as stipulated and agreed and set up detailed in his affidavit (Case, p. 15).

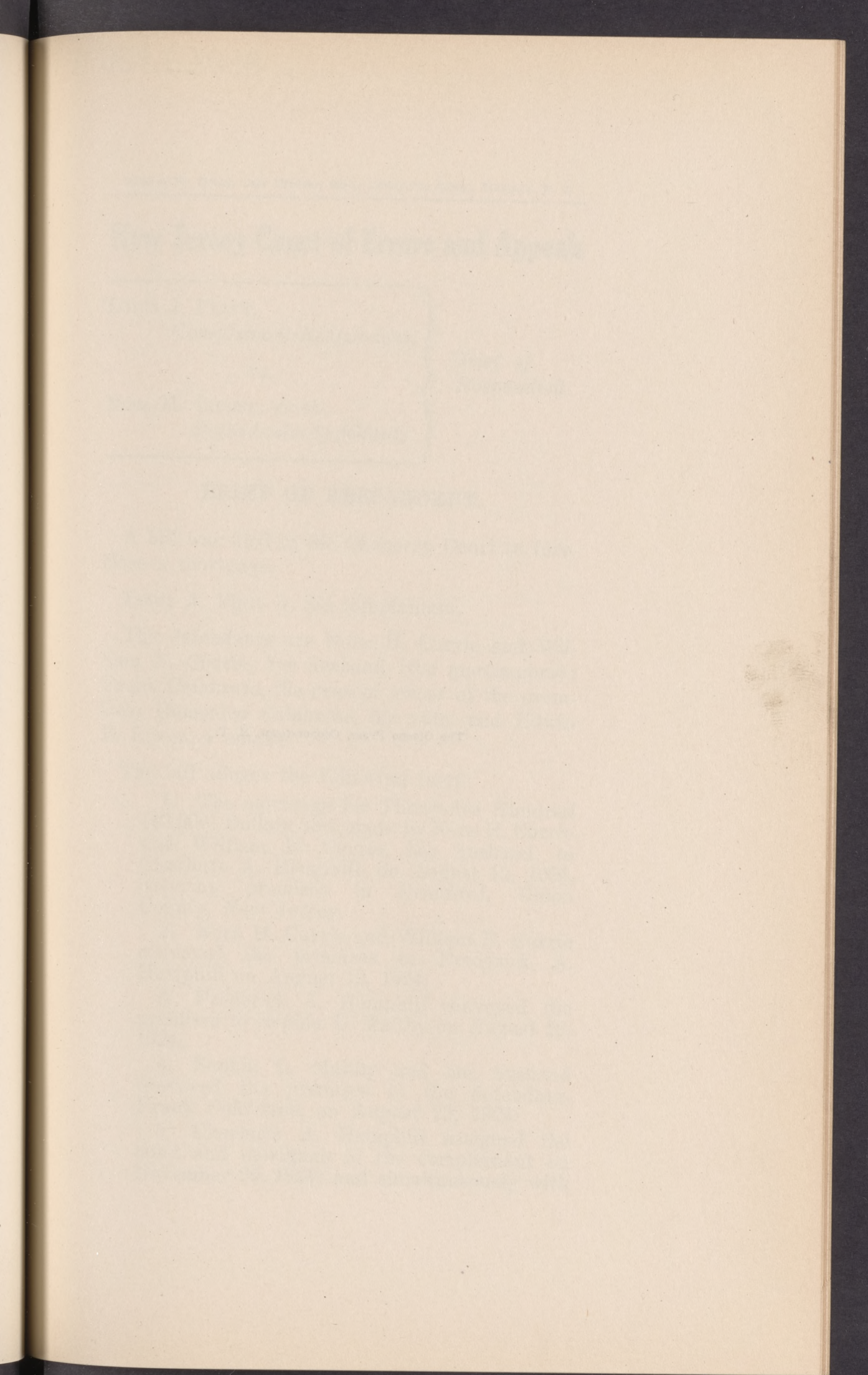
The case is pending in an equitable forum. The merits were to be determined according to principles of sound morals and conscience. The tribunal does not tolerate oppression. The record in this case did not authorize the Court of Chancery to dismiss the defense, as it did in a summary proceeding. The defense was real, substantial, and just. The defense should have been weighed in the balance and decided after hearing the witness in person and then subjected to the ordeal of cross-examination so as to determine the accuracy and veracity of the particular witnesses.

~~We respectfully submit that the order below is erroneous and that the answer should have been struck out.~~

EGIDIO W. MASCIA,
Solicitor.

ANTHONY R. FINELLI,
Of Counsel.





The Otsego Press, Cooperstown, N. Y.

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

New Jersey Court of Errors and Appeals

LOUIS J. PLATT,
Complainant-Respondent,

vs.

NORA H. CURRIE, *et al.*,
Defendants-Appellants.

*Brief of
Respondent.*

BRIEF OF RESPONDENT.

A bill was filed in the Chancery Court to foreclose a mortgage.

Louis J. Platt is the complainant.

The defendants are Nora H. Currie and William F. Currie, her husband (the mortgagors); Frank Calabrese, the present owner of the premises; Domenica Calabrese, his wife, and Edwin E. Franz, a tenant.

The bill alleges the following facts:

1. The mortgage for Thirty-five Hundred (\$3,500) Dollars was made by Nora H. Currie and William F. Currie, her husband, to Charlotte A. Hemphill, on August 12, 1924, covering premises in Cranford, Union County, New Jersey.

2. Nora H. Currie and William F. Currie conveyed the premises to Frederick A. Hemphill on August 12, 1924.

3. Frederick A. Hemphill conveyed the premises to Sophia L. Maltby on August 29, 1924.

4. Sophia L. Maltby and her husband conveyed the premises to the defendant, Frank Calabrese, on August 29, 1924.

5. Charlotte A. Hemphill assigned the bond and mortgage to the complainant on November 26, 1924; and simultaneously with

the said assignment the complainant agreed to extend the time of payment of the said bond and mortgage for six months in consideration for which the defendant, Frank Calabrese, executed a written guarantee to the complainant, guaranteeing the payment of the full amount of the principal and interest of the said bond and mortgage.

6. That the full amount of the principal, viz., Thirty-five Hundred (\$3,500) Dollars is due on the bond and mortgage.

A decree *pro confesso* was taken against all of the defendants with the exception of Frank Calabrese and Domenica Calabrese; and they filed an answer.

Their answer admits the execution of the bond and mortgage, the various conveyances of the premises, the assignment of the mortgage to the complainant, the extension of time for the payment of the mortgage given by the complainant, and the execution of the guarantee by the defendant, Frank Calabrese, guaranteeing full payment of the bond and mortgage in consideration for the extension.

The answer also admits that the full amount of the mortgage, viz., Thirty-five Hundred Dollars (\$3,500) with interest is due and payable.

The answer sets up an oral agreement to the effect that the complainant is to receive only Twenty-five Hundred (\$2,500) Dollars out of the principal of the bond and mortgage and that the remaining One Thousand (\$1,000) is to go to these defendants.

The complainant moved to strike out the answer on the ground that it was sham and frivolous and that it was set up only for the purpose of delay, and submitted to the Court affidavits of himself and of his solicitor setting forth his

purchase of the mortgage for Thirty-five Hundred (\$3,500) Dollars and all of the other facts as alleged in the bill, and exhibited to the Court the defendant's written guarantee of the payment of the full amount of Thirty-five Hundred (\$3,500) Dollars in consideration for the complainant's purchasing the mortgage and extending the time of payment for six months.

The Court read and considered the bill, the answer, the affidavits of the complainant and the answering affidavits of the defendant and decided that the answer did not set forth a sufficient defense ; that it was not only sham but also frivolous, and ordered it stricken out, and that a decree *pro confesso* be entered against the said defendants.

The appeal now is by the defendants, Frank Calabrese and Domenica Calabrese, from the said order of the Chancery Court.

ARGUMENT.

The Chancery Act (P. L. 1915, Chapter 116, paragraph 4) provides as follows:

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

In *Penrose v. Absecon Land Company, et al.*, 94 N. J. Eq. 436, Justice Parker, speaking for the Court of Errors and Appeals, said, in referring to this section of the Chancery Act:

“It is suggested that there is no provision for the taking of evidence under this section, but the necessary implication of the statute is that evidence shall be taken; for the very word ‘sham’ connotes unfounded

allegations of fact, and the universal practice is to deal with sham pleadings in a summary way by affidavits or documentary evidence and without waiting for the formality of a trial. The evident intent of the statute was to assimilate the equity practice in this respect to that at common law."

There is no doubt, therefore, of the Chancery's Court's jurisdiction to strike out the answer; and the question is whether on the facts before it, and on the pleadings, the Court was justified in exercising this power.

From the pleadings and affidavits it is apparent that the defendants endeavor to vary the terms of the written guarantee by parol testimony.

In paragraph six of the complainant's affidavit, on which the application for the order striking out the defendants' answer was based, the complainant said that the said Frank Calabrese executed a bond guaranteeing payment of the entire principal sum of thirty-five hundred (\$3,500) dollars with interest. And in paragraph three of the affidavit of Lionel Meyers, the attorney who represented the complainant in the transaction, Mr. Meyers said:

"To induce the said Louis J. Platt to buy the aforesaid mortgage and to extend the time of payment thereof, Frank Calabrese executed and delivered to him a bond in which he guaranteed payment of the full principal of \$3,500 secured by said mortgage."

In his answering affidavit, the defendant, Frank Calabrese, admitted the execution of this collateral guarantee or bond; and then endeavored to set up a parol agreement varying its terms. The Vice-Chancellor asked for the presentation of the written guarantee; it was handed to him and he read it.

We think it is unnecessary to furnish citations to sustain our contention that no parol evidence was admissible to contradict the terms of Calabrese's written agreement. The Court had before it, however, the affidavits of the complainant and of Mr. Meyers to the effect that no such agreement as set up by Calabrese was made between the parties; and the Court believed the testimony of those two witnesses.

It further appeared from the affidavit of the complainant that when the defendant, Frank Calabrese, purchased the property from Sophia L. Maltby and her husband he was given credit, on account of his purchase price, for two mortgages, viz., one held by the Fidelity Union Trust Company for seven thousand (\$7,000) dollars and the other this particular thirty-five hundred (\$3,500) dollars mortgage.

The complainant says that the deed from the Maltbys to Calabrese recites that Calabrese takes the property subject to those two mortgages. The defendant, Calabrese, did not deny this allegation, and it, therefore, appeared to the Vice-Chancellor that Calabrese had received credit on his purchase for the full amount of thirty-five hundred (\$3,500) dollars, and that he got full consideration for the mortgages which he assumed.

We direct the Court's attention also to the following situation:

The bill of complaint alleges that the whole amount of principal, viz., thirty-five hundred (\$3,500) dollars with interest from August 12, 1924, is due on the said bond and mortgage. The answer admits that the whole amount of principal is due with interest from the said date.

The defendant Calabrese is now the owner of the premises and, therefore, the full amount of the mortgage is due from him.

The Court rightfully held, therefore, that since he admits the amount is due, and due from him, and that it is due on the written instrument (viz., the bond secured by mortgage), he cannot seek to change the terms of that written document by collateral parol agreements.

It is respectfully submitted, therefore, that the order of the Chancery Court is correct; that the answer is not only sham but also frivolous, and that it is filed for the purpose of delay; that it does not set forth a sufficient defense and was rightfully stricken out.

Respectfully submitted,

OSBORNE, CORNISH & SCHECK,
Solicitors and Counsel of Complainant.

